No. 18-15054

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION,

SHAWNE ALSTON; MARTIN JENKINS; JOHNATHAN MOORE; KEVIN PERRY; WILLIAM TYNDALL; ALEX LAURICELLA; SHARRIF FLOYD; KYLE THERET; DUANE BENNETT; CHRIS STONE; JOHN BOHANNON; ASHLEY HOLLIDAY; CHRIS DAVENPORT; NICHOLAS KINDLER; KENDALL GREGORY-MCGHEE; INDIA CHANEY; MICHEL'LE THOMAS; DON BANKS, "DJ"; KENDALL TIMMONS; DAX DELLENBACH; NIGEL HAYES; ANFORNEE STEWART; KENYATA JOHNSON; BARRY BRUNETTI; DALENTA JAMERAL STEPHENS, "D.J."; JUSTINE HARTMAN; AFURE JEMERIGBE; ALEC JAMES,
Plaintiffs-Appellees
v.
DARRIN DUNCAN,
Objector-Appellant,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; PACIFIC 12 CONFERENCE; CONFERENCE USA; THE BIG TEN CONFERENCE, INC.; ATLANTIC SUN CONFERENCE, INC.; SOUTHEASTERN CONFERENCE; MID-AMERICAN CONFERENCE; ATLANTIC COAST CONFERENCE; MOUNTAIN WEST CONFERENCE; THE BIG TWELVE CONFERENCE, INC.; SUN BELT CONFERENCE; WESTERN ATHLETIC CONFERENCE; AMERICAN ATHLETIC CONFERENCE,
Defendants-Appellees.

On Appeal from the United States District Court for Northern District of California
4:14-md-02541-CW (Honorable Claudia Wilken)

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

Steve W. Berman
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Tel: (206) 623-7292

Bruce L. Simon
PEARSON, SIMON & WARSHAW LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Tel: (415) 433-9000

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees are not non-governmental corporate parties to this proceeding.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL RULES

OTHER AUTHORITIES

I. JURISDICTIONAL STATEMENT

Plaintiffs-Appellees do not dispute Appellant's jurisdictional statement.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in awarding attorneys' fees of $41,732,889, which represents 20% of the total settlement amount of $208,664,445 (and 20.31% of the net settlement amount).

2. Whether appellant, Darrin Duncan, waived his argument that the district court abused its discretion by not accounting for litigation expenses in calculating the percentage award, because he did not make that argument in the district court, even though he knew before filing his objections that Plaintiffs' counsel did not account for litigation expenses in calculating the 20% fee award.

3. Whether appellant, Darrin Duncan, waived his argument that the district court abused its discretion in performing a lodestar cross-check, because he did not make any argument in opposition to the lodestar in the district court, even though he knew before filing his objections the total hours, hourly rate, and lodestar for each Plaintiffs' attorney and paralegal who worked on this matter.

III. STANDARD OF REVIEW

This Court reviews "for abuse of discretion a district court's award of fees and costs to class counsel," as well as its method of calculation.[1] Findings of fact underlying an award of fees are reviewed for clear error.[2]

IV. STATEMENT OF THE CASE

This appeal concerns an award of attorneys' fees constituting 20% of a $208,664,445.00 settlement on behalf of student-athletes who attended Division I schools that would have awarded the full cost of attendance ("COA"), but for the NCAA bylaw in effect until January 1, 2015, that capped the maximum grant-in-aid ("GIA") at less than COA.[3] The average recovery for class members who played their sports for four years would be approximately $6,000. After final

---

[1] *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148–49 (9th Cir. 2000).

[2] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). Mr. Duncan cites the standard of review for review of a settlement, *see* Appellant's Opening Brief (AOB) at 3, but as explained below, his opening brief does challenges only the fee award, not the settlement.

[3] This Opposition is filed only on behalf of plaintiffs who pursued damages claims in *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, N.D. Cal. Case No. 14-md-2541-CW. Mr. Duncan's appeal improperly names seven plaintiffs who are parties *only* in the consolidated case that seeks injunctive relief. Those seven plaintiffs who seek only injunctive relief – Nigel Hayes, Alec James, Martin Jenkins, Johnathan Moore, Kevin Perry, Anfornee Stewart, and William Tyndall – should be dismissed from this appeal.

approval of the proposed settlement, each impacted class member with calculated damages will be mailed a check, with no claim form required and no right of any reversion of funds to defendants.[4] Darrin Duncan's appellate brief does not contain any criticisms of the order granting final approval of the settlement but instead only challenges the fee award. Accordingly, he waived any potential arguments with respect to the final approval order.

Out of the more than 53,000 class members, appellant Darrin Duncan is the sole objector to the fee award.[5]

A. History and settlement of this litigation.

1. Plaintiffs' counsel engaged in substantial pre-filing investigation.

Lead counsel Hagens Berman (HB) and Pearson, Simon & Warshaw (PSW) began investigating this case several years before filing a complaint.[6] In performing the investigation, they conducted extensive due diligence, including:

- Conducting informational interviews with current and former student athletes, and conferring with student-athletes' rights organizations;
- Retaining the services of experienced consultants to perform a substantial economic analysis of the relevant market;

[4] ER 114.

[5] ER 136-37.

[6] SER 755-56; SER 797.

- Researching the relationships between the NCAA and its conferences, and making the strategic decision to include the conferences as defendants (with the concomitant increase in resources necessary to prosecute against multiple defendants);
- Analyzing the diverse types of remedies to frame the requested relief in the case;
- Researching the positions of the NCAA and conferences on issues of competitive balance and amateurism;
- Reviewing public statements, interviews, and quotes from defendants and their executives dating as far back as 2003; and
- Researching the NCAA's IRS Form 990 filings and other sources that provided important information regarding the revenues and finances of the NCAA and the conferences.[7]

The hard work of HB and PSW culminated in the drafting and filing of the *Alston* complaint,[8] which was the first-filed complaint in the MDL.

2. Plaintiffs' counsel successfully obtained coordination of later-filed cases in the Northern District of California.

After HB and PSW filed the *Alston* complaint, other law firms filed complaints across the country.[9] Class counsel filed a motion with the JPML to

[7] *See generally* SER755-58; SER797-800.

[8] *Alston v. Nat'l Collegiate Athletic Ass'n et al.*, No. 4:14-cv-01011-CW (N.D. Cal.).

[9] SER758; SER807.

transfer actions to the Northern District of California.[10] PSW argued the motion to transfer before the JPML.[11] On June 13, 2014, the JPML granted the motion to transfer the cases to the Northern District of California.[12]

3. Plaintiffs successfully opposed defendants' motion to dismiss.

Plaintiffs' Consolidated Amended Complaint was immediately met with a motion to dismiss. Defendants' primary arguments were that this Court's decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), was fatal to plaintiffs' case and that there was a debilitating intra-class conflict.[13] But class counsel opposed the motion by emphasizing the major differences between this case and *O'Bannon* and by showing the legally deficient argument concerning the purported conflict.[14] The district court denied the motion.[15]

---

[10] *Id*.

[11] SER758.

[12] SER758; SER807.

[13] SER732 ("Plaintiffs cannot allege any plausible theory that can reconcile the relief they seek in this case with the decision and injunction in *O'Bannon* . . . .").

[14] SER702 ("Moreover, Plaintiffs' but-for world (one without the challenged restraint) is different than the *O'Bannon* world.").

[15] SER694.

4. Plaintiffs' counsel engaged in extensive written discovery and document production, obtaining and analyzing more than 550,000 documents and 2.8 million pages of documents.

Class counsel then began the written discovery and document production process. For three years, the two firms took the lead in responding to defendants' interrogatories and requests for production of documents, both by working with plaintiffs to acquire information requested by defendants and by drafting the discovery responses.[16] Discovery responses included, for example, a 45-page set of responses to defendants' contention interrogatories directed at critical issues in the case (e.g., less restrictive alternatives).[17]

Plaintiffs' counsel propounded extensive document requests on defendants and third parties. These requests yielded significant document productions of more than 550,000 documents and more than 2.8 million pages of documents.[18] Also, plaintiffs received productions from various NCAA member institutions throughout the litigation.[19] Reviewing these massive document productions was a major effort.[20] Lead counsel coordinated a complex and thorough review process

[16] SER117; SER152.
[17] SER117.
[18] SER118; SER152.
[19] SER118.
[20] SER118; SER152.

with eleven attorneys, spanning two-and-a-half years and amounting to about 5,000 attorney hours.[21]

And plaintiffs issued subpoenas to three hundred and thirty-seven NCAA member institutions in order to obtain critical NCAA member scholarship data. The importance of this effort cannot be overstated, given the necessity of detailed school and player-specific data required for plaintiffs' econometric damages model.[22] One of defendants' primary attacks against class certification was the varying nature of the data and that a school-by-school, or even a player-by-player, analysis was required. Given this attack, it was critical for plaintiffs to acquire comprehensive data from hundreds of schools, organize and digest the information, and coordinate with plaintiffs' experts to help create workable economic models in the case. And because these schools were not defendants, getting timely responses to meet court deadlines (such as class certification) was a significant challenge and required a major investment of dedicated resources.

[21] SER152.

[22] SER73-74; SER116; SER152.

Plaintiffs' counsel also collected necessary and comprehensive data from hundreds of schools.[23] This third-party subpoena project required a sustained effort, which consisted in part of:

- Creating and managing a database to track third-party subpoenas issued to all 337 schools, including information regarding dates of service, deadlines for responding, timing and status of productions received, and plaintiffs' requests for missing, updated, or additional information;
- Meeting and conferring with counsel and staff from these NCAA member schools regarding information sought by the subpoenas, timing of responses, requested format for responsive document productions (electronic vs. hard copy), issues related to production costs and expenses, as well as the nature, form, and timing of any notifications to students under the Family Educational Rights and Privacy Act; and
- Drafting and collecting from NCAA members schools customized business records affidavits authenticating records and data produced in response to the subpoenas.[24]

When discovery disputes arose during this case, HB and PSW were intimately involved in resolving them.[25] For example, the two firms were actively involved in the lengthy meet-and-confer process with conference defendants to

[23] SER73-74; SER116; SER152.

[24] SER73-74.

[25] SER118; SER152.

obtain their financials and media contracts.[26] Plaintiffs were successful, resulting in the production of financial statements, television contracts, and sponsorship contracts, all of which were asked about at depositions of conference defendant witnesses.[27] And when meet-and-confer talks broke down, HB and PSW litigated the discovery issues before Judge Cousins. For example, PSW argued motions to compel regarding (1) Notre Dame's commercial contracts (including its television contract with NBC) and (2) the Pac-12's eSports documents.[28]

5. Plaintiffs' counsel efficiently took more than 50 depositions, including numerous high-profile figures in college sports.

As in most complex antitrust cases, this case involved a large number of depositions. Plaintiffs took more than fifty depositions.[29] HB and PSW lawyers have deposed numerous high-profile figures in the world of college sports, including, but not limited to: Mark Emmert (President of the NCAA); Mary Willingham (the whistleblower who helped to reveal an academic fraud scandal at the University of North Carolina at Chapel Hill); Mike Slive (former Commissioner of the Southeastern Conference); John Swofford (Commissioner of

[26] SER118; SER152.
[27] *Id.*
[28] SER118.
[29] SER116; SER153.

the Atlantic Coast Conference); Michael Aresco (Commissioner of the American Athletic Conference); Harvey Perlman (former Chancellor of the University of Nebraska); Jim Delany (Big Ten Conference Commissioner); Karl Benson (Sun Belt Conference Commissioner); and Larry Scott (Pac-12 Conference Commissioner).[30]

To maximize class recovery and minimize costs, plaintiffs' counsel used a lean team to take depositions and execute all other projects.[31] One comparison is that defendants routinely staffed the defense of depositions with numerous lawyers (often, numerous senior lawyers).[32] For example, at the deposition of former NCAA executive Greg Shaheen, the deposing attorney was a PSW associate, appearing alone for plaintiffs. But on the defense side, ***five*** lawyers appeared in person.[33] The NCAA was represented in person by a partner and an associate from one of its law firms (Schiff Hardin LLP), an associate from one of its other law firms (Skadden, Arps, Slate, Meagher & Flom LLP), and an in-house counsel from the NCAA, while the Southeastern Conference was represented in person by a

[30] SER116; SER153.
[31] SER117; SER153.
[32] *Id*.
[33] SER117.

partner from one of its law firms.[34] This efficiency was typical for plaintiffs' counsel.

6. Plaintiffs' counsel filed a motion for class certification under Rule 23(b)(3), which defendants vigorously opposed.

HB and PSW spearheaded the filing of a motion for class certification under Rule 23(b)(3).[35] Plaintiffs' counsel put enormous time and energy into acquiring the NCAA member-school scholarship data.[36] Armed with this critical data, the firms worked closely with Dr. Rascher to assist him in constructing his damages modeling of the but-for world.[37] And HB and PSW performed significant legal research on class certification issues and wrote extensive briefs covering key issues such as class-wide impact, damages, and defendants' offset defense.[38]

Defendants vigorously opposed the class certification motion.[39] Relying in part on the district court's decision not to certify a damages class in the *O'Bannon* litigation, defendants argued that plaintiffs could not establish either impact or

---

[34] SER117.
[35] SER607-639.
[36] SER73-74; SER116; SER152.
[37] SER116; SER152.
[38] SER116; SER153.
[39] *See* SER566-606.

damages on a class-wide basis.[40] But class counsel undermined defendants' arguments, in part during HB's deposition of defendants' expert economist on damages class certification. In response to more than a dozen school witness declarations submitted by defendants in opposition to class certification, HB took sample depositions of five different university officials, again proceeding along the most efficient track. These witnesses confirmed that schools track, audit, and maintain detailed financial records in the ordinary course of business and provided corroborative support for plaintiffs' class certification position.[41] Working together with Dr. Rascher, class counsel filed a strong reply brief[42] and a strong rebuttal report from Dr. Rascher.

7. Plaintiffs' counsel engaged in lengthy negotiations that led to settlement of this matter at highly advantageous terms for settlement class members.

Settlement in this case was very challenging. Defendants made plaintiffs overcome numerous hurdles. For example, at virtually every step, plaintiffs were forced to deal with defendants' argument that this Court's *O'Bannon* decision

[40] SER588-595.
[41] SER153; SER550.
[42] SER545-565.

foreclosed plaintiffs' case. And even setting aside *O'Bannon*, defendants claimed that difficulties inherent in individual data issues could not be overcome.

Steve Berman and Bruce Simon were personally involved in the hard-fought settlement discussions that persisted intermittently over several years.[43] During these negotiations, the parties confronted many difficult and time-consuming issues.[44] The negotiations were arm's-length at all times and broke down on several occasions before the parties finally reached a settlement.[45] Berman and Simon attended multiple in-person mediation sessions with Professor Eric Green and participated in telephone calls with him.[46] Eventually, the settlement established a fund of $208,664,445, nearly single damages according to Dr. Rascher's model at the time of settlement.[47]

Plaintiffs and their experts engaged in extensive modeling of damages and a deep dive into the arcane classification systems and nomenclature used in college athletics. As a result, counsel valued the case with confidence. This extraordinary

[43] SER118; SER153.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] SER119; SER154.

result is the product of a thorough assessment and evaluation of the strengths and weaknesses of plaintiffs' case.[48]

B. The district court granted plaintiffs' motion for preliminary approval of settlement.

On February 3, 2017, plaintiffs filed their motion for preliminary approval of the $208,664,445 class action settlement,[49] along with the proposed settlement.[50] With the motion, plaintiffs filed: (1) the expert declaration of Daniel A. Rascher, who summarized the econometric analysis he performed to provide an estimate of class-wide damages for the proposed classes;[51] and (2) the declaration of Alan Vasquez of Gilardi & Co. LLC, a class action administrator, describing plaintiffs' proposed notice plan.[52]

On March 29, 2017, the district court granted the unopposed motion for preliminary approval of the class action settlement.[53] The Court preliminary certified the following Settlement Classes:[54]

---

[48] SER119; SER154.

[49] SER441-470.

[50] SER472-537.

[51] SER393-399.

[52] SER400-440.

[53] SER384-392.

[54] SER386. The Court defined "Full Athletics Grant-In-Aid" to mean "either (1) athletically related financial aid for any particular academic term (year, semester,

> **Division I FBS Football Class**: All current and former NCAA Division I Football Bowl Subdivision ("FBS") football student-athletes who, at any time from March 5, 2010 through the date of Preliminary Approval of this Settlement, received from an NCAA member institution for at least one academic term (such as a semester or quarter) a Full Athletics Grant-In-Aid (defined herein).
>
> **Division I Men's Basketball Class**: All current and former NCAA Division I men's basketball student-athletes who, at any time from March 5, 2010 through the date of Preliminary Approval of this Settlement, received from an NCAA member institution for at least one academic term (such as a semester or quarter) a Full Athletics Grant-In-Aid.
>
> **Division I Women's Basketball Class:** All current and former NCAA Division I women's basketball student-athletes who, at any time from March 5, 2010 through the date of Preliminary Approval of this Settlement, received from an NCAA member institution for at least one academic term (such as a semester or quarter) a Full Athletics Grant-In-Aid.

The court also approved the proposed notice, appointed Gilardi & Co. LLC as the settlement notice administrator, approved plaintiffs' plan for distribution of the settlement proceeds, designated four named plaintiffs as class representatives, and appointed HB and PSW as class counsel for the Settlement Classes.[55] And the

---

or quarter), in an amount equal to or greater than tuition and fees, room and board, and required course-related books, or (2) athletically related financial aid that was not equal to or greater than tuition and fees, room and board, and required course-related books only because it was reduced by the applicable NCAA member institution by an amount of nonathletically related financial aid received by the student-athlete."

[55] SER387.

court ordered class counsel to file a motion for attorneys' fees, costs, and service awards no later than September 6, 2017.[56]

The court ordered that by August 21, 2017, "Settlement Class Members shall be able to see on the Settlement website at www.GrantInAidSettlement.com an estimate of their individual ***gross*** and ***net*** recovery."[57] The court further ordered that anyone who believed that the amounts listed were wrong (or that they should have been listed but were not) could contact the Settlement Administrator about their dispute.[58] The court ordered that any objections to the Settlement or the motion for attorneys' fees, costs and service awards should be filed by September 20, 2107. The court ordered class counsel to file their motion for final approval of the Settlement by October 4, 2017,[59] and to file their response to any objections by November 3, 2017.[60] And the court set the final fairness hearing on November 17, 2107.[61]

---

[56] *Id*.

[57] SER388.

[58] *Id*.

[59] *Id*.

[60] SER389.

[61] SER386; SER389-390.

C. Plaintiffs filed their motion for attorneys' fees, expenses and service award and filed supplemental declarations pursuant to court order.

On September 6, 2017, plaintiffs' counsel filed their motion for attorneys' fees, expenses, and service awards, seeking 20% of the settlement amount, well below the 25% benchmark applied by this Court when fees are based on a percentage of the fund.[62]

On September 8, 2017, the district court entered an order requiring plaintiffs' counsel to file supplemental declarations to ensure compliance with the Northern District's Procedural Guidance for Class Action Settlements.[63] The court ordered that "no later than September 12, 2017, Plaintiffs' counsel shall submit supplemental declarations that summarize the hours spent on various categories of activities related to the action. In addition, Hagens Berman and Cafferty Clobes shall state whether their activities billed relate only to claims for damages and, if not, state the amount that does. Cafferty Clobes shall also itemize their hours per

[62] SER348-383. In support, plaintiffs' counsel filed declarations of Steve W. Berman, Bruce L. Simon, Elizabeth Pritzker, and Jennifer W. Sprengel. *See* SER66-67; SER68-112; SER113-150; SER151-347.

[63] SER64-65.

attorney."[64] On September 12, 2017, plaintiffs' counsel filed their supplemental declarations to comply with the district court's September 8 order.[65]

D. Darrin Duncan filed the sole objection to the motions for final approval of the settlement and for attorneys' fees, expenses, and service awards.

On September 20, 2017, Darrin Duncan filed an objection.[66] He is the only class member (out of approximately 53,748 class members) who filed an objection to the motion for final approval and the motion for attorneys' fees, expenses, and service awards. On October 4, 2017, plaintiffs filed their motion for final approval of the settlement.[67] And on November 3, 2017, plaintiffs filed their response to Mr. Duncan's objection.[68]

E. Mr. Duncan and his attorney are serial objectors.

This sole objector and his counsel, Caroline Tucker, also objected to the settlement in *O'Bannon*,[69] where their objections were overruled by the district court in their entirety,[70] and the court imposed an appellate bond on Mr. Duncan

---

[64] *Id*.

[65] SER38-43; SER44-51; SER52-55; SER56-63.

[66] ER 104-112.

[67] SER18-37.

[68] SER1-17.

[69] SER685-693.

[70] SER672-684.

(jointly and severally with one other objector).[71] On appeal, Ms. Tucker offered to drop the appeal in exchange for $200,000 for herself, which plaintiffs' counsel rejected.[72] Mr. Duncan subsequently voluntarily dismissed the appeal.[73]

Since dismissing the appeal in the *O'Bannon* case, Ms. Tucker has appealed several other district court orders pertaining to class action settlements. The list below shows Ninth Circuit cases in which she has represented objector-appellants since 2016:

- *Patrick Hendricks, et al. v. Starkist Co.*, 9th Cir. Case No. 16-16992 (case is pending);
- *In re: Jason Hill, et al. v. Volkswagen, AG, et al.,* 9th Cir. Case No. 16-17158 (case is pending);
- *Steven Russell, et al. v. Kohl's Department Stores, Inc., et al.*, 9th Cir. Case No. 16-56493 (case is pending);
- *Patrick Cotter, et al. v. Lyft, Inc.*, 9th Cir. Case No. 17-15648 (this Court granted appellees' motion for summary affirmance against Ms. Tucker's client; *id.* at Dkt. 25);

[71] SER663-671.

[72] SER643-662.

[73] SER639-642.

- *Moises Zepeda, et al v. Paypal, Inc.*, 9th Cir. Case. No. 17-15780 (Ms. Tucker's appeal on behalf of objector-appellant was voluntarily dismissed);
- *Neil Torczyner, et al. v. Staples, Inc.*, 9th Cir. Case No. 17-56427 (Ms. Tucker's appeal on behalf of objector-appellant was voluntarily dismissed);
- *Lorean Barrera, et al v. Pharmavite LLC*, 9th Cir. Case No. 17-56959 (Ms. Tucker's appeal on behalf of objector-appellant was voluntarily dismissed).

But Ms. Tucker has also served as an objector herself on several occasions and appealed the district courts' orders. *See Anthony Ferreira, et al. v. Groupon, Inc., et al.*, 9th Cir. Case No. 16-55605 (Ms. Tucker served as objector-appellant before voluntarily dismissing appeal); *Caroline Tucker v. Department Stores Ntl. Bank, et al.*, 8th Cir. Case No. 16-2506 (Ms. Tucker served as objector-appellant before voluntarily dismissing appeal); *Bacchi, et al v. Tucker*, 1st Cir. Case No. 17-2129 (Ms. Tucker served as objector-appellant before voluntarily dismissing appeal); *In re: Honest Marketing*, 2nd Cir. Case No. 18-57 (Ms. Tucker served as objector-appellant before voluntarily dismissing appeal).

F. The district court held a final fairness hearing and granted plaintiffs' motion for final approval of the settlement.

After holding the final fairness hearing on November 17, 2017, the district court granted plaintiffs' motion for final approval of the settlement on December 16, 2017.[74] The court first certified the Settlement Classes defined above for settlement purposes.[75] The court then found that the parties had complied with Rule 23(b) notice requirements.[76] Next, the court found that the settlement was fair, adequate, and reasonable.[77] The court also found that the plan of allocation is fair.[78]

In the district court, Darrin Duncan made the only objection to the settlement, contending that the "Court should order that the claims administrator distribute class funds until each class member would receive less than $3.00."[79] But his appellate brief does not renew that criticism or otherwise argue that the

---

[74] ER 133-147.

[75] ER 136.

[76] ER 136-138.

[77] ER 138-143.

[78] ER 143-44.

[79] ER 110.

district court abused its discretion in approving the settlement. Instead, he only challenges the fee award.

G. The district court granted plaintiffs' and class counsel's motion for attorneys' fees, expenses, and service awards.

On December 6, 2017, the district court granted the motion for attorneys' fees, expenses, and service awards.[80] As the district court noted, Mr. Duncan filed the "sole objection" to the motion for attorneys' fees, expenses, and service awards.[81] He raised two issues in objecting to the motion for fees, expenses, and service awards. *First*, he argued that "the 20% attorney's fee request here is excessive because attorney's fees calculated as a percentage of the class fund should decline from the 25% benchmark when the case involved a mega-fund – over $100,000,000 – and settlement is reached before class certification, trial or appeal."[82] *Second*, he argued that "the requested amount of $20,000 for the class representatives renders the settlement unfair."[83]

In granting the motion for fees, expenses, and service awards, the court first found that a fee of twenty percent of the settlement was "fair and reasonable (and

---

[80] ER 113-132.

[81] ER 131.

[82] ER 105.

[83] ER 110-11.

even below market) under the percentage-of-the-recovery method."[84] The court explained that this Court has established a 25% benchmark in percentage-of-the-fund cases that can be adjusted upward or downward to account for any unusual circumstances. The court then considered five factors to decide whether to apply an upward or downward adjustment.

First, the court found that the 25% benchmark award was presumptively reasonable, reflecting a market-based fee. In part, the court explained that a "study of attorneys' fees, known as the EMG Study, looked at awards in 458 class actions between 2009 and 2013, finding that 21% was the midpoint for fees where the recovery exceeded $100 million."[85] The court further explained that "of the 19 antitrust settlements between 2009 and 2013, with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median fee percentages were 27% and 30%."[86]

Second, the court ruled that all relevant circumstances confirmed a 20% fee award was reasonable. The court found that "the results are exceptional because

---

[84] ER 115.

[85] ER 116 (citing Eisenberg, Miller & Germano, Attorneys' Fees in Class Actions: 2009-2013) ("EMG Study") at 8).

[86] ER 116-17.

counsels' efforts created a $208,664,445 fund for the class (nearly 100% single damages at time of settlement and 66% of single damages currently). Far lesser results (with 20% recovery of damages or less) have justified upward departures from the 25% benchmark."[87] The court then found that the fee "is justified by the significant risk borne by plaintiffs' counsel and the complexity of issues in this case."[88] Next, the court determined that a 20% fee "is justified by the contingent nature of the representation and the efforts and costs expended by plaintiffs' counsel."[89] As the court explained, "counsel for the classes have spent more than three years investigating and litigating this case, without receiving any compensation to do so" and "advanced over $3,184,274.38 in expenses, interest-free, prosecuting this action, including all expert fees and expenses, which are a substantial but necessary burden in any antitrust action."[90] The court then found that a 20% fee "accords with fee awards in analogous cases."[91] In part, the court noted that "of the three common funds of nearly equivalent size cited by the Ninth

[87] ER 117.

[88] ER 118.

[89] ER 119.

[90] ER 120.

[91] *Id*.

Circuit in [*Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002)], ***all three cases awarded fees at or above the 25 percent benchmark***, and ***two of the three awards*** resulted in multipliers exceeding the 3.66 multiplier requested here . . . ."[92]

As to the final factor in determining whether to adjust the 25% benchmark, the court found that a "20% fee does not award windfall profits to counsel even if the settlement were deemed a megafund."[93] After noting that counsel sought 20%, rather than the 25% benchmark, the court explained that "[t]his is not a mass tort or fraud case in which mere disclosure of a government investigation all but guarantees the creation of a megafund, notwithstanding what counsel does or does not do; instead, this case went from zero recovery to megafund ***solely*** because of counsel's efforts and expenditures of expert fees and other expenses."[94] Further, a "megafund was created in this case despite the size of the classes, not because of it. And above-benchmark fees frequently are awarded where megafunds must be

---

[92] ER 121. The court also explained that, as shown by the EMG Study, "the fact that the average award in mega-fund cases across all subject matters and all locales in 2011 was greater than the 20% fee requested here confirms, like *Vizcaino II* does, that a 20% fee on a recovery of this size is reasonable and well inside the range of fee awards in comparable common fund cases." ER 122.

[93] *Id*.

[94] ER 123 (footnote omitted).

shared by hundreds of thousands, if not millions, of class members. Here, there are approximately 53,748 class members."[95]

The court next found that a lodestar "cross-check further supports the requested fees."[96] The court noted that "counsel for plaintiffs have invested $11,398,158.30 in attorneys' and para-professionals' time in this case, and request a 3.66 multiplier, which is well within the range of multipliers awarded in similar cases."[97] The court then explained that it could give an upwards adjustment to a lodestar to reflect *Kerr* "reasonableness" factors based on this Court's opinion in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).[98] As the court noted, "Foremost among these considerations, however, is the benefit obtained for the class."[99] The court then found that a 3.66 multiplier was reasonable because: (1) plaintiffs' counsel achieved an exceptional result for the classes; (2) Plaintiffs' counsel expended significant resources on behalf of the classes; (3) this case presented difficult questions, requiring extraordinary skill by plaintiffs' counsel;

---

[95] *Id*. (footnote omitted).

[96] ER 124.

[97] *Id*.

[98] ER125-26.

[99] ER 126 (quoting *Bluetooth*, 654 F.3d at 942).

(4) the market rate of antitrust lawyers with the experience of plaintiffs' counsel supports the request; (5) plaintiffs' counsel by-passed other cases due to their commitment to this case; (6) the requested fee is reasonable when compared to fees in similar litigation; and (7) the reputation, ability, and efficiency of plaintiffs' counsel supports the requested fee.[100] And based on its thorough opinion, the district court rejected Mr. Duncan's "sole objection."[101]

V. SUMMARY OF ARGUMENT

The sole objector in this case, Darrin Duncan, erroneously complains that the district court abused its discretion by awarding plaintiffs' counsel 20% of the $208,664,445 settlement in this matter. The *sole* objection made by Mr. Duncan in the district court that he has not abandoned on appeal is that "fees calculated as a percentage of the class fund should decline from the 25% benchmark when the case involves a mega-fund – over $100,000,000 – and settlement is reached before class certification, trial or appeal."[102] Remarkably, Mr. Duncan ignores the fact that the award *did* "decline from the 25% benchmark," because plaintiffs' counsel

---

[100] ER 125-130.

[101] ER 131. The court also found that the requested expense reimbursement of $3,184,274.38 is reasonable and granted a service award of $20,000 to each of the four class representatives. ER 131-32.

[102] ER 105.

asked only for a fee award of 20% of the settlement amount, and the court awarded the requested 20%.

And under this Court's standards for attorneys' fees in a non-reversionary common fund case, the court's 20% fee award is well within these standards of reasonableness. This Court's 25% benchmark is the starting point when assessing the reasonableness of an attorneys' fee request in common fund cases. From there, courts may look at various factors to adjust the percentage upward or downward based on the case-specific facts when assessing reasonableness. In a detailed opinion, the district court carefully considered all relevant factors and found that the 20% fee "is fair and reasonable (***and even below market***) under the percentage-of-the-recovery method."[103]

Mr. Duncan erroneously contends that the 20% fee is too high under what he refers to as the "mega fund rule" or a "sliding scale" approach. In doing so, he ignores *Vizcaino v. Microsoft Corporation*,[104] which rejected an "increase-decrease rule," whereby the percentage of the fund awarded to class counsel necessarily decreases as the common fund increases over a certain amount. Instead, this Court instructs district courts to consider the totality of the circumstances to determine if

---

[103] ER 115 (emphasis added).

[104] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002).

the fee request is reasonable, which may include the size of the common fund. Here, the district court explicitly found that "the so-called 'increase-decrease' principle . . . is tenuous here, where the size of the fund is not merely a factor of the size of the classes but is instead directly related to the efforts of plaintiffs' counsel, who achieved exceptional, megafund results for a relatively discrete set of class members."[105] And the court did *not* award the 25% benchmark but instead granted the request of plaintiffs' counsel for a 20% award.

Mr. Duncan also contends that the court erred by not excluding expenses from the numerator or denominator in calculating the percentage of the fee award, ignoring this Court's holding in *In re Online DVD-Rental Antitrust Litigation*,[106] that a district court does "not abuse its discretion in calculating the fee award as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses." And Mr. Duncan fails to acknowledge that even if the expenses were excluded from the numerator or denominator, the fee award would still be only 21.53% or 20.3%, respectively, well below the 25% benchmark, which could not affect the district court's finding that the awarded fee "is fair and

[105] ER 123-24.

[106] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015).

reasonable (***and even below market***) under the percentage-of-the-recovery method."[107]

Mr. Duncan also waived his argument that the district court abused its discretion in conducting a lodestar cross-check, because he told the district court in his objections that the "percentage of the fund is the more appropriate method of evaluation for this case unless the court is willing to spend months evaluating the lodestar. The court should evaluate the fees based upon a percentage of the fund analysis and apply the mega-fund rule."[108] In any event, his four arguments about the lodestar, which he makes for the first time in his opening brief in this Court, lack merit. *First*, he argues (incorrectly and without citing any authority) that the district court erred by awarding a "whopping" 3.66 multiplier, even though the court explained, in part, that "*Vizcaino II* alone demonstrates that both the requested fee and resultant multiplier is well within the reasonable range . . . ."[109]

Second, the district court properly relied on summary billing records in conducting the cross-check, because courts routinely and properly accept summaries of billing records as sufficiently detailed when used for purposes of a

---

[107] ER 115 (emphasis added).

[108] AOB at 5 (quoting Mr. Duncan's objection in district court).

[109] ER 121-22 (citing *Vizcaino*).

lodestar cross-check, particularly when not a single class member objects to such billing records. Indeed, after all plaintiffs' counsel submitted declarations summarizing the billings of attorneys and support staff, the court required them to provide supplemental declarations that, among other things, "summarize the hours spent on various categories of activities related to the action."[110] Plaintiffs' counsel submitted those supplemental declarations *before* Mr. Duncan filed his objections, and yet he did not object to those supplemental declarations at all.

Third, the district court did not abuse its discretion in finding that the hourly rates of all attorneys, including contract attorneys, were reasonable. Mr. Duncan provides no support for his contention that contract attorneys must be billed at cost, particularly when he does not meet his burden or providing evidence to the district court challenging the accuracy and reasonableness of the those fees.[111]

Fourth, Mr. Duncan does not meet his burden of proving that "the document review lodestar is also overstated because much of it was tasked to high-priced

---

[110] SER65.

[111] *See Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) ("'The party 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 . . . facts asserted by the prevailing party in its submitted affidavits.'") (citation omitted).

associates."[112] After explicitly inviting the district court *not* to review billing records, Mr. Duncan cannot complain that the court abused its discretion by not doing so. And he provides no evidence to support his contentions.

In summary, the district court's order awarding fees, expenses, and service awards should be affirmed.

//

//

//

VI. ARGUMENT

A. The District Court Did Not Err In Awarding Attorneys' Fees of Twenty Percent

1. The district court properly exercised its discretion by not applying a sliding percentage scale in awarding fees.

Mr. Duncan, the sole objector to the award of attorneys' fees out of more than 53,000 class members,[113] erroneously contends that the "fee award is excessive because of its status of a megafund settlement. Because of economies of scale, a reasonable fee award should utilize sliding scale percentage to prevent a

[112] AOB at 22

[113] ER137 (district court explained that there are "approximately 53,748" class members).

windfall for plaintiffs' attorneys at the expense of the class."[114] Mr. Duncan's argument founders in light of *Vizcaino*, in which this Court explicitly rejected that argument. Nonetheless, Mr. Duncan does not even acknowledge *Vizcaino*, which the district court discussed at length in awarding fees in this matter, let alone try to explain why it does not bind the district court (and this panel).[115]

In *Vizcaino*, this Court explained that "the primary basis of the fee award remains the percentage method."[116] To the extent lodestar is utilized, it serves as "merely a cross-check on the reasonableness of a percentage figure."[117] Moreover, this Court has "established a 25 percent 'benchmark' in percentage-of-the-fund cases that can be 'adjusted upward or downward to account for any unusual

---

[114] AOB at 11-12.

[115] Rather than even acknowledge this Court's *Vizcaino* decision, Mr. Duncan cites a Seventh Circuit case for the proposition that a sliding scale should be used. Br. at 12 (citing *Silverman v. Motorola*, 739 F.3d 956 (7th Cir. 2013)). *Vizcaino*, not *Silverman*, applies on this appeal. *See Matter of Walldesign, Inc.*, 872 F.3d 954, 969 (9th Cir. 2017) ("we cannot overrule a prior panel's decision without intervening Supreme Court (or en banc) precedent").

[116] *Vizcaino,* 290 F.3d at 1050.

[117] *Id.* at 1050 n.5 (the lodestar is used primarily merely as a cross-check because "it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement").

circumstances involved in [the] case.'"[118] Although the benchmark of 25 percent "is not per se valid, it is a helpful 'starting point.'"[119] Courts consider the following factors to determine whether to apply either an upward or downward adjustment from the benchmark to award a reasonable fee: (1) the results obtained by counsel; (2) the risks and complexity of issues in the case; (3) whether the attorneys' fees were entirely contingent upon success and whether counsel risked time and effort and advanced costs with no guarantee of compensation; (4) whether awards in similar cases justify the requested fee; and (5) whether the class was notified of the requested fees and had an opportunity to inform the Court of any concerns they have with the request.[120]

In both the district court and on this appeal, Mr. Duncan does not apply this Court's factors to assess the percentage-of-fund award to counsel under the facts of this case. Instead, he contends that this is a "mega fund case," whereby the percentage of the fund awarded to class counsel should automatically decrease as the common fund increases over a certain (arbitrary) amount. But his approach is

---

[118] *Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1006 (9th Cir. 2002) (citation omitted).

[119] *Online DVD-Rental*, 779 F.3d at 955 (citation omitted).

[120] *See, e.g.*, *Keller v. Elec. Arts, Inc.*, No. 09-cv-1967-CW, 2015 WL 5005057, at *2-3 (N.D. Cal. Aug. 18, 2015).

contrary to Ninth Circuit law and unpersuasive as a matter of policy. This Court in *Vizcaino* was presented with this same question, i.e., whether there should be an automatic or special rule in "megafund" cases – and answered: no.[121] This Court reasoned that a court "cannot rationally apply any particular percentage . . . without reference to all the circumstances of the case."[122] And this Court explained that the "question is not whether the district court should have applied some other percentage, but whether in arriving at its percentage it considered all the circumstances of the case and reached a reasonable percentage."[123]

Ignoring *Vizcaino*, Mr. Duncan falsely asserts that the "district court failed to consider that a reasonable fee award should utilize sliding scale percentage to prevent a windfall for plaintiffs' attorneys at the expense of the class."[124] To the contrary, the court correctly applied the 25% benchmark but also explicitly

---

[121] *See Vizcaino*, 290 F.3d at 1047-48 (rejecting objectors' request to apply so-called megafund increase-decrease rule as inconsistent with longstanding Ninth Circuit law).

[122] *Id.* at 1048.

[123] *Id.*

[124] AOB at 10.

addressed whether to reduce the fee award based on the "increase-decrease" rule, which is the terminology used by this Court in *Vizcaino*:[125]

> [W]hile applying the so-called "increase-decrease" principle may be appropriate in certain cases, it is tenuous here, where the size of the fund is not merely a factor of the size of the classes but is instead directly related to the efforts of plaintiffs' counsel, who achieved exceptional, megafund results for a relatively discrete set of class members. In so doing, they obtained incidental benefits for the public, expended huge amounts of time and money, and faced considerable risks of non-recovery (and thus non-payment) in pursuing this complex antitrust case against well-financed, top-notch counsel. The 20% fee request is below the market contingency rate, below the Ninth Circuit benchmark rate, and below rates awarded in other megafund cases, and results in a multiplier within the range of multipliers that the Ninth Circuit has deemed reasonable. The 20% fee request is eminently reasonable and justified based on all the circumstances of this case. To nonetheless apply the increase-decrease principle and reduce an otherwise reasonable fee simply because this is a "megafund" case would be unreasonable.

So there is no merit to Mr. Duncan's assertion that the district court "failed to consider" reduction of the percentage award due to the size of the settlement. Instead, the court properly applied the 25% benchmark, which this Court applies without exception in assessing fees awarded under the percentage-of-fund method.[126]

---

[125] ER 123-24 (footnotes omitted).

[126] *See*, *e.g.*, *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 747 (9th Cir. 2017); *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016); *Stanger*

And the district court's 20% award is consistent with Mr. Duncan's objection in the district court that "attorney's fees calculated as a percentage of the class fund should decline from the 25% benchmark when the case involved a mega-fund – over $100,000,000 – and settlement is reached before class certification, trial or appeal."[127] Plaintiffs' counsel sought, and the court awarded, fees constituting 20% of the settlement, a decline of five percent from the 25% benchmark.

On appeal, rather than address the district court's thorough discussion of the facts and law, Mr. Duncan erroneously contends that under the "mega fund" rule, a "reasonable award for class counsel in this case is between 10-15%."[128] He bases that argument solely on two surveys of attorneys' fees that he did not even cite to the district court. First, he relies on the 2010 Fitzpatrick study, which reports that the mean and median fee awards for settlements between $100 million and $250 million are 17.9% and 16.9%, respectively.[129] The same study reports that the

---

v. China Elec. Motor, Inc., 812 F.3d 734, 738 (9th Cir. 2016); *Online DVD-Rental*, 779 F.3d at 949.

[127] ER 105.

[128] AOB at 13.

[129] *See id.* at 13 ("In class actions in which the settlement equaled $100 to $250 million, the median fee award was 16.9% and the mean was 17.9%. [Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*,

mean and median fee awards for settlements between $250 million and $500 million are 17.8% and 19.5 percent, respectively.[130]

And yet somehow Mr. Duncan concludes that based on the Fitzpatrick study, fees in this case must be capped at 15% and perhaps be as low as 10%. In support of that conclusion, he solely argues (without any evidentiary substantiation or logic) that this case is "a classic instance of leveraging of a large class size rather than achieving a good value. Here, the class will receive approximately 50% of their single damages. ER 113. This is not an extraordinary result by any stretch of the imagination."[131]

In fact, providing class members 50% of their single damages after fees and expenses ***is*** an extraordinary result, as the district court explained in awarding a 20% fee. The court explained that "the recovery for all of those eligible class members now stands at 66% of their single damages. If the Court grants class counsel's fee and expense request, class members will receive approximately 50%

---

7 J. EMPIRICAL L. STUD. 811 (2010)] at 839. Other surveys support this analysis. *E.g.*, Logan, Stuart, et al., *Attorney Fee Awards in Common Fund Class Actions* 24 Class Action Reports (March-April 2003) (empirical survey showed average recovery of 15.1% where recovery exceeded $100 million)."

[130] *Id.*

[131] *Id.*

of their damages, a result almost never achieved in large, complex antitrust cases."[132] And as the court stressed, "Importantly, class counsel also negotiated an allocation and payment method whereby, at the time of disbursement, each non-opt-out class member who is entitled to payment will receive payment directly in the mail, without needing to make any showing or do anything further."[133] And the court explained that "Plaintiffs' counsel achieved these exceptional raw-dollar, percentage, and per capita results despite facing off against some of the best, and most well-resourced, defense lawyers in the country."[134] Mr. Duncan does not even acknowledge those findings and conclusions by the district court, let alone try to explain that they constitute clear error or an abuse of discretion.

And the other attorneys' fees report cited by Mr. Duncan also undermines his argument. According to that 2003 report, the percentage of fees and costs awarded equaled or exceeded 20.9% in 22 of the 48 reported settlements between

---

[132] ER 125 (footnotes omitted). A footnote to that quotation states, "*See*, *e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig*., 2016 U.S. Dist. LEXIS 102408, at *65 (holding that 20% antitrust recovery in a megafund case warranted 'a modest increase over the Ninth Circuit benchmark'); *In re Omnivision Techs*., 559 F. Supp. 2d at 1046 ('a total award of approximately 9% of the possible damages . . . weighs in favor of granting the requested 28% fee')." *Id*. at 12 n.49.

[133] ER 117.

[134] *Id*. (footnote omitted).

$100 million and $250 million, reaching as high as 48.4%.[135] Yet Mr. Duncan erroneously asserts that this report also supports his bald conclusion that fees in this case *must* be between 10% and 15%. And in reaching that unsupported and unsupportable conclusion, Mr. Duncan also ignores the district court's finding that "the EMG Study looked at average fee awards based on risk, according to the type of litigation. The average fee award for ***low-medium risk*** antitrust cases between 2009 and 2013 was ***24.91***%. This data looking at the risk dimension in antitrust cases reinforces the reasonableness of counsel's 20% fee request."[136]

B. The district court did not abuse its discretion when it did not include litigation expenses in calculating the percentage award.

Mr. Duncan erroneously contends that "litigation expenses should been included in calculating the percentage award."[137] That argument is incorrect for two reasons. First, Mr. Duncan did not make that argument to the district court and thus waived it. Second, his argument lacks merit in any event, because the district court has discretion *not* to include expenses in the percentage calculation and because including expenses would have made no difference in any event.

---

[135] *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reporter (March-April 2003), at 3-4.

[136] ER 118.

[137] AOB at 14.

1. Mr. Duncan waived his argument that litigation expenses should have been included in calculating the percentage award.

Mr. Duncan waived his argument that expenses should have been included in the percentage calculation, because he did not make that argument in the district court. As this Court has explained, an "argument must be raised sufficiently for the trial court to rule on it."[138] Although this Court will consider arguments for the first time on appeal in limited circumstances,[139] Mr. Duncan does not acknowledge that he failed to raise this argument in the district court, let alone argue that this Court should nonetheless address it. As a result, his argument should not be considered.

2. Mr. Duncan's argument that the district court erred by not including expenses in the percentage calculation lacks merit.

Mr. Duncan erroneously claims, for the first time in this litigation, that the district court should have either included expenses in the numerator or excluded expenses from the denominator when calculating the fee percentage.[140] As shown

---

[138] *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) (quoting *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989)).

[139] *See also Dennin v. Berryhill*, 706 F. App'x 371, 372 (9th Cir. 2017) ("Dennin also raises a number of issues that he did not advance before the district court . . . We may exercise our discretion to excuse waiver to prevent a miscarriage of justice, if a new issue is based on a change in law, or if the issue is purely one of law. Having thoroughly considered the issues presented by Dennin for the first time on appeal, we decline to excuse his waiver.") (citations omitted).

[140] AOB at 14-16.

below, there is no merit to Mr. Duncan's argument as a matter of law. But it bears emphasizing that, as explained in detail below, Mr. Duncan ignores the fact that if the expenses were included in the numerator, the fees and expenses together would be only ***21.53%*** of the total recovery. And if expenses instead were excluded from the gross settlement amount in the denominator, the fee award would constitute only ***20.31%*** of the net settlement fund. Mr. Duncan neither makes those calculations nor acknowledges that both percentages are still well under this Court's 25% benchmark figure for fees alone.

And the district court was not obligated to make those calculations, particularly when neither Mr. Duncan nor any other class member argued to the court that such calculations should be made. Mr. Duncan argues to this Court that the district court should have excluded expenses "from the denominator (i.e. the value of the fund)"[141] but ignores established Ninth Circuit law that a district court has discretion to calculate the fee based on *either* the gross or the net fund. For example, in *Online DVD-Rental*, this Court held that the district court "did not abuse its discretion in calculating the fee award as a percentage of the total settlement fund, including notice and administrative costs, and litigation

[141] AOB at 15.

expenses."[142] Similarly, in *Powers v. Eichen*, this Court explained that "the choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable. Our case law teaches that the reasonableness of attorneys' fees is not measured by the choice of the denominator."[143] But Mr. Duncan ignores this Court's binding rulings in *Online DVD-Rental* and *Powers.*

And Mr. Duncan fails to acknowledge that even if the percentage award in this case were based on the net settlement fund, the fee award granted by the district court constitutes only ***20.31%*** of the net fund. Specifically, with fees of $41,732,889 as the numerator and with a net settlement of $205,480,170.62 as the denominator (i.e., the gross settlement of $208,664,445 reduced by expenses of $3,184,274.38), the percentage is 20.31%. Given that the district court found that the requested 20% fee "is fair and reasonable (***and even below market***) under the percentage-of-the-recovery method,"[144] Mr. Duncan does not provide the slightest basis for his conclusion that the court abused its discretion by not calculating that the fee award constitutes 20.31% of the net settlement amount.

---

[142] *Online DVD-Rental*, 779 F.3d at 953.

[143] *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000).

[144] ER 115 (emphasis added).

Further, the cases cited by Mr. Duncan do not support his argument. In *In re Transpacific Passenger Air Transportation Antitrust Litigation*, the district court explained that "it is not an abuse of discretion to calculate fees based on the gross fund" but that "[t]his Court has had a longstanding preference for using the net . . . ."[145] In *Transpacific*, the settlement fund was $39,502,000, and the plaintiffs sought $13,154,166 in attorneys' fees, which was 33.33% of the total fund. But after subtracting expenses of $8,320,199.73 from the total fund, the requested fee was "*42% of the net Fund*."[146] The court found that "Plaintiffs are therefore entitled to $9,000,000 in fees, which is roughly thirty percent of $31,181,800.27."[147] In contrast, the fee award here is 20% of the gross settlement fund and 20.31% of the net settlement fund, well below the benchmark of 25%.

Similarly in another case cited by Mr. Duncan, *Redman v. RadioShack Corporation*, the "agreed-upon attorneys' fees, plus the $830,000 worth of coupons at face value, plus the administrative costs, add up to about $4.1 million. Class

---

[145] *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL 3396829, at *1 (N.D. Cal. May 26, 2015), *aff'd*, 701 F. App'x 554 (9th Cir. 2017).

[146] *Id*. at *2.

[147] *Id*. This Court did not address the fee calculation in affirming the judgment in *Transpacific*.

counsel argued that since the attorneys' fees were only about 25 percent of the total amount of the settlement, they were reasonable."[148] But deducting the $2.2 million in costs from the gross amount of the settlement resulted in a net settlement of $1.9 million, increasing the percentage of the fee award from 25% to 52.63%. In contrast in this matter, excluding costs from the gross settlement amount results in a fee award of 20.31%, compared to 20.0% of the gross settlement fund.[149]

Alternatively, Mr. Duncan incorrectly argues that this Court "include[s] litigation 'expenses' with the attorneys' fees in the numerator when calculating the percentage of recovery. *See Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012) (calculating percentage versus benchmark based on '$2 million in fees and costs'). . . ."[150] In *Dennis*, this Court explained that there were "serious issues about the alleged dollar value of the product *cy pres* award, an important number

---

[148] *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014).

[149] In another case cited by Mr. Duncan, *In re Wells Fargo Secutities Litigation*, 157 F.R.D. 467 (N.D. Cal. 1994), the court did not award fees but instead assessed competing bids to be class counsel. The court explained that "[b]ecause fees under the Milberg bid are unchecked by the amount of litigation expenses, and because Lieff's approach does provide such a check, Milberg's expenses would tend to be an indeterminate amount higher than Lieff's." *Id*. at 471. That holding has no bearing on whether the fee award in this matter is reasonable.

[150] AOB at 14.

used to measure the appropriateness of attorneys' fees."[151] This Court stated that "if the alleged $5.5 million value of the product *cy pres* distribution turns out on close examination to be an illusion and is subtracted from the alleged $10.64 million value of the common fund, the dollar value of the settlement fund plummets to $5.14 million, and the $2 million attorneys' fees award becomes 38.9% of the total, which is clearly excessive under our guidelines."[152] But this Court then explained that "[o]ur decision on the merits of the settlement renders moot the attorneys' fees issue."[153] So this Court was not presented with (and did not address) the issue of whether all fees and expenses must be included in the numerator in assessing the percentage of fees awarded to class counsel.[154]

And Mr. Duncan again fails to calculate what the percentage award would be if expenses were included in the numerator. In fact, fees and expenses together would be only ***21.53%*** of the total recovery. Specifically, $41,732,889 in fees plus

---

[151] *Dennis v. Kellogg Co.*, 697 F.3d 858 at 868 (9th Cir. 2012).

[152] *Id*.

[153] *Id*. at 868 n.2.

[154] On remand, the district court included *only* attorneys' fees in the numerator under the percentage method, explaining that the "settlement provides for, and class counsel here seeks, an award of $1,000,000 in fees which constitutes 25% of the cash fund." *Dennis v. Kellogg Co.*, 2013 WL 6055326, at *7 (S.D. Cal. Nov. 14, 2013).

expenses of $3,184,274.38 equals $44,917,163.38 (i.e., the numerator), which is 21.53% of the $208,664,445.00 gross settlement (i.e., the denominator). Again, Mr. Duncan does not and cannot provide any explanation for why the district court abused its discretion in light of the facts and law.

Two other cases cited by Mr. Duncan also do not support his argument that the district court abused its discretion by not including expenses in the numerator when calculating the percentage award. In *In re Imax Securities Litigation*, the plaintiff sought "attorneys' fees of $3,000,000, representing 25% of the settlement amount, as well as reimbursement of expenses totaling $1,677,838.02 . . . . Adding these attorney's fees and expenses, the total of $4,677,838.02 reflects almost 39% of the settlement amount."[155] The court noted that "this figure alone gives us pause" but reserved decision on the award of fees based on other concerns.[156] In stark contrast to *Imax*, the fees and expenses awarded to Plaintiffs' counsel here amount to only 21.53% of the total settlement amount.

And finally, Mr. Duncan's argument is not supported by his citation to *Kmiec v. Powerwave Technologies, Inc.*, in which the court explained that "[a]warding a 30% fee on top of the requested expenses amount would result in

---

[155] *In re Imax Sec. Litig.*, 283 F.R.D. 178, 193 (S.D.N.Y. 2012).

[156] *Id.*

more than 40% of the settlement flowing to attorneys—a troublingly high amount."[157] In contrast here, the district court awarded only 21.53% of the gross settlement as fees and expenses, well under the 25% benchmark.

VII. MR. DUNCAN'S LODESTAR ARGUMENTS ARE WAIVED AND LACK MERIT

Mr. Duncan makes three challenges to the lodestar cross-check performed by the district court. He waived all three by not raising them in the district Court. And those arguments lack merit in any event.

A. Mr. Duncan waived all arguments concerning the lodestar cross-check.

In the district court, Mr. Duncan made a single reference to the lodestar of plaintiffs' counsel, stating that the "percentage of the fund is the more appropriate method of evaluation for this case unless the court is willing to spend months evaluating the lodestar. The court should evaluate the fees based upon a percentage of the fund analysis and apply the mega-fund rule."[158] But in an abrupt about-face, Mr. Duncan now argues to this Court that "[i]n megafund cases, the lodestar cross-check assumes particular importance."[159] And he complains to this Court that "the

---

[157] *Kmiec v. Powerwave Tech., Inc.*, No. SACV 12-00222-CJC(JPRx), 2016 WL 5938709, at *5 (C.D. Cal. Jul. 11, 2016).

[158] AOB at 5 (quoting Mr. Duncan's objection in district court).

[159] *Id.* at 16.

district court failed to request enough information about the lodestar amount to make a reasonable analysis. The court did not request a breakdown of how much time was spent on various litigation tasks such as depositions, document review, drafting, etc. Without this information, it was impossible to compare the lodestar to the requested percentage for attorney fees."[160] But Mr. Duncan did not object on that ground in the district court, even though he had the complete request for fees submitted by plaintiffs' counsel *before* filing his objections. As a result, he has waived any and all objections to the lodestar cross-check.[161]

B. Mr. Duncan's lodestar arguments ignore this Court's precedents and are factually baseless.

Mr. Duncan makes four arguments about the district court's lodestar calculation,[162] but all of them are based on a misunderstanding of the purpose of a lodestar cross-check. In *City of Roseville*, this Court stated, "we find meritless Orloff's contention that the district court committed reversible error by not

---

[160] *Id*. at 10.

[161] *See City of Roseville Emp. Ret. Sys. v. Orloff Fam. Tr. UAD 12/31/01*, 484 F. App'x 138, 141 n.2 (9th Cir. 2012) ("Orloff, however, made no argument concerning the district court's lodestar crosscheck in its opening brief, waiting until its reply to question the multiplier utilized by the district court. Accordingly, this issue is waived."). Similarly, Mr. Duncan waived the lodestar issues by not making them to the district court.

[162] *See* AOB at 16-24.

lowering its fee award in response to allegedly excessive billing practices by the lead partner on the case, John Grant." [163] As this Court explained, "In pressing this argument, Orloff misapprehends the difference between the percentage-of-the-fund and the lodestar methods of awarding attorney's fees in common fund cases. Under the percentage-of-the-fund method, the focus is not on the attorneys' billing records, but on whether the percentage awarded and the resulting fee are reasonable under the circumstances of the case."[164] As a result, "Orloff's contention that the class is being made to compensate Mr. Grant for work that could have been handled by an associate is plainly inaccurate, as the fee award does not correlate to any specific expenditure of attorney time."[165] Similarly here, Mr. Duncan's arguments about the lodestar focus on billing records and assignments of tasks, not on whether the fee awarded is reasonable.

1. The 3.66 multiplier awarded by the court is reasonable and not an abuse of discretion.

Mr. Duncan substitutes an unsupported conclusion for analysis when he claims – without any evidence or discussion of the district court's findings – that

[163] *City of Roseville*, 484 F. App'x at 141.

[164] *Id.*

[165] *Id.*

the 20% fee award is excessive because "the lodestar amounts to $11,398,158.30, a whopping 3.66 multiplier to what was awarded."[166] Mr. Duncan ignores the district court's finding "of the three common funds of nearly equivalent size cited by the Ninth Circuit in *Vizcaino II*, ***all three cases awarded fees at or above the 25 percent benchmark***, and ***two of the three awards*** resulted in multipliers exceeding the 3.66 multiplier requested here. . . ."[167] The court then showed in a chart that in one of those cases, the multiplier was between 4.5 and 8.5, and 19.6 in the other case. But Mr. Duncan does not even acknowledge those findings, let alone try to establish that they constitute clear error or that the court abused its discretion under the totality of the circumstances in finding the 3.66 multiplier reasonable.

And Mr. Duncan's unsupported assertion that the 20% fee is excessive because the 3.66 multiplier is "whopping" is further undermined by additional cases. For example, in *Steiner v. American Broadcasting Company*, this Court affirmed a 6.85 multiplier, holding that it "falls well within the range of multipliers that courts have allowed."[168] And in the Second Circuit's *Wal-Mart* decision that

---

[166] AOB at 13.

[167] ER 121. In a footnote to that quotation, the court cited *Vizcaino*, 290 F.3d at 1052, as "upholding 28% fee on $97 million settlement fund."

[168] *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007).

Mr. Duncan relied on extensively in the district court, the court awarded a multiplier of 3.5, similar to what plaintiffs request here, resulting in a fee award of $220.3 million.[169] In another case cited by Mr. Duncan to this Court, the district court found that a "multiplier of 3.97 is not unreasonable in this type of case. Indeed, as noted by the Honorable Leonard B. Sand, 'In recent years multipliers of between 3 and 4.5 have become common.'"[170] Finally, in one of the reports cited by Mr. Duncan, for the 64 cases analyzed with recoveries of $100 million, the aggregated multiplier was 4.5,[171] which is substantially above the 3.66 multiplier here.

2. Plaintiffs' counsel properly submitted (and the district court properly relied on) billing summaries.

Mr. Duncan incorrectly argues that the "district court failed to require plaintiffs' attorneys to provide sufficient detail in their billing summaries."[172] Mr. Duncan cites the N.D. Cal. Procedural Guidance for Class Action Settlements as stating that "requests for approval of attorneys' fees awards must include

---

[169] *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 123 (2d Cir. 2005).

[170] *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (citation omitted).

[171] *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reporter (March-April 2003), at p. 1.

[172] AOB. at 18.

detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund."[173] But Mr. Duncan ignores the fact that courts in the Northern District routinely accept summaries of billing records as sufficiently detailed when used for purposes of a lodestar cross-check.[174]

More egregiously, Mr. Duncan ignores the fact that the district court required plaintiffs' counsel to submit supplemental declarations for the express purpose of complying with the Northern District's Procedural Guidance for Class

---

[173] *Id*.

[174] *See*, *e.g.*, *In re Volkswagen 'Clean Diesel' Mktg., Sales Prac., and Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2017 WL 1047834, at *5 n.5 (N.D. Cal. Mar. 17, 2017) ("'[I]t is well established that "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean counting ... [courts] may rely on summaries submitted by the attorneys and need not review actual billing records."') (citation omitted); *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 10-md-2143 RS, 2016 WL 7364803, at *13 (N.D. Cal. Dec. 19, 2016) ("Sweeney objects that class counsel should submit detailed billing records. The Court finds that given the detailed description of the time dedicated to this case, the hourly rates of the Hagens Berman attorneys, and the number of hours per attorney provided by Hagens Berman, such a submission is not necessary."); *In re Yahoo Mail Litig.*, No. 13-cv-4980-LHK, 2016 WL 4474612, at *9 (N.D. Cal. Aug. 25, 2016) ("Sweeney states that Class Counsel has failed to submit 'detailed billing records' to support their request for attorney's fees . . . This statement is factually incorrect. In their motion for attorney's fees, filed on May 31, 2016—a full month and a half before Sweeney's objection—Class Counsel included detailed billing records which showed the number of hours each attorney worked and the attorney's billable rate.").

Action Settlements.[175] On September 12, 2017, plaintiffs' counsel filed their supplemental declarations to comply with the district court's order.[176] And eight days later, on September 20, 2017,[177] Mr. Duncan filed his objections but did not object to either the original or supplemental billing declarations.

Now on appeal, Mr. Duncan argues for the first time that the district court abused its discretion by not requiring plaintiffs' counsel to provide even more information. Mr. Duncan erroneously relies on a Ninth Circuit case that did not involve common funds. In *Intel Corporation v. Terabyte International, Inc.*, the plaintiff sought attorneys' fees under the Lanham Act. In assessing such a fee request, "the district court must first determine the presumptive lodestar figure by multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate."[178] This Court held that the district court erred when it "made no findings that the hours expended were reasonable and that the hourly rates were customary. The order merely awarded the fees without elaboration.

---

[175] SER64-65.

[176] SER38-43; SER44-51; SER52-55; SER56-63.

[177] ER 104-112.

[178] *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622 (9th Cir. 1993).

'Such a procedure is inadequate.' That is particularly true where, as here, the requesting party submits mere summaries of hours worked."[179]

Intel is readily distinguishable. First, the district court here made findings that the hours expended were reasonable and that the hourly rates were customary. Second, as a district court has explained, "*Intel* was a Lanham Act case governed by the Federal Rules of Evidence and standards of proof therein. In that non-class action case, the district court made no finding that the hours expended were reasonable and/or that the hourly rates were customary. As discussed above, under California law, plaintiffs need not submit detailed time records."[180] Similarly here, detailed time records are not required when performing a lodestar cross-check, particularly when the sole objector to the fee award did not request such detailed records in the district court even after the district court required supplemental declarations from plaintiffs' counsel.

---

[179] *Id*. at 623 (citation omitted).

[180] *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1169 n.5 (C.D. Cal. 2010).

3. Plaintiffs' counsel billed contract attorneys properly.

Mr. Duncan erroneously argues on this appeal, for the first time in this litigation, that contract attorneys were "billed at exorbitant rates."[181] Two contract attorneys were billed at $300 per hour and another at $350 per hour.[182] But Mr. Duncan failed to object to those rates in the district court, so neither plaintiffs' counsel nor the district court had any reason to address whether those rates were "exorbitant." As this Court has explained, "declarations filed by the fee applicant do not conclusively establish the prevailing market rate. 'The party 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 ... facts asserted by the prevailing party in its submitted affidavits.'"[183] Mr. Duncan did not meet his burden, because he did not even try to challenge evidence submitted by plaintiffs' counsel.

In the district court, plaintiffs' counsel submitted a billing survey to support the billing rates,[184] and the court relied on that "reputable survey of billing rates" in

---

[181] AOB at 18.

[182] SER160-61.

[183] *Camacho*, 523 F.3d at 980 (citation omitted).

[184] SER198-201.

finding that the rates of plaintiffs' attorneys were reasonable.[185] Mr. Duncan had the burden of proving that the rates charged for contract attorneys were not valid market rates. Without any evidence as to the qualifications of the contract attorneys or as to the nature of the document review they performed, Mr. Duncan has not met his burden.[186] And in any event, the district court did not abuse its discretion in finding that the rates charged for the contract attorneys are reasonable.[187]

---

[185] ER 127.

[186] *See also Gates v. Gomez*, 60 F.3d 525, 535 (9th Cir. 1995) ("As to the third claim—that plaintiffs' hours were duplicative and inefficient—defendants did not meet their rebuttal burden of submitting evidence challenging the accuracy and reasonableness of the hours charged or the facts asserted.").

[187] *See Optical Disk Drive Prods.*, 2016 WL 7364803, at *8, *13 (in approving "hourly rates ranging from between $300 to $350" for staff and contract attorneys, the court explained that "[c]ourts throughout the country have accepted the use of contract attorneys in this type of complex litigation"); *O'Bannon v. NCAA*, No. C 09-3329 CW, 2016 WL 1255454, at *11 (N.D. Cal. Mar. 31, 2016) ("the NCAA provides no authority for its position that document review may only be performed by contract attorneys or paralegals, or that contract attorneys and paralegals may only be compensated at $100 per hour"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-cv-5944 JST, 2016 WL 721680, at *45 (N.D. Cal. Jan. 28, 2016) ("[T]he legal community now commonly uses contract attorneys. There is not the slightest justification to downgrade their billing rates or not apply a multiplier to them."); *Andrews v. Lawrence Livermore Nat. Sec., LLC,* No. C 11-3930 CW, 2012 WL 160117, at *2 (N.D. Cal. Jan. 18, 2012) (approving an hourly rate of $300 for a contract attorney, because "[d]efendants provide no authority for the proposition that, for purposes of determining reasonable hourly rates, an attorney's status as a contract attorney, as opposed to his or her employment as an associate, is a proper substitute for evaluating an attorney's actual experience or skills.").

Nonetheless, Mr. Duncan makes the unsupported argument that the "best practice is to bill the contract attorneys at cost." Br. at 19. The only case he cites from this Circuit in making that argument is *Banas v. Volcano Corporation*,[188] but he ignores the fact that *Banas* was not a class action. Instead, the court decided how much to award the defendants "pursuant to an attorneys' fees provision in the merger agreement from which the underlying dispute arose."[189] So the court did not award fees as a percentage of recovery and then perform a lodestar cross-check. Nor did the court address the *market rate* for contract attorneys who performed "first-level" document review.[190] Instead, the court found only that the "low hourly-rates charged by the contract attorneys ($47 to $59 per hour) . . . is reasonable."[191] In contrast, the court found that hourly rates of $245 to $290 for paralegals "are within the prevailing market rates for similar cases in the Northern District."[192] So *Banas* does not provide any support for the proposition that in

[188] *Banas v. Volcano Corp.*, 47 F. Supp. 3d 957 (N.D. Cal. 2014).

[189] *Id.* at 961.

[190] *Id.* at 970.

[191] *Id.* at 980.

[192] *Id.* at 965.

performing a lodestar cross-check, a district court must require class counsel to charge only the cost of contract attorneys.[193]

In support of his misguided argument that the "best practice" is to bill contract attorneys at cost, Mr. Duncan cites *Dial Corporation v. News Corporation*,[194] as "commend[ing] class counsel for treating contract attorney work as an expense."[195] But *Dial*, from the Southern District of New York, does not support Mr. Duncan's argument. As this Court explained in *Moreno v. City of Sacramento*, a district 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."[196] Whether the decision to use contract attorneys is reasonable – and whether rates charged for those attorneys in calculating the lodestar are reasonable – depends on the facts of the case and the

---

[193] Mr. Duncan cites to an opinion by the ABA Standing Committee on Ethics in erroneously claiming that "it is likely unethical to charge more than cost" for contract attorneys. AOB at 20. That opinion concerned agreements between attorneys and clients, not use of a lodestar cross-check in a class action, and provides that clients may agree to pay more. Mr. Duncan cites *nothing* to support his implicit assertion that it's unethical to bill contract attorneys are market rates in setting a lodestar.

[194] *Dial Corp. v. News Corp.*, 317 F.R.D. 426 (S.D.N.Y. 2016).

[195] AOB at 19.

[196] *Moreno v. City of Sacramento* 534 F.3d 1106, 1115 (9th Cir. 2008).

abilities of the contract attorneys. But Mr. Duncan has not met his burden of opposing the lodestar, because he does not provide *any* evidence that the staffing decisions by plaintiffs' counsel were unreasonable or that the work performed by the contract attorneys was low-level work that should not be billed at $300 or $350 per hour.[197]

Finally, Mr. Duncan performs a sleight of hand when he asserts that the "5,000 hours devoted to document review would have been closer to $250,000 - $400,000 (5,000 hours billed at $50-75 per hour), instead of the likely $2,500,000 (5,000 hours billed at $500 per hour) that was used as a lodestar."[198] His complaint is that contract attorneys were billed at too high a rate, not that all attorneys who reviewed documents were billed at too high a rate. In his declaration, Mr. Berman plainly explained, "Hagens Berman and Pearson Simon coordinated a complex and thorough review process with eleven attorneys and spanning over two-and-a-half

---

[197] *See Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 897-98 (C.D. Cal. 2016) ("Arguably, when a party needs to conduct basic document review to respond to voluminous discovery requests—a task that is typically limited to 'checking the box' for relevance and privilege—it might make sense to engage an agency offering a pool of temporary contract attorneys. The same is not true, however, when a small plaintiffs firm engaged in high-stakes litigation needs to review voluminous disclosures by well-heeled corporate defendants—a task that, to ensure critical evidence is not missed, requires attention to detail and a sophisticated understanding of the facts and law at issue in the case.").

[198] AOB at 21.

years, amounting to approximately 5,000 attorney hours."[199] But that does not mean that the document review was conducted solely by contract attorneys, so once again, Mr. Duncan has failed to meet his burden in opposing the lodestar because he has no evidentiary basis to baldly assert that those 5,000 attorney hours were billed at an average of $500 per hour.

4. Mr. Duncan does not meet his burden of proving that plaintiffs' counsel improperly assigned low-level work to associates.

For the first time in this litigation, Mr. Duncan complains that the district court "failed to recognize that the document review lodestar is also overstated because much of it was tasked to high-priced associates."[200] He waived that argument in the district court, where he told the court that the "percentage of the fund is the more appropriate method of evaluation for this case unless the court is willing to spend months evaluating the lodestar."[201] After explicitly inviting the district court *not* to review billing records, Mr. Duncan cannot complain that the court abused its discretion by not doing so.

---

[199] SER152.

[200] AOB at 22.

[201] *Id*. at 5 (quoting Mr. Duncan's objection in district court).

And yet again, Mr. Duncan has not met his burden of opposing the lodestar. He asserts that plaintiffs' counsel "assigned low-level document review to higher-priced associates"[202] but never describes the nature of the document review performed by associates because he did not object on that ground and did not seek discovery of such information. As a result, the cases he cites do not support his argument. For example, in *In re Citigroup Inc. Securities Litigation*, an objector provided *evidence* in the district court in the form of an expert declaration as to the value of work performed by contract attorneys.[203] In contrast, Mr. Duncan did not provide any argument, let alone evidence, in the district court as to his assertion that any or all document review in this case was simplistic. In *In re Citigroup*, the objector's expert inferred that all work by contract attorneys "was simplistic,"[204] but the court explained that "not all document review is created equal. Many of the documents reviewed here concerned highly complex financial instruments and subtle nuances of circumstantial evidence of scienter."[205] Without any record to support his bald assertions about the nature of the document review or which

[202] *Id*. at 22.

[203] *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013).

[204] *Id*. at 397.

[205] *Id*. at 398.

attorneys performed that review, Mr. Duncan fails to meet his burden of demonstrating that the district court abused its discretion.

And Mr. Duncan's argument founders under *Moreno*, in which the district court "reduced the hourly rate from $300 an hour to $250 an hour, in part because it thought that other firms could have staffed the case differently. The court speculated that other firms would have used a less skilled attorney, rather than the lead counsel, to perform document review."[206] As this Court held, "The court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but 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. The difficulty and skill level of the work performed, and the result achieved—not whether it would have been cheaper to delegate the work to other attorneys—must drive the district court's decision."[207] Mr. Duncan does not provide any evidence to support his argument under *Moreno* standards.

---

[206] *Moreno*, 534 F.3d at 1114.

[207] *Id*. at 1115. *See Chambers*, 214 F. Supp. 3d at 898 (C.D. Cal. 2016); the court relied on *Moreno* to explain that "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. . . . These considerations weigh in favor of approving the fees sought by class counsel.").

VIII. CONCLUSION

Under the factors specified by Ninth Circuit law, as well as an examination of comparable cases, the district court did not abuse its discretion in granting plaintiffs' request for attorneys' fees equivalent to 20 percent of the common fund. And the court did not abuse its discretion in performing the lodestar cross-check, which also shows the reasonableness of the requested fees. The lone objector's arguments to the contrary are without merit and, in many cases, waived. For the foregoing reasons, plaintiffs and plaintiffs' counsel respectfully request that this Court affirm the district court's order awarding attorneys' fees, costs, and service awards.

Dated: June 8, 2018

Respectfully submitted,

/s/ Steve W. Berman

STEVE W. BERMAN

1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com

Bruce L. Simon
44 Montgomery Street, Suite 2450
San Francisco, CA 94104
Telephone: (415) 433-9000
Facsimile: (415)433-9008
bsimon@pswlaw.com

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 12,166 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   This brief has been prepared in a proportionally spaced typeface of 14 points or more.

Executed on June 8, 2018.

/s Steve W. Berman
STEVE W. BERMAN

STATEMENT OF RELATED CASES
PURSUANT TO NINTH CIRCUIT RULE 28-2.6

No other appeals have been consolidated with this appeal.

Executed on June 8, 2018.

/s Steve W. Berman
STEVE W. BERMAN

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

Executed on June 8, 2018.

/s Steve W. Berman
STEVE W. BERMAN