ALTSHULER BERZON LLP
EVE CERVANTEZ (SBN 164709)
ecervantez@altshulerberzon.com
JONATHAN WEISSGLASS (SBN 185008)
jweissglass@altshulerberzon.com
DANIELLE E. LEONARD (SBN 218201)
dleonard@altshulerberzon.com
MEREDITH A. JOHNSON (SBN 291018)
mjohnson@altshulerberzon.com
TONY LOPRESTI (SBN 289269)
tlopresti@altshulerberzon.com
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

COHEN MILSTEIN SELLERS & TOLL PLLC
ANDREW N. FRIEDMAN (admitted pro hac vice)
afriedman@cohenmilstein.com
GEOFFREY GRABER (SBN 211547)
ggraber@cohenmilstein.com
SALLY M. HANDMAKER (SBN 281186)
shandmaker@cohenmilstein.com
ERIC KAFKA (admitted pro hac vice)
ekafka@cohenmilstein.com
1100 New York Ave. NW
Suite 500, West Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699

Lead Plaintiffs' Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In Re Anthem, Inc. Data Breach Litigation	Case No. 15-MD-02617-LHK **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS TO CLASS REPRESENTATIVES** Date: February 1, 2018 Time: 1:30 p.m. Judge: Hon. Lucy H. Koh Crtrm: 8, 4th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Rules

Additional Authorities

I. INTRODUCTION

Plaintiffs request a fee award that reflects the extraordinary result Class Counsel achieved after making a major investment of time and resources in this highly complex litigation. The fact is that Class Counsel secured much of the relief that could have been won for the class at trial, on a much faster timeline. The $115 million settlement fund pays for credit monitoring that, even when limited only to the class members who have submitted claims, more than quadruples the value of the settlement to over $500 million, while also compensating those who suffered out-of-pocket losses up to $10,000 each and providing $50 cash to individuals who do not need credit monitoring. Over and above the settlement fund, Counsel secured important improvements to Anthem's cybersecurity that Plaintiffs and their experts believe are necessary to protect class members' data still held by Anthem, and a contractual commitment from Anthem to nearly triple its spending on cybersecurity for the next three years. Anthem did not implement these new cybersecurity measures on its own in response to the data breach; they will be implemented only after the settlement is finally approved.

Regardless of how the Court chooses to value the common fund, the requested fee award is reasonable: Plaintiffs seek $37,950,000, which is less than 8% of the over $500 million value of credit monitoring services claimed by class members to date, and under 25% of the combined value of the settlement fund and the additional funds that Anthem has committed to its cybersecurity budget for the next three years. Even if the Court were to value the common fund at only $115 million, Class Counsel has earned an upward departure from the 25% Ninth Circuit "benchmark" to 33% of that fund, based on the exceptional results achieved (particularly the cybersecurity improvements that are apart from and in addition to the $115 million fund), the extremely risky nature of this novel case that Counsel took on a pure contingency basis, and the high quality of Counsel's work. Unlike the "megafund" cases cited by frequent class action objector Adam Schulman (and his counsel, Ted Frank), there is no need to reduce the requested fee here to avoid windfall profits. Rather, Counsel seek a *negative multiplier* on their lodestar of $38,015,714, illustrating both the size of Counsel's investment in the case and the reasonableness of their request. Objectors' criticism of Counsel's lodestar disregards the many courts (including this one) that have approved Counsel's market rates, and ignores the significant amount of high-quality work that went into litigating this cutting-edge action.

II. ARGUMENT

A. The Settlement's Extraordinary Result Justifies the Requested Fee.

For purposes of a percentage-of-the-fund calculation, there are many ways in which the Court may value the results achieved. If the Court's valuation of the common fund includes either the value of credit monitoring services to the class or Anthem's additional commitment of funds for cybersecurity, then the requested fee award is much less than 25% of the fund created. Fee Brief (ECF 916-6) at 3, 5. Even valuing the common fund at only $115 million, Class Counsel's request for 33% of that $115 million fund is reasonable because each of the factors courts use to evaluate fee requests weighs in favor of an upward adjustment to the benchmark.[1] Fee Br. at 2-17. Objectors who argue that the fee request is too high rely on incorrect assumptions about the value of the results to the class, as described below.

1. The cybersecurity improvements provide new and essential relief.

Under the settlement, Anthem is required to invest a sum certain in data security (much higher than pre-breach spending) and make specific changes to its cybersecurity practices. Settlement Agreement ("SA") ¶2.3-2.4 (ECF 916-20); SA Ex. 2 (ECF 869-11). These measures are precisely what Plaintiffs wanted and needed, given that Anthem still possesses their personal information, and constitute a substantial part of the relief Plaintiffs would have sought had the case gone to trial. *See* ECF 743-14 at 2-3; ECF 744-17 at 74-81 (expert report of Matthew Strebe regarding remediation necessary to protect PII). Two objectors argue that Counsel cannot "take credit" for the negotiated and enforceable changes to Anthem's security practices on the mistaken belief that Anthem has already made such changes. Not true. Objector Coddington's argument (ECF 927 at 4) is based on erroneous reporting in a news article. Final Approval Reply Brief at 7; Cervantez Reply Dec. ¶10. The increased budget for cybersecurity called for in the settlement is new money not called for in the prior regulatory settlement. *Id.* Nor is Objector Schulman correct that Anthem had already sufficiently "beefed up its cybersecurity after the breach…." ECF 924 at 10. Although Anthem took steps to improve cybersecurity after the breach, Plaintiffs

[1] There is no merit to objector Schulman's argument that the case must not have been risky because many firms applied for leadership positions (ECF 924 at 6). He fails to acknowledge or refute any of the many risks detailed in Plaintiffs' opening brief, including the novelty of the claims, the dearth of any certified data breach case, and the significant risk of losing on the merits on motions to dismiss, summary judgment, or trial. Fee Br. at 12-13; *see, e.g., Enslin v. Coca-Cola Co.*, 2017 WL 1190979 (E.D. Pa. Mar. 31, 2017) (granting defendant summary judgment on breach of contract and unjust enrichment claims in data breach case), *reconsideration denied*, 2017 WL 3727033 (E.D. Pa. Aug. 30, 2017).

contended that much more was necessary, which Anthem contested. *Compare* ECF 797-15 at 64-67 (Anthem's expert describing security initiatives Anthem had taken) *with* ECF 744-17 at 74-81, ECF 744-19 at 22-23 (Plaintiffs' expert opining on additional steps needed to protect class member PII). Most of the cybersecurity measures required under the settlement are new practices that Anthem has not yet undertaken. Final Approval Reply at 7; Cervantez Reply Dec. at ¶11; SA ¶2.2 (Anthem's commitment to pay for and implement business practices for three years "from the date of entry of Final Approval").[2]

Objector Schulman does not dispute that attorneys' fees here should reflect the value of these cybersecurity improvements, but argues that the relevant inquiry is "the value of those benefits to the class," not "how much money a company spends on purported benefits." ECF 924 at 9, *quoting In re Bluetooth*, 654 F.3d 935, 944 (9th Cir. 2011). *Bluetooth* does not stand for the proposition that the amount of money spent on injunctive relief by a company could *never* equal the value to the class, nor that such amount could never support a percentage-of-the-fund fee award.[3] Where the settlement itself requires Anthem to spend an additional sum certain on cybersecurity (in addition to taking specified cybersecurity measures), then the value to the class *can* be "accurately ascertained," *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003), and should be added to the common fund. And if the Court nevertheless declines to calculate fees as a percentage of a figure that includes the specific monetary value of the cybersecurity improvements, it should grant an upward enhancement on a fee based on a percentage of the $115 settlement fund, in recognition of the important value of these protections. Fee Br. (916-6) at 6; *Staton*, 327 F.3d at 974, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002).

That information about the cybersecurity improvements was necessarily filed under seal does not preclude this Court from relying upon the value of those improvements to determine a reasonable award of

[2] By comparison, in one of the cases cited by objector Schulman, the defendant had already implemented the agreed-upon injunctive relief. ECF 924 at 10. *See Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017) ("The injunction does not obligate ARS to do anything it was not already doing."). In *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017), the supposed injunctive relief did not require the defendant to make any changes to its practices at all. *See id.* at 556-57.

[3] In *Bluetooth*, the district court had failed to place any value on the injunctive relief at all, and the Ninth Circuit noted that "the value of the injunctive relief is not apparent to us from … the progression of the settlement talks, the last of which occurred after defendants had already voluntarily added new warnings to their websites and product manuals." *Bluetooth*, 654 F.3d at 945 n.8. Similarly, the court in *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418 (N.D. Cal. 2009) found that the proposed relief included anti-spam software that was "available to most internet users for free or very little cost" and security practices that "should be conducted by any reputable company anyway." *Id.* at 422.

attorneys' fees.[4] The public briefs make it clear that Anthem is nearly tripling its spending on cybersecurity, and that the cybersecurity improvements are those recommended by Plaintiffs' expert. 869-5 at 6, 916-3 at 6-7**.** That should be sufficient information to compare the fee request to the value received by the class. Objectors Schulman and Kress (ECF 924 at 9; ECF 925 at 5-9) don't tell the Court what level of cybersecurity commitment *would* satisfy them, casting doubt on the legitimacy of their objections about sealing. *Cf. Cassese v. Williams*, 503 F.App'x 55, 58 (2d Cir. 2012) (court did not err in denying disclosure of time records to objectors where "[n]o objector specifies how access to class counsel's billing records would have affected her objections to the fee request").

Moreover, Objector Schulman is wrong to the extent he contends that Fed. R. Civ. P. 23(h) or *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010) supersede the well-known standards for filing confidential materials under seal, which courts routinely apply in class cases. *See, e.g., Thomas v. Magnachip Semiconductor Corp.*, 2016 WL 3879193, at *7 (N.D. Cal. July 18, 2016) (compelling reasons to file under seal document identifying threshold number of opt-out exclusions); *In re: Whirlpool Corp. Front–loading Washer Prod. Liab. Litig.*, 2016 WL 5338012, at **17-18 (N.D. Ohio Sept. 23, 2016) (overruling objection to detailed time records being filed under seal; explaining that "[d]ocuments supporting attorney fees and expenses are often filed under seal," and in the context of fee motions, "the only requirement is that these documents must be provided to *the Court* for its own review"). Rule 23(h) merely sets forth the "procedures" by which counsel may move for attorneys' fees and class members may object, and *Mercury Interactive* interprets Rule 23(h) to require that the objection deadline fall after counsel's fee motion has been filed, so that class members have an "adequate opportunity" to review and object to the fee motion. *Id.* at 993-94. The Court set such a schedule here. No more is required.

2. The credit monitoring services are extremely valuable to the class.

The Settlement provides credit monitoring and fraud resolution services for class members, which remedy the specific harms that class members suffered. It now appears that credit monitoring services will almost certainly extend for a full four years, meaning that every credit monitoring product is worth at least $479.52 per class member. Cervantez Reply Dec. ¶6. Based on the 1,082,106 claims for credit monitoring

[4] On preliminary approval the Court found "compelling reasons" to seal the settlement's cybersecurity improvements, to protect class members' PII from would-be hackers of Anthem, and to seal Anthem's cybersecurity budget, so as not to place Anthem at a competitive disadvantage. ECF 902.

to date, the value of the claimed credit monitoring alone to the class is over $500 million. *Id.* ¶ 9. Additionally, any class member (whether or not she claims credit monitoring) may, at any time during the next four years, obtain fraud resolution services, valued at about $89.98. Cervantez Reply Dec. ¶7. Counsel's requested fee award appropriately reflects this benefit for the class.

Objector Kress argues that this is a "coupon settlement" under the Class Action Fairness Act, such that the fee award should be pegged to the "the value of the number of credit monitoring services actually signed up for by class members." ECF 925 at 3-5, *citing* 28 U.S.C. § 1712 (awards of attorneys' fees in coupon settlements). But this is not a "coupon settlement," and the rules set forth in §1712 do not apply. Coupon settlements "involve a discount—frequently a small one—on class members' purchases from the settling defendant. These discounts require class members to hand over more of their own money before they can take advantage of the coupon, and they often are only valid for select products or services." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 951 (9th Cir. 2015) (internal cites omitted). The credit monitoring provided here does not offer a discount on some future product offered by Anthem, or require class members to hand over money to anyone, much less Anthem. It is not a coupon settlement. *See, e.g.*, *Kearney v. Hyundai Motor Am.*, 2013 WL 3287996, at *7 n.5 (C.D. Cal. June 28, 2013) (settlement providing free recalibration of defective air bag system and potential buyback option not "coupon settlement" where it did not provide a discount on product offered by defendant); *Browning v. Yahoo! Inc.*, 2007 WL 4105971, at *5 (N.D. Cal. Nov. 16, 2007) (defendants' provision of free credit score or credit monitoring not "coupon settlement" because it did not "require class members to spend money").

There is no support for Objector Schulman's argument that the value of the credit monitoring should be discounted when assessing the value of the common fund, nor that the provision of these valuable in-kind services warrants a downward departure. ECF 924 at 10. Here, the credit monitoring services have a specific retail value. Cervantez Dec. (ECF 916-8) ¶9. Moreover, in-kind services are not inherently worth less than their cash equivalent. Rather, the value of a particular in-kind service is context- and case- specific.[5] In-kind services like the custom-designed credit monitoring offered here, specifically

[5] Insofar as the Seventh Circuit has stated in passing that "compensation in kind is worth less than cash of the same nominal value," the Ninth Circuit has not adopted this commentary. *Cf.* ECF 924 at 9, *quoting In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001). Moreover, the court there was not referring to all offers of in-kind services, but to coupons. In another case cited by Schulman, the court

targeted at the harm suffered by class members – and therefore valuable to them – should be treated as fully "equivalent" to their cash value for purposes of calculating attorneys' fees. *See, e.g., Johansson-Dohrmann v. Cbr Sys., Inc.*, 2013 WL 3864341 (S.D. Cal. July 24, 2013) (using retail value of "credit package" to assess value of settlement fund against which attorneys' fees would be measured in stolen PII case); *Ceccone v. Equifax Info. Servs. LLC*, 2016 WL 5107202, at *2, *11 (D.D.C. Aug. 29, 2016) (attorneys' fees reasonable whether measured as 10.87% of total settlement benefits, including retail value of credit monitoring at $717.60 per class member, or as less than 35% of a more conservative valuation of settlement benefits); *see also Hillis v. Equifax Consumer Servs., Inc.*, 2007 WL 1953464, at *4 (N.D. Ga. June 12, 2007) (noting retail value of credit monitoring to class). The speculation, with no factual basis, that "many class members . . . do not value credit monitoring as a service highly" (ECF 924 at 9) is belied by over one million class members who have filed claims for credit monitoring, and the nine *pro se* class members who objected that the settlement provides *too little* credit monitoring, not too much. *See, e.g.*, ECF 913, 920, 922. Schulman's further argument that "[a]ny class members who did value such services above their retail price would have purchased those services independently of the settlement" (ECF 924 at 9), misses the point that Anthem already provided two years of credit monitoring services (now expired), that any class members who purchased credit monitoring independently of the settlement may file an out-of-pocket claim for reimbursement of those expenses, and that not all class members could necessarily afford to independently purchase credit monitoring at $120 or more annually.

Under any of the possible calculations, the credit monitoring has created an enormous value to class members that brings the requested attorneys' fees award to far less than 25 percent of the value of the credit monitoring alone (setting aside all other settlement relief). And even if the Court were to award attorneys' fees based only on the $115 million settlement fund, an upward departure from the 25% benchmark is warranted to account for Counsel's ability to parlay that fund into services with a much higher retail value, which directly address the specific harms faced by the class.

---

found that free credit reports offered to class members were not worth $10 (the price for which they were sold online) because class members were already entitled to free credit reports. *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 390 (C.D. Cal. 2007) *cf. Browning*, 2007 WL 4105971, at *8 (overruling objection that credit scores and monitoring were invalid benefits under *Acosta* because "there is no law requiring free credit scores or monitoring"). Moreover, Schulman's own case recommends only a 15% discount on the retail value of in-kind services such as gift cards. *See Georgino v. Sur la Table, Inc.*, 2013 WL 12122430, **19-20 (C.D. Cal. May 9, 2013). Applying a similar discount here would still result in the credit monitoring services claimed by the class being worth over $400 million.

3. The $115 million fund is the largest data breach settlement ever.

Even ignoring the value of the cybersecurity improvements, Anthem's secured investment to implement those changes, or the retail value of credit monitoring to the class, no one disagrees with Plaintiffs' characterization of the $115 million fund as the "largest settlement ever achieved in a data breach case." Fee Br. at 7, 9. It is not correct that the size of the fund reflects only the size of the class. ECF 924 at 8. This settlement dwarfs settlements in past data breach cases with over 100 million class members. *See, In re Heartland Payment Sys. Inc. Customer Data Sec. Breach Litig.*, 851 F.Supp.2d 1040, 1047, 1081 (S.D. Tex. 2012) ($4.5 million); *In re Target Corp. Customer Data Security Breach Litig.*, No. 14-md-02522, Dkt. 645 at 8 (D. Min. Nov. 11, 2015) ($23.3 million). Whether evaluating the settlement here on a per-member or class-wide basis, it compares favorably to data breach settlements with a class size over 15 million, and militates in favor of an enhanced fee award. Cervantez Reply Dec. Ex. B.

B. The Requested Fee Is a Reasonable Percentage of the Common Fund.

1. The fee award should be based on the gross settlement fund.

Class Counsel's use of the gross settlement fund for purposes of the percentage-of-the-fund valuation is appropriate and aligns with well-established practice in this district. Objector Schulman recycles the arguments that his counsel, Theodore Frank, made unsuccessfully before the Ninth Circuit on his own behalf in objecting to the settlement in *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 953 (9th Cir. 2015), contending that the percentage of recovery should be calculated only after subtracting notice, administration, and litigation expenses from the common fund. ECF 924 at 10-14; *see also* ECF 925 at 12 (Kress) (same). The Ninth Circuit rejected that argument, noting that courts have discretion to assess attorneys' fees from the gross settlement fund because these costs all benefit the class: administrative costs "make it possible to distribute a settlement award in a meaningful and significant way," "notice costs allow class members to learn about a settlement," and "litigation expenses make the entire action possible." *Online DVD-Rental*, 779 F.3d at 953.

The Ninth Circuit's reasoning applies with equal if not greater force here. The investment in a comprehensive notice and claims administration effort was critical to ensure that almost 80 million class members, some 23 million of whom had not received formal notice of the data breach from Anthem, learned about the ongoing threat posed to their personal information and how to submit claims to protect

their privacy and receive reimbursement for any losses. Fee Br. at 12-13; Cervantez Dec. ¶13. Schulman speculates that Counsel overspent on inefficient administration, ignoring that the majority of that was for postage (including pre-paid postage to lessen the burden on class members choosing to mail claim forms) to over 50 million class members. *See* KCC Reply Dec. ¶4. Similarly, Counsel paid over $2 million in out-of-pocket litigation expenses with no guarantee of reimbursement because those expenses, including every expert hired, were necessary to litigate this case. Cervantez Dec. ¶¶56-61 & Exs. 5-10; Cervantez Reply Dec ¶26. The suggestion that Counsel spent unnecessary money in this high-risk litigation for the purpose of making their fee request look more attractive is specious.

Counsel's investment in notice, administration and litigation expenses provided direct benefits to the class. Schulman's preferred approach of subtracting these expenses from the settlement fund would encourage counsel in future cases to take the cheapest possible approach, jeopardizing class members' ability to recover. The greater danger to class members is that they will lose to well-resourced defendants, not that contingency fee class counsel will spend too much money in an attempt to win. Accordingly, this Court and other courts in this district typically apply the percentage-of-the-fund calculation against the gross settlement. *See, e.g.*, *Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3616638, at *9 (N.D. Cal. June 26, 2017); *Johnson v. Quantum Learning Network, Inc.*, 2017 WL 747462, at *6 (N.D. Cal. Feb. 27, 2017). There is no reason to stray from that practice here.

2. The lodestar cross-check confirms that Counsel do not seek windfall profits.

The Ninth Circuit has explained that courts should evaluate percentage-of-the-fund fee requests in "megafund" cases to ensure that class counsel do not receive "windfall profits." *Bluetooth*, 654 F.3d at 942. However, the Ninth Circuit has expressly rejected the principle that fee awards necessarily decrease as the fund increases. *Vizcaino*, 290 F.3d at 1047. Instead, courts typically rely on the lodestar cross-check as the "best way to guard against a windfall." *In re Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 4126533, at *10 (N.D. Cal. Aug. 3, 2016); *see also* 6 William B. Rubenstein, *Newberg on Class Actions* §15:86 5th ed. (2017) (lodestar cross-check provides better safeguard "than the alternative sliding scale or mega-fund tests – both of which respond to the windfall concern by seeking to award lower percentages as fund sizes increase – as it is a more fine-tuned and less back-of-the-envelope analysis").

Here, Counsel's fee request represents a lodestar multiplier of less than 1.0. Cervantez Reply Dec.

¶19. Class Counsel are not requesting *any* windfall profit above the work actually done in this case.[6] In contrast, for example, in *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, **4, 8 (N.D. Cal. May 21, 2015), the court refused to approve a 25% fee request for $50.7 million because it would constitute a multiplier of 10.38 on counsel's lodestar, or $4,900 per hour billed. The court reduced the award to $18 million or 9% of the fund, awarding a multiplier of 5.5 to one firm and 2.0 to another. *Id.* at *7. Other courts relied upon by objectors also reduced fees to prevent windfalls in comparison to counsel's lodestar.[7]

Courts within the Ninth Circuit do not hesitate to award fees above the 25% benchmark in large-fund cases where the lodestar crosscheck shows, as here, that class counsel will not receive windfall profits. *See, e.g., In re Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 4126533, at *10 (N.D. Cal. Aug. 3, 2016) (27.5% of $576,750,000 settlement fund with lodestar multiplier of 1.96, which is "well within the range of acceptable multipliers"); *In re Apollo Grp. Inc. Sec. Litig.*, 2012 WL 1378677, at *7 (D. Ariz. Apr. 20, 2012) (33.33% of $145 million common fund after trial with lodestar multiplier of 1.74). Even if, as Schulman argues, Class Counsel had overstated its lodestar by $13 million – and, as explained below, there is no basis whatsoever for Schulman's arguments – the fee request would represent a multiplier of approximately 1.5. This is on the low end of the normal range of multipliers for large fund cases. *Vizcaino*, 290 F.3d at 1051 n.6.

C. Class Counsel's Lodestar Is Reasonable and Properly Supported.

1. Counsel's billing summaries are sufficiently detailed.

Class Counsel's billing summaries, set forth in paragraphs 21 to 55 of the Cervantez Declaration and Exhibits 1-3 thereto, comply with this Court's guidelines for class action attorney fee requests and contain sufficient detail for the Court to conduct a lodestar cross-check, notwithstanding Objector Schulman's protestations to the contrary. ECF 924 at 24. *See* Plfs' Opp. to Mot. to Appoint a Sp. Master

[6] Several objectors complain generally that the attorneys are being paid too much or are the greatest beneficiaries of the settlement. Obj. of Deibel, Hurt, Andrianopolis, Drum, Stone, and Mayo. The lodestar crosscheck shows this is not correct. Denying recovery to Class Counsel, who had to invest substantial time and resources to benefit the class as a whole, would have a chilling effect on class actions.

[7] *See Alexander v. FedEx Ground Package Sys., Inc.*, 2016 WL 3351017, at *3 (N.D. Cal. June 15, 2016) (reducing fee from $49.93 million (multiplier of 4.0) to $37.2 million (multiplier of 3.0)); *In re High-Tech Emp. Antitrust Litig.*, 2015 WL 5158730, at **7-8, 10 (N.D. Cal. Sept. 2, 2015) (reducing fee from $81,125,000 (multiplier of 4.5), to $40,043,933 (multiplier of 2.2)); *Nitsch v. DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at *8, (N.D. Cal. June 5, 2017) (reducing fee from $36 million (multiplier of 3.91), to $18,538,159 (multiplier of 2.0)); *In re Charles Schwab Corp. Secs. Litig.*, 2011 WL 1481424, at *8 (N.D. Cal. Apr. 19, 2011) (fee award of $17,604,474, "reasonable" multiplier of 2.68)

(ECF 938) at 6-7, 14-16; *see also Perkins v. Linkedin Corp.*, 2016 WL 6199596, *17 (N.D. Cal. Feb. 16, 2016); *Young v. Polo Retail, LLC*, 2007 WL 951821, *6 (N.D. Cal. Mar. 28, 2007). Plaintiffs provided a detailed declaration describing the work performed, why it was necessary, and why it was assigned as it was, along with charts showing the name of each billing professional, law school graduation year, job title, billing rate, hours expended, number of hours that each firm billed under 14 separate task codes, each firm's website for additional information on firm and attorney expertise, and citations to specific orders justifying the rates that each firm billed. Cervantez Dec. ¶¶21-43 and Exs. 1-3. The detailed time records are available should the Court require them. *Id.* ¶55.

There is no basis for Schulman's speculation that Counsel continued discovery or document review after settling to "inflate the lodestar." ECF 924 at 24. All discovery was completed by March 2017, in accordance with this Court's scheduling orders. Cervantez Reply Dec. ¶47. No document review was conducted or billed for after May 2017. *Id.*

2. Counsel efficiently prosecuted this case.

Co-Lead Counsel followed this Court's directives (ECF 284, 286) and assigned each firm discrete and non-duplicative tasks. Fee Br. at 23-27; Cervantez Dec. ¶¶22-48. Courts generally "defer[] to counsel's professional judgment regarding the time required to be spent on the case." *Edwards*, 2017 WL 3616638, at *10; *see also Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee.").

There is no support for objector's speculation that Counsel billed excessive time, merely because 53 law firms worked on the case. ECF 924 at 15-18. *See In re Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *41 (N.D. Cal. Jan. 28, 2016) (rejecting argument that use of 50 class counsel firms was excessive); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013) (approving fee request for 116 firms). As this Court recognized would be necessary (ECF 286), MDL firms from around the country assisted in plaintiff identification, primarily because of the need to locate over 100 Named Plaintiffs nationwide to counter Defendants' standing and typicality arguments. Cervantez Reply Dec. ¶29, 44; Cervantez Dec. ¶¶26-27; Fee Br. at 7-8. Because most Named Plaintiffs retained one of the non-Lead/PSC firms, Co-Lead Counsel relied on these firms to respond to

interrogatories, collect and review documents, and defend the depositions of their client Named Plaintiffs (with appropriate guidance from Co-Lead Counsel). Cervantez Dec. ¶¶28-29. For 26 firms, this was their primary contribution to the litigation. Cervantez Reply Dec. ¶34. Similarly, because the depositions of 14 Non-Anthem defendants had to be taken in 13 states over a one-month period, Lead Counsel sought assistance from six non-Lead/PSC firms, most in geographical proximity to the deponent. Cervantez Reply Dec. ¶39. None of this work was duplicative, as each set of written discovery required an individual response from that Plaintiff, and each deposition had to be taken or defended based on information specific to that Plaintiff or Non-Anthem Defendant (following templates and outlines provided by Lead Counsel). *Id.* ¶40. Finally, as this Court anticipated (ECF 268), Co-Lead Counsel looked to additional non-PSC firms to help efficiently review, analyze, and summarize 3.8 million pages of documents on a compressed timeline. Cervantez Dec. ¶31 & Ex. 2; Cervantez Reply Dec. ¶¶35-38.

There is no factual support for any speculation that Co-Lead Counsel's use of 49 additional law firms resulted in duplicative billing. ECF 924 at 17-18. Indeed, Co-Lead/PSC firms performed the vast majority of the challenged class certification and settlement work. Cervantez Dec. ¶¶39, 43 & Ex. 2. Any attempt to cast doubt on Class Counsel's lodestar by comparing the expenditures of time here to purportedly similar tasks in totally different cases (ECF 924 at 17-18) highlights the objector's failure to recognize the complexity of the case and the investment that was necessary to litigate it. All of the time invested by Counsel in depositions, class certification, and settlement was necessary and inured to the benefit of the Class. Cervantez Dec. ¶¶21-43, Cervantez Reply Dec. ¶¶39-46.[8]

3. Counsels' rates for document analysis and review are reasonable.

Class Counsel implemented an effective and efficient system, supervised by partners at the PSC firms and staffed by contract attorneys, staff attorneys, and associates, to analyze almost 4 million pages of documents in just 15 months. Objector Schulman does not argue that this work was not essential to the litigation, but only that the billed rates were too high. ECF 924 at 18-22. But once a fee applicant provides evidence supporting the reasonableness of a requested rate, as Plaintiffs have done here, "[t]he party

[8] Finally, there is no basis for Schulman's speculation that any non-PSC firms were assigned work because of secret "backscratching" agreements. ECF 924 at 16. There are no fee agreements between Co-Lead/PSC firms and any other firms. Cervantez Reply Dec. ¶48; Friedman, Gibbs, Sobol Dec. in Opp. to Special Master Mot. (ECF 938-2, -3, -4).

opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness" of the rates. *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 980 (9th Cir. 2008). Absent such an evidentiary showing, the Court should "presume th[at] the requested rates are reasonable." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *see also Notter v. City of Pleasant Hill*, 2017 WL 5972698, at *4 (N.D. Cal. Nov. 30, 2017) (proffered rates reasonable if no contrary evidence). Objector offered only a statement by a defendant's attorney in Boston about the rates one defendant paid for rudimentary work totally unlike that at issue here. ECF 924 at 20 *citing* Frank Dec. Ex. 3 (ECF 924-7 at 83-86). This is not *evidence* of the relevant market rates, and the Court should overrule the objection on that basis alone.

Schulman's unsubstantiated assertion that the document analysis and review work in this case was "menial," "unskilled," or "low-level" is wrong. ECF 924 at 12. Document reviewers played a central role in this case, carefully working through millions of pages of often very technical documents, coding them according to a highly detailed matrix of issues, identifying and analyzing "hot" documents, summarizing key documents, drafting detailed analyses on specified topics based on targeted searches, and providing critical exhibit identification assistance for depositions. Cervantez Reply Dec. ¶51. This is significantly more demanding than the "first-level," "relevance" review sometimes conducted by defendant-employed contract attorneys. *Cf.* Frank Dec., Ex. 3 at 83:11-22 ("they're basically taking millions and millions of documents and dividing them into two piles: The pile nobody is ever going to go look at again and the pile that has sufficient relevance according to the way that we've trained them, that they're going to be looked at again."). *See also Chambers*, 214 F.Supp.3d at 898 (document review "is a critically important and challenging task;" "the court does not agree that document review is menial or mindless work").

a. The contract and staff attorney rates are reasonable, market rates.

Courts within this district and across the country routinely approve contract and staff attorney rates on par with those requested here. Friedman Reply Dec. Ex. A. (summarizing court orders approving Counsel's rates for contract and staff attorneys).[9] Recent empirical analysis by Prof. William B. Rubenstein of Harvard Law School demonstrates that the contract and staff attorney rates used here are

[9] Inadvertent clerical errors in Cervantez Dec. Exs. 1 and 3 misidentify Senior Associate Hal Cunningham of Scott + Scott as a contract attorney and incorrectly refer to Lieff Cabraser staff attorneys as "contract attorneys." These are corrected in Exs. D and F to Cervantez Reply Declaration.

well within the range generally awarded by courts. Cervantez Reply Dec. Ex. L (Rubenstein Dec. at 21, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Prods. Liab. Litig.*, Case 3:15-md-02672, Dkt. No. 3396-2, Ex. B (N.D. Cal. June 30, 2017)). Prof. Rubenstein's analysis of 13 cases that approved contract and staff attorney rates yielded an average rate of $386.75 in 2017 dollars—higher than the blended rate of $360 for contract and staff attorneys at issue here. *Id.* ¶¶31-35; ECF 924-3 (calculating blended rate for contract attorneys in this case as $360).

Schulman does not cite – and Counsel have not located – any cases within this district or the Ninth Circuit reducing a contract or staff attorneys' rate on the basis that it must be treated as a "cost" rather than a fee. Schulman suggests that the ABA Standing Committee on Ethics has opined that contract attorneys should be billed to clients at cost. ECF 924 at 19 (citing to ABA Formal Opinion 08-451 relating to "outsourced legal services"). To the contrary, the Committee has specifically opined that a firm may charge a markup to cover overhead and profit if the contract attorney charges are billed as fees for legal services. *See* ABA Comm. on Ethics & Prof'l Resp. Formal Op. 00–420 (Nov. 29, 2000) ("Surcharge to Client for Use of a Contract Lawyer") ("a lawyer may, under the Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services."). Courts have recognized this practice as sound policy:

> Law firms are not eleemosynary institutions. Economic rationality dictates that the fees they charge clients be higher than the amounts paid to their timekeeping personnel. The Court should no more attempt to determine a correct spread between the contract attorney's cost and his or her hourly rate than it should pass judgment on the differential between a regular associate's hourly rate and his or her salary.

In re AOL Time Warner S'holder Derivative Litig., 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010). *See also Chambers v. Whirlpool Corp.*, 214 F.Supp.3d 877, 898 (C.D. Cal. 2016) ("regardless of whether a task is performed by a law firm partner, a contract attorney, or a paralegal, the reasonableness of the fees depends on '[t]he difficulty and skill level of the work performed, and the result achieved[,]' not the title of the person who did the work)" (citations omitted); *In re Tyco Int'l, Ltd. MDL*, 535 F.Supp.2d 249, 272 (D. N.H. 2007) ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney. It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar."); *Charlebois v. Angels Baseball LP*, 993 F.Supp.2d 1109 (C.D. Cal. 2012); *Brazitis v. Colvin*,

2013 WL 6081017, at *2 (N.D. Ill. Nov. 19, 2013) ("attorneys regularly add a surcharge to the cost of the contract attorneys they engage, and do so ethically as long as the overall fee is reasonable").

Schulman argues that "the relevant inquiry is what paying clients would pay for the work." ECF 924 at 18. Class Counsel sets hourly rates according to prevailing market rates. *See* Sobol Dec. ¶24; Friedman Dec. ¶7; Gibbs Dec. ¶15. Schulman's statement that "[c]ontract attorneys are hired to do relatively unskilled document review work that discerning paying clients refuse to pay a premium for and [class counsel] certainly cannot charge rates of $360/hour" (ECF 924 at 19) is false. Schulman focuses in particular on PSC firm Lieff Cabraser's involvement in the *State Street* case, but Schulman's objection flatly misstates Lieff Cabraser's representations to the *State Street* court, asserting that "Lieff Cabraser confirmed at the hearing [relating to appointment of Special Master] that the [staff attorney] rates were *not* charged to 'paying clients.'" ECF 924 at 23. In fact, a Lieff Cabraser attorney told the court the *exact opposite* of what Schulman represents:

> The answer is yes, your Honor, we do have some paying clients. We have had some paying clients for whom we have billed out document review work done by attorneys at this level. We call them staff attorneys or contract attorneys, depending on the year, *but we have had two or three cases where we've had paying clients who have paid close to market rates or the actual market rates that are listed in my declaration.*

Frank Dec., 924-7 at 92:21-93:6 (emphasis added). If, as Schulman says, contract attorneys should be paid at market rate, and "[t]he best measure of the market rate is to review what *paying clients* are willing to pay," ECF 924 at 20 (emphasis in original), then Class Counsel has billed consistent with Schulman's proposal for contract and staff attorneys in this case.

b. Associate document review rates are properly calibrated.

There is nothing exceptional about Class Counsel's use of associates for document analysis and review. Courts regularly approved Class Counsel's fee requests with lodestars that include associate document review at rates comparable to those billed here. Friedman Reply Dec. ¶3. Firms typically bill associates at their customary rate for all work performed, including document review. Cervantez Reply Dec. ¶55. There is no basis for Schulman's argument that document review must be assigned to contract attorneys rather than associates. ECF 924 at 18. In fact, the Ninth Circuit has warned courts not to second guess staffing decisions in the manner Schulman suggests. *Moreno*, 534 F.3d at 1115 (court "may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if

different staffing decisions might have led to different fee requests;" rejecting reduction of fee award on the basis that a "less skilled attorney" should have performed document review); *see also O'Bannon v. Nat'l Collegiate Athletic Assoc.*, 2016 WL 1255454, at *11 (N.D. Cal. Mar. 31, 2016) (rejecting argument that document review should have been done by contract attorneys).

Schulman attempts to make Class Counsel's effort appear unreasonable by compiling and relying on a list of firms with associates who billed at the highest rates in the litigation. ECF 924. But, Class Counsel's blended rate for *all* document analysis and review in this case was $389 including the work of PSC firm partners who supervised the associates and partners, illustrating the cost-efficiency of Class Counsel's overall iterative approach to document analysis and review. Cervantez Reply Dec. ¶54. Thus, re-assigning the document review work to contract attorneys would have had little impact on the lodestar.

D. Counsel Should Be Reimbursed For Litigation Expenses

There are no specific challenges to any of Counsel's reasonable litigation expenses. Updated through January 15, 2018, those expenses amount to $2,005,068. Counsel established a call center in the fall of 2017 to assist class members file claims. Cervantez Reply Dec. ¶¶12-13. Class members continue to contact the call center, and will likely continue to do so through the claims filing deadline for out-of-pocket expenses. *Id.* Counsel request a reserve to pay for the call center through the claims filing deadline. *Id.* ¶13. Counsel request a total of $2,005,068.59 in incurred expenses, plus a reserve of $132,000 ($60,000 for expert review of Anthem's annual cybersecurity reports and $72,000 to fund the call center).

E. The Requested Service Awards Are Reasonable

The answer to objector Kress's question (ECF No. 925 at 9-11) "how did the class benefit" from the Named Plaintiffs' involvement is simple: They contributed significant time and effort, such that a "benchmark" award of $5,000 (or where computers were forensically imaged, $7,500) is warranted. The service awards are not too large in comparison to class member awards. *See In re Online DVD*, 779 F.3d at 947 (approving service awards of $5,000 to each of the nine class representatives, "roughly 417 times larger than the $12 individual award" for class members). Class member awards here are far greater.

III. CONCLUSION

For the foregoing reasons, Plaintiffs should be awarded attorneys' fees of $37,950,000, costs of $2,005,068.59, a cost reserve of $132,000, and Service Awards totaling $597,500.

Respectfully Submitted,

ALTSHULER BERZON LLP
EVE H. CERVANTEZ
JONATHAN WEISSGLASS
DANIELLE LEONARD
MEREDITH JOHNSON
TONY LOPRESTI

Dated: January 25, 2018

By: /s/ *Eve H. Cervantez*
Eve H. Cervantez

COHEN MILSTEIN SELLERS & TOLL PLLC
ANDREW N. FRIEDMAN
GEOFFREY GRABER
SALLY M. HANDMAKER
ERIC KAFKA

Dated: January 25, 2018

By: */s/ Andrew N. Friedman*
Andrew N. Friedman

Lead Plaintiffs' Counsel

LIEFF CABASER HEIMANN & BERNSTEIN, LLP
MICHAEL SOBOL
JASON LICHTMAN
DAVID RUDOLPH

GIRARD GIBBS LLP
ERIC GIBBS
DAVID BERGER

Plaintiffs' Steering Committee