BURSOR & FISHER, P.A.
L. Timothy Fisher (State Bar No. 191626)
Julia A. Luster (State Bar No. 295031)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
jluster@bursor.com

BURSOR & FISHER, P.A.
Scott A. Bursor (State Bar No. 276006)
Neal J. Deckant (admitted *pro hac vice*)
888 Seventh Avenue
New York, NY 10019
Telephone: (212) 989-9113
Facsimile: (212) 989-9163
E-Mail: scott@bursor.com
ndeckant@bursor.com

Attorneys for Class Representative,
the Interested Parties and
the Putative Settlement Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PATRICK HENDRICKS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

STARKIST CO.,

Defendant.

Case No. 13-CV-00729-HSG

PLAINTIFF'S RESPONSE TO OBJECTIONS TO RENEWED MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES

Date: April 21, 2016
Time: 2:00 p.m.
Courtroom 10, 19th Floor

Hon. Haywood S. Gilliam, Jr.

TABLE OF CONTENTS

PAGE(S)

I. INTRODUCTION 1
II. THE SO-CALLED LAFFEY MATRIX SHOULD NOT BE APPLIED 1
III. MS. KRALOWEC'S INCHOATE FEE REQUEST HAS NO MERIT 3
IV. CONCLUSION 5

TABLE OF AUTHORITIES

PAGE(S)

CASES

Bellinghausen v. Tractor Supply Co.,
306 F.R.D. 245 (N.D. Cal. 2015) 2

Freitag v. California Dept. of Corrections,
2009 WL 2485552 (N.D. Cal. Aug. 12, 2009) 2

In re Enron Corp. Securities, Derivative & ERISA Litig.,
586 F. Supp. 2d 732 (S.D. Tex. 2008) 1

In re LivingSocial Marketing & Sales Practice Litig.,
298 F.R.D. 1 (D.D.C. 2013) 2, 4

J & J Sports Productions, Inc. v. Ortiz,
2014 WL 1266267 (N.D. Cal. Mar. 24, 2014) 2

Laffey v. Northwest Airlines, Inc.,
572 F. Supp. 354 (D.D.C. 1983) 1

Prison Legal News v. Schwarzenegger,
608 F.3d 446 (9th Cir. 2010) 1

Rodriguez v. Disner,
688 F.3d 645 (9th Cir. 2012) 4, 5

Rosenfeld v. U.S. Dept. of Justice,
904 F. Supp. 2d 988 (N.D. Cal. Oct. 17, 2012) 2

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

I. INTRODUCTION

Of the six additional objections were filed in response to Plaintiff's renewed motion for final approval, two make new arguments concerning Plaintiff's motion for an award of attorney's fees, costs and expenses, Dkt. No. 262. Objector Lindberg argues the Court should apply the so-called *Laffey* matrix to slash Class Counsel's hourly rates. Lindberg Objection at 30, Dkt. No. 354. Objector Moore argues the Court should delay consideration of Class Counsel's fee application to await a possible fee application from Moore's counsel. Moore Objection at 2:20-24, 16:23-24, Dkt. No. 352. These objections have no merit. They should be overruled, and Court should grant plaintiff's motion without further delay.

II. THE SO-CALLED LAFFEY MATRIX SHOULD NOT BE APPLIED

Approved originally 33 years ago in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds,* 746 F.2d 4 (D.C. Cir. 1984), the *Laffey* matrix is an inflation-adjusted grid of hourly rates for lawyers of varying levels of experience in Washington, D.C. *Id.* at 371-75. Objector Lindberg argues that the so-called *Laffey* matrix should be applied to slash counsel's hourly rates. That argument is wrong for at least three reasons.

First, the *Laffey* matrix was "intended to be used in cases in which a 'fee shifting' statute permits the prevailing party to recover 'reasonable' attorney's fees." *See* Miorrelli Decl. Ex. D (explanatory notes for the *Laffey* Matrix – 2014-2015). But this is a common fund case, and Plaintiff's fee application seeks a percentage of the total settlement benefit pursuant to the common fund doctrine. The *Laffey* matrix has no application in a common fund case. *See In re Enron Corp. Securities, Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 818-19, 822 (S.D. Tex. 2008) ("This Court observes that this not a statutory fee-shifting case, the type to which the *Laffey* Matrix applies.").

Second, even in a fee shifting case, the Ninth Circuit has squarely rejected the application of the *Laffey* matrix. *See Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010) ("[J]ust because the *Laffey* matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere, let alone in a legal market 3,000 miles away."). Thus courts in this District and throughout the Ninth Circuit have refused to apply the *Laffey* matrix,

even in fee shifting cases. *See Freitag v. California Dept. of Corrections*, 2009 WL 2485552, at *2, n.6 (N.D. Cal. Aug. 12, 2009) (Henderson, J.) (declining to apply the *Laffey* matrix, stating "[i]n this Circuit, the starting point for determining reasonable fees is not the *Laffey* Matrix, but the 'lodestar,' a calculation obtained by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate … [based on] the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation"); *see also Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 262-63 (N.D. Cal. 2015) (Corley, J.) (declining to apply the *Laffey* matrix, stating "the *Laffey* matrix itself is of limited significance to rates in this District"); *J & J Sports Productions, Inc. v. Ortiz*, 2014 WL 1266267, at *3, n.1 (N.D. Cal. Mar. 24, 2014) (Koh, J.) (declining to apply the *Laffey* matrix, stating "[t]he Ninth Circuit has questioned the relevance of the *Laffey* Matrix to determining a reasonable rate in the Bay Area"); *Rosenfeld v. U.S. Dept. of Justice*, 904 F. Supp. 2d 988, (N.D. Cal. Oct. 17, 2012) (Chen, J.) (declining to apply the *Laffey* matrix, stating "[w]hile the *Laffey* matrix has been used to set rates for attorney fee awards by courts in this district in the recent past, the Ninth Circuit recently questioned its broader value as a tool for use in evaluating attorney's fees motions") (internal citations omitted).

Third, even courts that have applied the *Laffey* matrix have done so primarily where the attorney's fee applicants failed to submit appropriate evidence as to reasonable hourly rates. *See, e.g.*, *In re LivingSocial Marketing & Sales Practice Litig.*, 298 F.R.D. 1, 21 (D.D.C. 2013) ("[P]laintiffs do not provide any affidavits regarding local rates of the sort that are commonly submitted with fee requests. In such a situation in this jurisdiction, the default standard for calculating appropriate hourly rates is the *Laffey* Matrix."). But here, Class Counsel has submitted abundant evidence confirming the reasonableness of their hourly rates, including the following:

(a) Evidence that the Bursor & Fisher hourly rates submitted here "are the same hourly rates that we actually charge to our regular hourly clients who have retained us for non-contingent matters, and which are actually paid by those clients." 10/30/15 Bursor Decl. ¶ 78, Doc. 262-1. *See also id.* ("As a matter of firm policy, we do not discount our regular hourly rates for non-contingent hourly work, which comprises approximately 20% of our

revenue.”). This is evidence confirming the reasonableness of these rates based on real-world clients paying these same hourly rates for the same lawyers.

(b) Citations to nine decisions by California state and federal courts, including three from this District, two from Alameda County, and two from San Francisco County, approving similar or higher rates for lawyers with similar skills and experience. *Id.* ¶ 79.

(c) Eight surveys of legal rates, Bursor Decl. ¶ 80 and Exhibits D through K, confirming similar or higher rates for lawyers with similar skills and experience.

(d) References to five court orders approving the same rates for the same lawyers in five recent matters. *Id.* ¶ 81.

(e) Evidence concerning the high level of risk in undertaking this representation, *id.* ¶ 83, the significant expenses that Class Counsel was required to advance, *id.* ¶ 84, and the relatively low blended hourly rate due to counsel’s practices of assigning appropriate work to less senior lawyers who bill at lower hourly rates, and efficient staffing practices, *id.* ¶ 85.

Since this is a common fund case, the hourly rates are used solely for the lodestar cross-check. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (describing the lodestar cross-check for common fund cases). For all the reasons stated above, Bursor & Fisher’s actual hourly rates should be used for calculating that lodestar cross-check. The *Laffey* matrix rates should not be used for any purpose.[1]

III. MS. KRALOWEC’S INCHOATE FEE REQUEST HAS NO MERIT

Moore’s objection gives notice that her counsel, Ms. Kralowec, “reserve[s] the right to move for attorney’s fees, costs and incentive awards in this proceeding.” Moore Objection at 2:20-24, Dkt. No. 352. It notes, however, that “Objector Carla Lown and her counsel, Zelle LLP, do not join

[1] Objector Lindberg pointed out that the Bursor & Fisher hourly rate sheet previously submitted failed to provide complete identifying information for six timekeepers who were identified only by their initials in the firm’s billing records. Lindberg Objection at 29:22-30:4. These six individuals collectively accounted for only 34.3 hours, or roughly 1% of the billed work. Nevertheless, Lindberg’s point is well taken. So Class Counsel is submitting herewith an amended rate sheet identifying these timekeepers with their full names, titles, and years of experience. *See* Bursor Decl. Ex. A. The Bursor Declaration submitted herewith also includes updated billing diaries and expense records for work done and expenses incurred after the submission of Plaintiff’s initial motion for an award of attorney’s fees, costs and expenses.

1 in this objection to the Motion for Attorney's Fees included with the Renewed Motion, and do not
2 intend to seek attorneys' fees in this proceeding." *Id.* at 2:27-3:2. Even Moore's counsel, Ms.
3 Kralowec, is unsure of her intention to seek fees, stating "[s]hould Objectors Moore and Gore decide
4 not to file such a motion, they will immediately notify the Court and the parties to avoid any
5 unwarranted delay of the Court's consideration of Plaintiff's motion for fees." *Id.* at 16:23-24.
6 Moore cites *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012) as supporting her counsel's
7 potential fee application. But that case actually shows why any fee application by Moore's counsel
8 would be futile. *Rodriguez* was a $49 million common fund settlement. It came to light that Class
9 Counsel, McGuireWoods, had entered into "incentive agreements" specifying the amount of the
10 incentive awards counsel would seek for the class representatives, depending on the amount of the
11 settlement or verdict. *Id.* at 649-650. The Court approved the settlement and initially awarded
12 McGuireWoods over $7 million in attorneys' fees, but disapproved the incentive awards on the
13 ground that the "incentive agreements" were unethical. *Id.* at 650-51. As a result of objectors'
14 appeals, the Ninth Circuit reversed the fee award and remanded for the district court to consider the
15 effect of the unethical incentive agreements on counsel's entitlement to attorneys' fees. *Id.* at 652.
16 Ultimately, the District Court held that McGuireWoods was not entitled to any attorneys' fees for its
17 representation of the class because the "incentive agreements" created a conflict of interest and
18 constituted an ethics violation. *Id.*
19 The objectors' efforts in *Rodriguez* resulted in the common fund saving $7 million in
20 attorney's fees and $325,000 in incentive awards, which were disapproved. As a result, the Ninth
21 Circuit held that the objectors who had brought about this result could apply for fees. "If these
22 objections result in an increase to the common fund, the objectors may claim entitlement to fees on
23 the same equitable principles as class counsel." *Id.* at 658. "Conversely, objectors who do not
24 increase the fund or otherwise substantially benefit the class members are not entitled to fees, even if
25 they bring about minor procedural changes in the settlement agreement." *Id.* All but one group of
26 objectors fell into this latter category, and were properly denied fees. *Id.* at 658-59.
27 Here, Objector Moore's efforts have brought about at most a minor revision to the release
28 language – and one that has no monetary value. Moore's successful objection to the first amended

release preserved only a "possible future antitrust action" based on a conspiracy between StarKist and its competitors to underfill cans of tuna. *See* 2/19/16 Order at 5:21, Dkt. No. 336. There is no reason to believe that such a cause of action for a conspiracy to underfill has any value. Indeed to date, even after the filing of 44 cases in the *PSP Antitrust Litigation*, not a single one has alleged a claim based on a conspiracy to underfill. Thus it appears that Moore's efforts did little more than preserve a jack-a-lope. A mythical creature that does not exist. Moore did not confer any benefit, let alone a substantial monetary benefit, on the Class.

Moore also is not entitled to a fee for her continued efforts in objecting to the Second Amended Release. Moore's principal complaint appears to be that his counsel were not involved in negotiating the Second Amended Release. *See* Moore Objection at 5:23-24, Dkt. No. 352 (bemoaning StarKist's "failure to negotiate with Objectors in drafting their Second Amended Release"); *see also* Kralowec Decl. ¶ 6, Dkt. No. 352-1 (complaining that the parties "made no attempt to contact me or any of my co-counsel to discuss the proposed revised language … [a]s a result we had no input whatsoever into the wording of the amended release language"). In any event, Moore's colleagues representing the same group of End Purchaser Plaintiffs (EPPs) in the *PSP Antitrust Litigation* have repeatedly characterized the revisions to the release that Moore seeks as "minor" and "modest." *See* Twitchell Objection at 2:25, Dkt. No. 351 ("modest changes"); *id.* at 4:1 ("only minor modifications"); *id.* at 4:2 ("minor revisions"); *id.* at 5:13-14 ("not substantively necessary"); *id.* at 5:27 ("minor alterations"). These are precisely the type of "minor procedural changes" which do not merit a fee award. *See Rodriguez*, 688 F.3d at 658 ("[O]bjectors who do not increase the fund or otherwise substantially benefit the class members are not entitled to fees, even if they bring about minor procedural changes in the settlement agreement.").

IV. CONCLUSION

For the foregoing reasons, Moore's and Lindberg's further objections to Plaintiff's motion for an award of attorney's fees, costs and expenses, Dkt. No. 262, should be overruled, and the motion should be granted, awarding Class Counsel $4 million in attorney's fees (33.3% of the common fund) and reimbursing Class Counsel $155,779.96 in out-of-pocket expenses. *See* 4/5/16 Bursor Decl. ¶¶ 6-7, Ex. B (updated expense figure).

1 Dated: April 5, 2016

Respectfully submitted,

2 **BURSOR & FISHER, P.A.**

3

By: /s/ *Scott A. Bursor*
4 Scott A. Bursor

5 Scott A. Bursor (State Bar No. 276006)
Neal J. Deckant (admitted *pro hac vice*)
6 888 Seventh Avenue
New York, NY 10019
7 Telephone: (212) 989-9113
Facsimile: (212) 989-9163
8 E-Mail: scott@bursor.com
ndeckant@bursor.com
9

BURSOR & FISHER, P.A.
10 L. Timothy Fisher (State Bar No. 191626)
Julia A. Luster (State Bar No. 295031)
11 1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
12 Telephone: (925) 300-4455
Facsimile: (925) 407-2700
13 E-Mail: ltfisher@bursor.com
jluster@bursor.com
14

15 *Attorneys for Class Representative,*
the Interested Parties and
the Putative Settlement Class

16

17

18

19

20

21

22

23

24

25

26

27

28