UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

OBJECTION TO PROPOSED SETTLEMENT

AND ATTORNEYS' FEE REQUEST

I. PRELIMINARY STATEMENT

Kevin P. McDonald is a member of the class in this case who was a Household employee and through his 401-K account acquired Household common stock at inflated prices during the class period. When McDonald submitted an individual claim in this matter, he was informed that it was duplicative of a claim already made on his behalf as a Household employee. On that basis, McDonald is a class member on whose behalf a claim was submitted and who has standing to object to the proposed settlement and fee award. *See* Declaration of Kevin P. McDonald, filed herewith.

II. INTRODUCTION

The fee award that Lead Counsel seek is grossly excessive. Seventh Circuit precedents indicate that percentage fee awards should be considerably lower in huge cases like this than in smaller matters, and they recommend a ceiling of two for lodestar multipliers. The request in this case, for a 24.68% award from a $1.575 billion fund, amounting to a multiplier of 5.4 times counsel's regular hourly rates, is exorbitant and unsupported by Seventh Circuit precedent. *Infra* at 1-3, 6-7. Lead Counsel's lodestar is, moreover, inadequately documented and improperly inflated. *Infra* at 11-13. The notice to the class misleadingly suggests a risk remains that defendants might avoid liability by contesting scienter and whether the statements they made were in fact misleading. *Infra* at 14.

III. ARGUMENT

A. The requested fee award is grossly excessive and contrary to Seventh Circuit precedent

Class counsel seek an award of 24.68% of a $1.575 billion settlement fund, for an attorneys' fee award of over $388 million, amounting to a multiplier of 5.4 times their regular hourly rates. That is contrary to Seventh Circuit precedent, under which percentage awards ordinarily should be considerably smaller in huge cases like this, with a recommend ceiling of two for resulting multipliers of counsel's lodestar.

In *Florin v. Nationsbank of Georgia, N.A.,* 60 F.3d 1245, 1249 (7th Cir. 1995) (*Florin II*), for example, the Seventh Circuit warned that "though the benchmark in common fund cases is 20%-30%, fee awards usually fall in the 13%-20% range for funds of $51-$75 million, and in the 6-10% range for funds of $75-$200 million." *Id.* (quoting *In re Unisys Corp. Retiree Med. Ben. ERISA Litig.,* 886 F. Supp. 445, (E.D. Pa. 1995)). Honoring market forces, including economies of scale, fee awards should be lower still where the recovery exceeds a billion dollars. *Florin's* analysis precludes a hefty 25% fee award in this case with its $1.575 billion settlement fund. *See id.*

So does the Seventh Circuit's reasoning in *Silverman v. Motorola Solutions, Inc.,* 739 F.3d 956 (7th Cir. 2013), which explained that "it is almost as expensive to conduct discovery in a $100 million case as in a $200 million case. ... There may be some marginal costs of bumping the recovery from $100 million to $200 million, but as a percentage of the incremental recovery these costs are bound to be low. It is accordingly hard to justify awarding counsel as much of the second hundred million as of the first." *Id.* at 959. It is harder still to justify awarding the substantially same percentage for the fifteenth or sixteenth $100 million. "Awarding counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin (yet still preserving some incentive for lawyers to strive for these higher awards)." *Silverman*, 739 F.3d at 959. If, as *Silverman* held, a 27.5% fee award in a $200 million case was "at the outer limit of reasonableness," *id.*, then a 24.68% fee award in this $1.575 billion case far exceeds the outer limit of reasonableness. *See id.*

Consistent with Seventh Circuit precedent, the MANUAL FOR COMPLEX LITIGATION warns against applying a 25% a benchmark in cases like this: "The application of a benchmark percentage for unusually large funds may result in a windfall." MANUAL FOR COMPLEX LITIGATION 4TH ("MCL 4th") §14.121, at 189 & n. 497 (Federal Judicial Center 2004).[1]

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[1] https://public.resource.org/scribd/8763868.pdf

"Accordingly, in 'mega-cases' in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages to be appropriate." *Id*. at 188. As an example, the MANUAL cites *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 F.3d 283, 339–40 (3d Cir. 1998), where the Third Circuit remanded a 6.7% award "for a more thorough examination and explication of the proper percentage to be awarded to class counsel . . . in light of the magnitude of the recovery." *See also In re WPPSS Sec. Litig.,* 19 F.3d 1291, 1297-98 (9th Cir. 1994) ($687 million fund was so large that a 25% fee award would be excessive); *In re Nortel Networks Corp. Sec. Litig.,* 539 F.3d 129, 131-32 (2d Cir. 2008) (affirming district court finding that 8.5% percent of a $1.142 billion settlement fund would be excessive, and holding that a 3% fee amounting to a 2.04 multiplier of the attorneys' lodestar was reasonable).

In the same vein, the Federal Judicial Center's pocket guide on *Managing Class Action Litigation* advises judges considering common fund fee applications:

> In "mega" cases, be prepared to see attorney requests for truly huge amounts, up to hundreds of millions of dollars. In such cases, of course, the monetary recovery to the class typically is also in the hundreds of millions of dollars, even in the billions. ... In such cases, you should be looking at a percentage of recovery far less than the typical range and perhaps as low as 4%. … Generally, as the total recovery increases the percentage allocated to fees should decrease.

Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges,* 33 (Federal Judicial Center, 3d ed. 2010).[2]

Lead Counsel ask this court to ignore the foregoing principles and precedents because the fee agreement they negotiated with a union pension fund in April 2005, nearly three years after the action was commenced, somehow establishes a "market rate" for the legal services in this case that is binding under *In re Synthroid Mktg. Litig.,*264 F.3d 712 (7th Cir. 2001), and *In re Synthroid Mktg. Litig.*, 325 F.3d 974 (7th Cir. 2003). On its face, however, that agreement was one structured for a much smaller case: It provided for Lead Counsel to claim 19% on the

[2] http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf

first $50 million recovered; 23% of the next $100 million recovered; and 25% of all recovery amounts in excess of $150 million. That might make sense in a case where the potential recovery tops out at three or four hundred million dollars. But this is a huge case, with a potential recovery in the billions. Applying Lead Counsel's purported "market rate" agreement results in a fee approximating the 25% benchmark appropriate for much smaller cases. That is too much for a case like this, as Lead Counsel well know.

When dealing with sophisticated institutional investors in other large cases, they agree to much lower percentages. Robbins Geller's fee application in *In re Enron Corp. Sec. Litig.,* 586 F. Supp. 2d 732, 766-70 (S.D. Tex. 2008), for example, asked for just 9.52% of the settlement fund, based on its agreement with a sophisticated institutional investor client that was represented by experienced negotiators in its dealings with the law firm. Robbins Geller's negotiated fee agreement in that case recited:

> [T]his representation has been undertaken on a contingent fee basis and [the] firm will look only to the proceeds of any recovery for all of our fees. We have agreed upon the following fees as a percentage of the recovery for the class: 0-$1 billion 8%; $1-$2 billion, 9%; $2+ billion, 10%. The higher percentages apply only to the marginal amounts. In addition, we will also advance all costs and disbursements, and will also look only to the proceeds of any recovery for repayment of those costs.

See Fee Application, at 15 (ECF 25), *In re Enron Sec. Litig.,* No. 4:01-cv-03624, Dkt. 5816 (filed Jan. 4, 2008); Declaration of Helen J. Hodges, ¶¶20-27, Dkt. 5818 at 12-18 (ECF 16-22), *In re Enron Sec. Litig.,* No. 4:01-cv-03624 (filed Jan. 4, 2008), & Ex. 3 thereto, Dkt. 5818-1 at ECF pp. 7-11.

The potential recovery exceeded $2 billion in this case as well. Indeed, Judge Guzman entered a $2.46 billion Rule 54(b) judgment on claims of just 10,902 class members, with tens of thousands of claims then still being processed – meaning that the total potential recovery likely exceeded $5 billion.[3] Applying Lead Counsel's *Enron* fee schedule to the $1.575 billion

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[3] On the appeal from the Rule 54(b) judgment on claims of a portion of the class, the Seventh Circuit observed that the district court had divided claimants into categories based on responses to a claims form questionnaire, and that, "10,902 claimants answered 'no' to the court's question (these are the

ultimately obtained in a settlement binding the entire class, the attorneys' fees here would be 8% of the first billion dollars (i.e., $80 million) plus 9% of $575 million (i.e., $51.75 million) for a total fee award of $131.75 million. At nearly three times that, the $388 million fee that Lead Counsel request is above-market and unreasonable.

Agreements entered by other class action plaintiffs' firms dealing with sophisticated institutional investors confirm this. In the *WorldCom* securities fraud litigation, for example, class counsel agreed that attorneys' fees for a large recovery would drop to "4% of that portion of the class recovery that exceeds $1 billion." *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288(DLC), 2004 WL 2591402, at *17 (S.D.N.Y. Nov. 12, 2004). Following their agreement, the lawyers "applied for attorneys' fees of $141.5 million, which constitutes 5.5% of the settlement fund" of $2.575 billion. *Id. See also In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d 319, 353, 357 (S.D.N.Y. 2005) (fee agreement negotiated with "the second largest public pension fund in the United States" produced a 5.5% fee award).

Lead Counsel suggest that a higher award is warranted because "[u]nlike *Enron, WorldCom,* and other well-known frauds, few plaintiffs' firms sought to be appointed lead counsel in this case. Only three law firms applied for that role and the other two ultimately withdrew before Robbins Geller was appointed." Fee Brief, Dkt. 2222 at 16 (ECF 23). "This lack of competition distinguishes this litigation from other high-profile cases," according to Lead Counsel, and "'suggests that most members of the securities bar saw this litigation as too risky for their practices.'" *Id.* (quoting *Silverman,* 739 F.3d at 958).

Lead Counsel's argument ignores the record. This case was extremely desirable: many competing law firms filed a total of seven separate actions, which the district court naturally

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claims at issue on this appeal), while "[a]pproximately 30,000 claims remain unresolved." *Glickenhaus & Co. v. Household Intern., Inc.,* 787 F. 3d 408, 431-32 (7th Cir. 2015). If "10,902 claimants . . . are the claims at issue" in the appeal, but "[a]pproximately 30,000 claims remain[ed] unresolved" when the Rule 54(b) judgment was entered, *id.*, it necessarily appears that the $2.46 billion judgment was but a fraction of the Defendants' total liability under the jury verdict.

consolidated.[4] The Private Securities Litigation Reform Act ("PSLRA") directed the appointment as Lead Plaintiff of the "person or persons" with "the largest financial interest in the relief sought by the class," 15 U.S.C. §78u-4(a)(3)(B)(iii)(bb), which Lead Plaintiff "shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. §78u-4(a)(3)(B)(v). Other plaintiffs and their law firms withdrew because the Glickenhaus group, represented by Robbins Geller, claimed the largest losses – not because any of the other law firms suddenly found the case undesirable.[5]

And while the *Synthroid* decisions do frown on arbitrarily capping "megafund" fee awards without regard to market rates for attorneys' services, *Synthroid II* clearly states that "the market rate, as a percentage of recovery, likely falls as the stakes increase." *Synthroid II,* 325 F.3d at 975. In that case, where Consumer Class Counsel sought attorneys' fees from an $88 million settlement fund, the Seventh Circuit ruled that the lawyers should receive "30% of the first $10 million and 25% of the next $10 million," then 22% of "the band from $20 million to $46 million," and "15% of all amounts over that." *Synthroid II,* 325 F.3d at 980. "Because the consumer class recovered a total of $88 million, the fee comes to $17.52 million, or 19.9% of the fund." *Id.* As the settlement fund here is almost 18 times the size of the fund in *Synthroid,* and as "the market rate, as a percentage of recovery, likely falls as the stakes increase," *id.*, the market rate attorneys' fee award in this $1.575 billion case should amount to far less than the 19.9% ultimately awarded in *Synthroid.* Here, in a highly desirable case with billions of dollars at stake, an award of around five percent is appropriate, as in *WorldCom*.

Such an award would honor Seventh Circuit precedents holding that fee awards should not result in paying lawyers more than twice their reasonable hourly rates. After inflating their

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[4] *See* Dkt. 33, 12/09/2002 Minute Order consolidating seven cases; Dkt. 39, 12/20/2002 Minute Order ("Having … consolidated the related cases for all purposes and having directed that all filings be made under case number 02 C 5893, the Court hereby terminates the following case numbers: 02 C 5934 (*Abrams*); 02 C 6130 (*Eisberry*); 02 C 6326 (*Jannett*); 02 C 6352 (*Dolowich*); 02 C 6859 (*Hanschman*); and 02 C 7067 (*Friedel*).").

[5] *See, e.g.,* Dkt. 12 (StoneRidge Partners withdrawal "[g]iven the Glickenhaus Institutional Group's losses of over $6 million").

lodestar by adding in expenses, Lead Counsel say the fee they request comes to "a 3.7 multiple of lodestar (5.4 if expenses are excluded from the lodestar)." Fee Brief, Dkt. 2222, at 25 (ECF 32). The implication that the multiplier sought is only 3.7 if expenses are included in the lodestar is outrageous. Expenses are not a component of lodestar, by definition. They are ***never*** included in the lodestar, much less accorded a multiplier.[6] In truth, Lead Counsel seek a multiplier fully 5.4 times their rather substantial hourly rates. And that is far too much.

Seventh Circuit precedent indicates that "a doubling of the lodestar would provide a sensible ceiling." *Skelton v. General Motors Corp.,* 860 F.2d 250, 258 (7th Cir. 1988); *accord, e.g., Cook v. Niedert,* 142 F.3d 1004, 1038 (7th Cir. 1998) ("a multiplier of 2 may be a sensible ceiling"); *Florin v. Nationsbank of Georgia, NA,* 34 F.3d 560, 565 (7th Cir. 1994) (*Florin I*) ("we have suggested [what] is a sensible ceiling of double the lodestar"); *Harman v. Lyphomed, Inc.,* 787 F. Supp. 772, 782 (N.D. Ill. 1992) (noting ceiling); *Purdy v. Security Sav. & Loan Ass'n,* 727 F. Supp. 1266, 1278-79 (E.D. Wis. 1989) (declining "to exceed the suggested ceiling").

In *In re Illinois Congressional Districts Reapportionment Cases,* 704 F.2d 380, 382 (7th Cir. 1983), a fee shifting case, when the district court awarded a multiplier of three the Seventh Circuit warned that "district courts should not lightly apply large multipliers." Noting that "we have never approved a multiplier as high as three," the Seventh Circuit cut the multiplier to just 1.2, explaining that "the enormous bonus the multiplier yielded for the lead attorney leads us to caution that a multiplier has little significance by itself. Its importance is in its effect on the basic hourly rate, and where that rate is already high, a multiplier may yield an excessive bonus." *Id.* at 384. Here, of course, Lead Counsel's lodestar already incorporates premium rates. Michael Dowd's 8,407 hours on the case are billed at $960 an hour, for example, and

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[6] *See, e.g., In re Agent Orange Product Liability Litigation*, 818 F.2d 216 (2d Cir.1987) (forbidding fee allocation by relative investment in expenses because "fees that include a return on investment present the clear potential for a conflict of interest between class counsel and those whom they have undertaken to represent."); *cf. Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) (percent of fund is measured from net fund, less expenses and costs of administration, not the gross common fund).

Spence Burkholz's 10,037 hours at $905 an hour. Dowd Decl., Ex.A, Dkt. 2225-2 at 1 (ECF 2). Applying the 5.4 multiplier that Lead Counsel seek, Mr. Dowd's billing rate becomes $5,184 an hour, and Mr. Burkholz's is $4,887 an hour. That is plainly excessive. *See Perdue v. Kenny A.,* 130 S. Ct. 1662, 1676 (2010) (objecting in a fee shifting case that the effect of the "large enhancement" afforded by a 1.75 multiplier "was to increase the top rate for the attorneys to more than $866 per hour").

Lead Counsel are entitled to compensation for delay in payment, of course, "by basing the award on current rates," high though they are. *Id.* (quoting *Missouri v. Jenkins,* 491 U.S. 274, 282 (1989)). But they are not entitled to five thousand dollars an hour. *See id.*; *see also Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir. 2000) (in common fund case, affirming an unenhanced lodestar fee award that was based on findings that "use of current hourly billing rates compensated counsel for delay in payment" and that the "high hourly billing rates compensated counsel for the quality of their efforts, and what risk there was in the case").

A court should consider the negative consequences of awarding large multipliers. In *Florin II,* 60 F.3d at 1248-49, the Seventh Circuit granted "a multiplier of 1.53, which translates to a 34.6% risk of not being paid — better than a one-in-three chance." A multiplier of two, then, translates to compensating for a 50% risk of not being paid. Awarding higher multipliers, above this ceiling of two, would encourage class counsel to litigate probable losers. Indeed, awarding a multiplier of 3.7 or 5.4 would induce class action plaintiffs' counsel to take on meritless cases, hoping for long shot wins.

That would be bad policy. The Seventh Circuit set a ceiling of two for a reason. Courts should not encourage meritless litigation. The Supreme Court, for its part, has held that "reasonable fee" awards under fee shifting statutes ought never to be subject to multipliers compensating counsel for taking long shot cases, since doing so would:

> provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any

> contingency enhancement, a contingent fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement for the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well.

City of Burlington v. Dague, 505 U.S. 557, 565 (1992).

Lead Counsel request a multiplier even higher than the multiplier of five that *Dague* warned would encourage the litigation of too many meritless claims. The Seventh Circuit's ceiling of two is a sound one.

Awarding around five percent of the fund would, in addition, conform to the Supreme Court's common fund precedents involving fees awarded as a percentage of the fund. In *Central RR. & Banking Co. v. Pettus,* 113 U.S. 116, 128 (1885), for example, the Supreme Court slashed an unreasonably high 10% common fund fee award to a more reasonable 5% of the fund. In *United States v. Equitable Trust Co.*, 283 U.S. 738, 746-47 (1931), moreover, the Second Circuit had overturned a district court's award of attorneys' fees as 33⅓% of a recovered fund. "If there be a rule in the District Court that in such cases allowances shall be made upon a basis of one-third of the amount involved," Judge Learned Hand wrote for the Second Circuit, "we do not know it and we disapprove it; it certainly has never had our sanction."[7] The Second Circuit cut the attorneys' fee award to $100,000.[8] The Supreme Court thought that still too much, and halved the fee award to just $50,000, apparently representing less than ten percent of the equitable fund in question.[9]

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[7] *Barnett v. Equitable Trust Co.,* 34 F.2d 916, 919 (2d Cir. 1929). The court added: "We do not mean, of course, that a percentage basis is in itself improper; but it cannot be fixed at the same rate for all cases regardless of the amount. The allowance is a payment for legal services, not a speculative interest in a lawsuit." *Id.*

[8] *Id.*

[9] *Compare Equitable Trust,* 283 U.S. at 746-47, *with Barnett,* 34 F.2d at 919. Lead Counsel cite *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980), to show that "[t]he Supreme Court has consistently held that where a common fund has been created for the benefit of a class as a result of counsel's efforts, counsel fees should be based on a percentage of the fund." Fee Brief, Dkt. 2222, at 4-5 (ECF

If Supreme Court common fund precedents are any guide, the fee award in this case should be around five percent – a figure that the Federal Judicial Center guide for complex litigation endorses as well: "In such cases, you should be looking at a percentage of recovery far less than the typical range and perhaps as low as 4%." ROTHSTEIN & WILLGING, *supra*, at p.33.

Finally, the Court should note that federal securities claims are subject to a fee shifting regime. *See* 15 U.S.C. §§77k(e), 77z-l(c), 78i(f), 78r, 78u-4(a)(8), 78u-4(c). Lead Plaintiffs asserted in this action, and the proposed Settlement Release Expressly bars, claims under both the Securities Act of 1933 and the Securities Exchange Act of 1934.[10] The 1933 Act claims are subject to §11(e)'s express fee shifting provision. *See* 15 U.S.C. §77k(e). The Supreme Court has twice held that §10(b) claims are properly subject to provisions governing express claims under §§9 and 18.[11] Because the action was certified as a class action, it also is subject to the

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11-12). But *Boeing* actually involved a lodestar award, with counsel ultimately receiving multipliers of 1.7 and 1.5 – well below the Seventh Circuit ceiling of two. *See Van Gemert v. Boeing,* 516 F. Supp. 412, 414, 417-20 (S.D.N.Y. 1981). *Boeing* expressly rests the common fund doctrine on two seminal decisions: "Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Pettus,* we have seen, slashed a common fund fee award from an unreasonable 10% of the fund to just 5%. *Pettus,* 113 U.S. at 128. *Greenough,* on the other hand, the Supreme Court approved of an award of the attorneys' fees actually incurred and paid, with no enhancement or multiplier of any kind. *See Greenough,* 105 U.S. at 529-31, 537-38.

[10] *See* Notice of Proposed Settlement, Dkt. 2213-3, at 9 (ECF 11) (case asserts "claims for violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and §§11, 12(a)(2) and 15 of the Securities Act of 1933"); *id.* at 7 ¶20 (ECF 9) ("Released Claims" shall include "without limitation" claims under "the Securities Act of 1933 and Securities Exchange Act of 1934").

[11] *See Musick, Peeler & Garrett v. Employers Insurance of Wasau,* 508 U.S. 286, 294-97 (1993) (incorporating in §10(b) the right to contribution among violators from §9 and §18); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 358-61, 364 & n.9 (1991) (incorporating limitations provision from §9(e)), *subsequently superseded by* 28 U.S.C. §1658. Sections 9 and 18 each also provide: "In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant." 15 U.S.C. §§78i(f), 78r(a). Following the logic of *Lampf* and *Musick, Peeler*, these fee shifting provisions must govern claims arising under §10(b)'s closely related implied cause of action.

fee shifting provision of 15 U.S.C. §78u-4(a)(8).[12] Entry of judgment, moreover, makes it subject to the mandatory Rule 11 inquiry, and potential fee shifting, commanded by 15 U.S.C. §78u-4(c).

Since the claims in this matter were subject to statutory fee shifting provisions, Lead Counsel *should have* filed a motion to tax Defendants with the plaintiff class's attorneys' fees when the jury returned a plaintiffs' verdict and when the district court entered a $2.4 billion Rule 54(b) judgment.

This is a serious lapse. The Seventh Circuit's decision in *Pierce v. Visteon Corp.,* 791 F.3d 782, 787 (7th Cir. 2015), limits the common fund doctrine's percentage fee awards to cases "outside the scope of a fee shifting statute." *Pierce* rejects attorneys' contentions that they should be paid more than their lodestar fee by resort to the common fund doctrine: "But this case was litigated under a fee shifting statute, and we do not see a good reason why, in the absence of a contract, counsel should be entitled to money from the class on top of or in lieu of payment by the losing litigant." *Id.* Under *Pierce,* Lead Counsel would be limited to their lodestar – giving them a fee award coming to about 4½% of the settlement fund.[13]

B. Lead counsel's lodestar is inadequately documented and improperly inflated

When they made their initial fee application in December of 2013, Lead Counsel indicated that their lodestar was between $50 and $55 million, and that total litigation expenses were around $14 million.[14] Now they claim a lodestar of "approximately $70 million" and "incurred expenses in excess of $34 million." 2016 Fee Motion, Dkt. 2222, at 23 (ECF 86).

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[12] *See* 15 U.S.C. §78u-4(a)(8). The provision's legislative history explains that "Congress long ago authorized similar undertakings in the express private right of action in Section 11 of the 1933 Act and in Sections 9 and 18 of the 1934 Act." H.R. Conf. Rep. No. 104-369, at 40 (1995); *see supra* note 10.

[13] *See id.; accord Haggart v. Woodley,* 809 F.3d 1336, 1358-59 (2016) (Fed. Cir. 2016) ("we agree with the *Pierce* court's determination that permitting class counsel to recover in the presence of fee shifting statutes . . . contravenes the Supreme Court's decision in *Dague.*").

[14] *See* 2013 Fee Motion, Dkt. 1959, at 3 (ECF 12) (referencing "Class Counsel's investment of over $54 million in time and over $14 million in expenses"); *id.* at 22 (ECF 31) (claiming "a 'lodestar' of substantially in excess of $50 million and litigation expenses of almost $15 million"); *id.* at 23 (ECF 32) (citing "over $50 million worth of attorney and support staff time, as well as over $14 million in expert and consulting fees and other expenses");

Hoping to shrink the actual multiplier that their fee request produces, Lead Counsel seek to pad their lodestar by adding in all their expenses, since "certainly, no other class counsel ever had to cut a check for $13.28 million to pay appellate costs in under 30 days. Therefore, it is appropriate to define Plaintiffs' lodestar – i.e., the measure of its risk – as a combined $104 million in time and expenses." 2016 Fee Brief, Dkt. 2222, at 24 (ECF 24). With this adjustment, "the requested fee award would reflect a 3.7 multiplier of the lodestar (5.4 if expenses are excluded from the lodestar.)" *Id.*

This Court ought not to accept such manipulations. The lodestar – and its dramatic expansion since 2013 – are neither sufficiently documented nor adequately explained. This case is like *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, --- F.3d ---, 2016 WL 3163073, at *8 (6th Cir. June 7, 2016), where "class counsel provided no backup whatsoever—no time records, no descriptions of work done—in support of their hours spent working on the case. Instead, class counsel provided the district court with a single page of documentation for each firm, listing only the employee names, titles, rates, hours, and—by multiplying the rates and hours—the total lodestar for that firm." That was insufficient documentation even in a case in which the district court chose to award fees as a percentage of the fund recovered. *Id.* at **7-**8. Here, as in *Shane Group*, Lead Counsel provides only a bare bones summary in support of its percentage fee application, with no time records or descriptions of work done. *See* Declaration of Michael J. Dowd, Dkt. 225, ¶4 (ECF 2-3) & Ex . A, Dkt. 225-1 (ECF 2-4); *see also* Declaration of Christopher B. Sanchez, Dkt. 2234, ¶6 (ECF 2). As in *Shane Group,* this is plainly insufficient.

The attempt to inflate the lodestar by adding in expenses is even worse – particularly the inclusion of more than $13 million for a supersedeas bond. This was a wholly unnecessary cost, incurred only because Lead Counsel unreasonably rejected less expensive alternatives to insisting that Defendants post a supersedeas bond in order to appeal from the $2.46 billion Rule 54(b) judgment. The common fund doctrine permits "reasonable expenses" of litigation to be assessed against the fund recovered. *Greenough,* 105 U.S. at 533. But the $13 million expense

for a supersedeas bond was one that Class Counsel had every opportunity to avoid – as this Court has already found. *See* Dkt. 2061, 11/05/15 Order, at 4 (ECF 5); *see also* Def. Household's Reply in Support of Motion for Award of Costs, Dkt. 2056, at 10 (ECF 16). They ought not be rewarded with a large multiple of an unnecessary expense.

C. The class notice and final approval papers are misleading and thus do not support final approval of the proposed settlement

McDonald objects that the Class Notice is misleading, and the Proposed Settlement inadequate. The Class Notice and Lead Counsel's settlement and fee briefs both misleadingly downplay the value of the class's claims, and overstate the risk of continued litigation. The Class Notice states that "[o]n October 17, 2013, the Court entered a partial final judgment pursuant to Fed. R. Civ. P. 54(b) in the amount of $1,476,490,844.21 plus prejudgment interest in the amount of $986,408,772.00, for a total amount of $2,462,899,616.21 …." Notice of Proposed Settlement, Dkt. 2213-3, at 11 (ECF 13). But neither the Class Notice, nor the final approval papers notes that the $2.46 billion judgment, because it covered the claims of just 10,902 class members, represented only a fraction of Household's liability under the jury verdict. On appeal from the Rule 54(b) judgment, the Seventh Circuit noted that "10,902 claimants . . . are the claims at issue on this appeal" but that "[a]pproximately 30,000 claims remain unresolved." *Glickenhaus & Co. v. Household Intern., Inc.,* 787 F.3d 408, 431-32 (7th Cir. 2015). Thus, the $2.46 billion judgment was but a fraction of the defendants' total liability under the jury verdict, entered for only 10,902 members of the class, when more than 30,000 claims still were being processed, so Defendants' actual liability to the class must be several times the $2.46 billion figure.

The final approval papers nonetheless assert that the $1.575 billion settlement now proposed "is between 75% and 252% of recoverable damages." Fee Brief, Dkt. 2222, at 1 (ECF 8). That cannot be true. The $1.575 billion is less than 65% of the $2.46 billion judgment, and Defendants' liability was some multiple of the judgment.

The $1.575 billion offered is a far smaller portion of the real potential recovery than Lead Counsel say. The claim that it could represent several times recoverable damages is profoundly misleading.

Lead Counsel also inflate the apparent risks presented by further proceedings. The Class Notice suggests that defendants' scienter and the falsity of their statements remain contested. Under the prominent heading "**DEFENDANTS' DENIALS OF WRONGDOING AND LIABILITY**" the Notice tells class members that "Defendants have denied and continue to deny each and all of the claims alleged by Plaintiffs in the Litigation," and that "Defendants expressly have denied and continue to deny all charges of wrongdoing or liability," as if Defendants' denials of wrongdoing were relevant. Dkt. 2213-3, at 12 (ECF 14). In truth, the Seventh Circuit's mandate precludes Defendants from contesting charges that they engaged in fraud. The Seventh Circuit held that Household was properly found guilty of fraud and it narrowly limited the issues subject to retrial. *See Glickenhaus,* 787 F.3d at 433. A dispute about which individual defendants are liable for particular statements was easily resolved by stipulation. Dkt. 2122, Ex.A. So the defendants are clearly guilty of fraud; the *only* remaining issues relate to loss causation and damages.

The Notice's assertion that the defendants "continue to deny all charges of wrongdoing" completely ignores the Seventh Circuit's mandate, which is the law of the case binding this Court, and misleads class members concerning the risk presented by proceeding to a second trial. The single really important issue on remand was proving the loss that Defendants' wrongdoing caused.

Manifestly, Lead Counsel's interest at this point is not so much in obtaining an optimal result for the class as avoiding the risk that they will not collect as large a fee. They asked for extra pages for their fee brief, but not for the settlement approval brief. Both briefs emphasize, indeed exaggerate, the risk of non-recovery posed by a trial where, in truth, Defendants' culpability is given and the issues will be limited to loss causation and damages.

The emphasis on "risk" is telling. "Across a broad range of cases," Professor Coffee has observed, "plaintiffs' attorneys will be more risk averse than class members in considering settlement offers and will wish to accept many offers that the class will rationally wish to reject." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,* 100 Colum. L. Rev. 370, 391 (2000). Particularly in a securities class action like this:

> Class counsel are . . . far less diversified than securities investors, and by the point that settlement negotiations begin in earnest in the typical class action, they may have already invested several million dollars of their own funds in carrying the litigation. Even beyond these reimbursable litigation expenses, plaintiffs' counsel will also have invested their own time plus the time of their associates, paralegals, and staff. Given this financial outlay and the significant opportunity cost that the litigation represents to them, plaintiffs' attorneys are unlikely to be as risk neutral in their approach to the litigation as the average class member can be.

Id. at 390-91; *see also* John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform,* 62 Ind. L. J. 625, 635-36, 649 (1987).

The proposed settlement advances the interests of Lead Counsel, not the interests of the class. It should not be approved.

IV. CONCLUSION

Given the size of the case, Seventh Circuit precedents warrant a fee award of around 5%, with a multiplier ceiling of two. On the current record, and given the misleading character of the class notice and final approval papers, the proposed settlement and fee award should not be approved.

Date: September 11, 2016

Respectfully submitted,

s/ John W. Davis

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses for counsel of record denoted on the attached Service List. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: September 11, 2016

s/ John W. Davis
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Jaffe v. Household Int'l, Inc., No. 02-5893 (N.D. Ill.)

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