UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

COMMODITY EXCHANGE, INC., GOLD FUTURES AND OPTIONS TRADING LITIGATION

This Document Relates To All Actions

CASE NO. 14-MD-2548 (VEC)
14-MC-2548 (VEC)

HON. VALERIE E. CAPRONI

EXPERT DECLARATION OF PROFESSOR CHARLES SILVER ON THE REASONABLENESS OF CLASS COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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I, Charles Silver, state as follows:

I. SUMMARY OF OPINIONS

1. By comparison to both fees paid in the private market for legal services and awards in cases with comparable recoveries, Co-Lead Counsel's request for an award of roughly 28 percent of the recovery (plus expenses) is reasonable.

2. A lodestar cross-check also supports the reasonableness of Co-Lead Counsel's fee request, which requires an extraordinarily low multiplier of .71.

II. CREDENTIALS

3. I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I received tenure in 1991. Since then, I have been a Visiting Professor at University of Michigan School of Law (twice), the Vanderbilt University Law School, and the Harvard Law School.

4. The study of attorneys' fees has been a principal focus of my academic career. I published my first article on the subject shortly after I joined the law faculty at the University of Texas at Austin. *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991). Since then, I have published about a dozen more articles, two of which are empirical studies of fee awards in class actions. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment*, 66 Vanderbilt L. Rev. 1677 (2013); and Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015) ("*Is the Price Right?*"). The CORPORATE PRACTICE COMMENTATOR chose *Is the Price Right?* as one of the ten best in the field of corporate and securities law in 2016. In his concurring opinion in *Laffitte v. Robert Half Internat. Inc.*, 1 Cal.

5th 480, 376 P.3d 672 (2016), Justice Goodwin Liu cited *Is The Price Right?* nine times. He also cited two of my other works.

5. My writings are also cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996), the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, and the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT.

6. From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited the PRINCIPLES with approval, including the U.S. Supreme Court.

7. I have testified as an expert on attorneys' fees many times. Judges have cited or relied upon my opinions when awarding fees in many class actions, including *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2019 WL 6888488 (E.D.N.Y. 2019), *In re Enron Corp. Securities, Derivative & "ERISA" Litig.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008), and *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), all of which settled for amounts exceeding $1 billion.

8. I have attached a copy of my resume as Appendix I to this declaration.

III. DOCUMENTS REVIEWED

9. In preparing this report, I received the items listed below which, unless noted otherwise, were generated in connection with this litigation.

- *Memorandum Order (Appointing Class Counsel)*
- *Order Awarding Attorneys' Fees, In re London Silver Fixing, Ltd. Antitrust Litigation*

- *Application to Appoint Quinn Emanuel Urquhart & Sullivan, LLP and Berger & Montague, P.C. Interim Lead Class Counsel*
- *Hearing Transcript, April 8, 2021, In re London Silver Fixing, Ltd. Antitrust Litigation*
- *Joint Declaration of Daniel L. Brockett and Merrill G. Davidoff in Support of (1) Plaintiffs' Motion for Final Approval of Two Settlement, Final Approval of the Plan of Allocation, and for Certification of the Settlement Class; and (2) Co-Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses (draft)*
- *Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Two Settlements, Final Approval of Plan of Allocation, and for Certification of the Settlement Class (draft)*
- *Memorandum of Law in Support of Plaintiffs' Motion for Attorneys' Fees and Litigation Expenses (draft)*
- *Opinion and Order (Denying Non-UBS Defendants' Motion to Dismiss)*
- *Opinion and Order (Granting UBS Defendants' Motion to Dismiss and Ruling on other Motions)*
- *Third Consolidated Amended Class Action Complaint*
- *Stipulation and Agreement of Settlement with Deutsche Bank AG*
- *Declaration of Merrill G. Davidoff in Support of Plaintiffs' Motion for Preliminary Approval of the Settlement Agreement with Deutsche Bank AG*
- *Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of the Settlement Agreement with Deutsche Bank AG*

- *Order Preliminarily Approving the Deutsche Bank Settlement Agreement, Certifying the Settlement Class, and Appoint Class Counsel and Class Representatives for the Settlement Class*
- *Stipulation and Agreement of Settlement with HSBC Bank PLC*
- *Declaration of Merrill G. Davidoff in Support of Plaintiffs' Motion for Preliminary Approval of the Settlement Agreement with HSBC Bank PLC*
- *Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of the Settlement Agreement with HSBC Bank PLC*
- *Plaintiffs' Memorandum of Law in Further Support of Motion for an Order Providing for Notice to the Settlement Class and Preliminarily Approving Plan of Allocation*
- *Letter from Plaintiffs to the Court dated Feb. 5, 2021*
- *Order Providing for Notice to the Settlement Class and Preliminarily Approving Plan of Allocation*
- *Plan of Allocation*
- *Proof of Claim and Release Form*
- *Summary Notice*
- *Long Form Notice*

IV. FACTS

10. The litigation-related facts upon which my conclusions rest are set out in detail in *Joint Declaration of Daniel L. Brockett and Merrill G. Davidoff in Support of (1) Plaintiffs' Motion for Final Approval of Two Settlement, Final Approval of the Plan of Allocation, and for*

Certification of the Settlement Class; and (2) Co-Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses ("Joint Declaration").

11. In brief, Co-Lead Counsel began an investigation and filed a class action complaint in March 2014. The investigation and development of the case continued after the Court appointed Co-Lead Counsel to head the litigation.

12. Because the case focused on price manipulation, the data needed to establish liability and quantify damages included a mountain of electronic information, much of which Co-Lead Counsel acquired via discovery after lengthy battles with the Defendants. Co-Lead Counsel also engaged expert economists who were familiar with the market for gold instruments to analyze the data and serve as expert witnesses.

13. Co-Lead Counsel shepherded the litigation through the motions practice period, during which several motions to dismiss were filed and some were granted. Co-Lead Counsel enhanced the Class' prospects of surviving these motions by filing amended complaints that spelled out the Defendants' actions with increasing specificity and detail. By means of these efforts, Co-Lead Counsel succeeded in reviving conspiracy claims that pre-dated 2006.

14. Co-Lead Counsel negotiated a $60 million settlement with Deutsche Bank in April 2016 and a $42 million settlement with HSBC in October 2020. Both settlements are now before the Court for approval.

V. INTRODUCTION: COMPENSATING LAWYERS APPROPRIATELY AND CREATING GOOD INCENTIVES

15. Throughout my academic career, I have urged judges to set fees in class actions early on as part of a more general recommendation to "mimic the market" by handling fees in the

same manner that sophisticated clients do.[1] Although my view initially attracted few adherents, over time more and more judges have come to see the virtue of taking guidance from practices that prevail in the market for legal services.

16. One such practice is that of setting contingent fees upfront, when the risks of litigation are palpable and both lawyers and clients gain by agreeing on compensation terms that encourage the former bear them. As the Seventh Circuit observed,

> The best time to determine [a contingent fee lawyer's] rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers never wait until after recovery is secured to contract for fees. They strike their bargains before work begins.

In re Synthroid Marketing Litigation, 264 F.3d 712, 724 (7th Cir. 2001).

17. When hiring lawyers on contingency, sophisticated clients also incentivize them by tying their fees to the results they obtain. They use the percentage-based compensation arrangements to yoke lawyers' interests to their own. The contingent fee's logic is simple and powerful: The client and lawyer prosper together. Because the lodestar method, which bases lawyers' fees on time expended and hourly rates, harmonizes interests poorly, sophisticated clients never use it. Judges who see the advantage of mimicking the market also set compensation in percentage terms. They use the lodestar method solely as a cross-check and, even then, assign it little weight.

18. The market for legal services also indicates that lawyers' marginal fee percentages should fall somewhere between 30 percent and 40 percent, in large cases and small ones alike. Although comprehensive data are not available, I have studied the market for years

[1] Most recently, the recommendation appears in an empirical study of fee awards in securities class actions that two colleagues and I published in the Columbia Law Review. See *Is The Price Right?*, *supra*, Part II (recommending *ex ante* fee setting).

and have only occasionally seen sophisticated clients pay lawyers less. The consensus is that fees in this range are needed to motivate lawyers to maximize clients' expected gains.

19. In this report, I will show that Class Counsel's request for a fee of roughly 28 percent of $102 million—the combined total of the two proposed settlements—is reasonable because it falls at the low end of the range of percentages that prevails in the private market.

VI. A COMPENSATION MODEL FOR SERIAL LITIGATION

20. To show how fee awards in class actions are properly handled, I begin this Declaration by describing a series of antitrust cases that were brought against drug manufacturers. The matters, which numbered thirty-three in all and generated more than $2 billion in recoveries, were related. In each one the plaintiff class contained the same small group of drug wholesalers, several of which were of Fortune 500 size or larger, who contended that practices engaged in by the makers of brand-name drugs and generics violated the antitrust laws. Initially, the cases plowed new ground but over time the law developed. Even the Supreme Court weighed in. Throughout the series, the claims had merit, but success was not guaranteed.

21. In keeping with the customary practice, the class' attorneys worked on contingency even though the wholesalers could have afforded to pay them by the hour. Consequently, when dollars were recovered, the lawyers applied for fee awards from the common funds. I supplied expert declarations in support of several requests and my colleague Professor Brian Fitzpatrick of the Vanderbilt University School of Law gathered information on many more.

22. Professor Fitzpatrick summarized the manner in which the class members and their lawyers handled attorneys' fees.

> Although the fee requests ranged from a fixed percentage of 27.5 percent to a fixed percentage of one-third, one-third heavily dominated: the average was 32.85 percent. . . . Moreover, although I was able to find retainer agreements in only

> three of the cases, in all of them, the agreement called for a fixed percentage of one-third. Finally, in the vast majority of cases, one or more of these corporate class members—often the biggest class members—came forward to voice affirmative support for the fee requests, and not a single one of these corporate class members objected to the fee request in any of the thirty-three cases. Although this support among class members for class counsel's fee requests is not formally ex ante market data—the support came at the end of the cases—because it was the same class of corporations in case after case and often the same counsel in case after case, class members could have tried to alter this pattern at any time. But they did not; they have gone along with it for seventeen years. In other words, the corporations in these cases appear perfectly happy with the percentage method and perfectly happy with the same fixed percentage of one-third that most unsophisticated clients also choose.

Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1161-1162 (March 2021). The cases supporting these findings are presented in a table in Appendix II.

23. As stated, I believe these antitrust cases provide a model that courts should follow when awarding fees from common funds. My reasoning runs as follows. The claimants were highly sophisticated businesses with ready access to the market for legal services. All had in-house or outside counsel monitoring the lawsuits as well. The plaintiffs had both the incentive and the knowledge needed to support fee awards that were calculated to maximize their net recoveries. Because the litigations played out over many years, the class members also had opportunities to learn about the risks the cases entailed and the rewards they were likely to generate. Consequently, they could have discovered and corrected any mistaken judgments about the manner of handling fees and reimbursing expenses. They could also have shifted from contingent compensation to guaranteed hourly rates once the risks and rewards were known but did not.

24. The model has many implications for this litigation, which also sounds in antitrust. Although this is a single lawsuit, the defendants are settling and litigating serially. Consequently, there may be many opportunities for the Court to address the matter of attorneys'

fees. As the class members' fiduciary, the Court should use these opportunities to impose fee terms that are reasonably calculated to maximize their expected net recoveries. Because the drug wholesalers had every reason to seek the same end, the manner in which they handled fees should carry great weight. The cases appear to be similar in size too. As the table in Appendix II shows, many of the pharmaceutical antitrust cases generated settlements in the $40 million to $60 million range.

25. The parallels between the pharmaceutical cases and this litigation may not be perfect, of course. When drawing lessons from any model, important factual differences (should there be any) between it and the matter at hand must be identified and weighed. Here, Quinn Emanuel and Berger & Montague's initial leadership application proposed a scale of percentages that Judge John Gleeson applied in *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 05 MD 1720, 2014 WL 92465, at *6 (E.D.N.Y. Jan. 10, 2014).[2] *See Application to Appoint Quinn Emanuel Urquhart & Sullivan, LLP and Berger & Montague, P.C. Interim Lead Class Counsel*, Case No. 1:14-cv-02213-VEC, Dkt 17, p. 21. The firms' offer demonstrates their belief at the time that the listed percentages would compensate them sufficiently for the resources they expected to expend and the risks they expected to bear. The model, and other evidence drawn from the market for legal services that I discuss below, shows that reasonable fee percentages tend to be far higher than Co-Lead Counsel estimated they would be willing to accept. Any reductions would therefore be likely to harm the class by weakening the lawyers' incentives.

[2] I submitted an expert report on the reasonableness of class counsel's fee request in the *Payment Card* litigation.

VII. SETTING COMMON FUND FEES ACCORDING TO MARKET RATES MAXIMIZES CLASS MEMBERS' EXPECTED RECOVERIES

26. Having discussed the model and Co-Lead Counsel's offer, I turn now to the reasoning that supports my opinion that the pending request for roughly 28 percent of the recovery plus expenses is reasonable.

A. Fee-Setting Is A Positive-Sum Interaction

27. Many people think that fee-setting is a zero-sum game in which more for a lawyer means less for a client. Because the object of class litigation is to help victims, they infer that lower fees are always better than higher ones.

28. This belief is mistaken. Fee-setting is a positive-sum interaction in which higher fees can help claimants. To see this, imagine how class members would fare if courts set common fund fee awards at 0 percent. When the fee is zero, the expected recovery is zero too because lawyers will not agree to represent class members (or signed clients) on these terms. From class members' perspective, any fee percentage greater than zero is better than zero because any positive recovery is better than no recovery.

29. When regulating fees, then, the object should ***not*** be to set them as close to zero as possible. ***It should be to maximize class members' net expected recoveries***—the amounts they expect to take home after paying their attorneys. Because a claimant who nets $1 million after paying a 40 percent fee is better off than one who nets $500,000 after paying a 20 percent fee, it is rational for clients to offer higher percentages when doing so is expected to leave them with more money after fees are paid.

30. Judges have known this for years. In 2002, a task force on fees commissioned by the Third Circuit stated: "The goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, *not to obtain the lowest*

attorney fee. The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee." *Third Circuit Task Force Report*, 208 F.R.D. 340, 373 (January 15, 2002) (emphasis added). The Seventh Circuit made a similar point when it rejected the so-called "mega-fund rule," according to which fees must be capped at low percentages when recoveries are very large. "Private parties would never contract for such an arrangement," the court correctly observed, because it would encourage cheap settlements. *Synthroid*, 264 F.3d at 718.

B. The Case For Mimicking The Market

31. As mentioned, in the market for legal services clients and lawyers negotiate contingent fees when litigation starts, not when it ends. By contrast, when presiding over class actions, judges typically set fee terms in connection with settlements. The practice of setting fees *ex post* rather than *ex ante* has the potential to wreak havoc with lawyers' incentives because in hindsight risks are likely to seem smaller than they were. Because judges base fee awards partly on the perceived riskiness of cases, this downward bias will cause fee percentages to be too small to motivate lawyers appropriately going forward.

32. To guard against this, I believe that judges should base fee awards on the amounts that class members would have agreed to pay had they bargained directly with their lawyers when litigation was about to commence. A general insight from the economics of contracts is that rational parties agree on terms that maximize the amount of wealth available for them to share. *See* Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541 (2003) ("[P]arties at the negotiation stage prefer to write contracts that maximize total benefits."). When markets are competitive, as the market for legal services plainly is, clients and lawyers should settle on the lowest percentages that maximize their joint expected return. This is the percentage that maximizes clients' net expected recoveries.

33. The market rate also provides a natural cross check on the reasonableness of a fee request. When a request falls within the range that sophisticated clients normally pay when hiring lawyers on contingency to handle large cases, there is reason to believe that class members would have agreed to pay it had they been able to bargain with class counsel directly. The best evidence of the terms of hypothetical bargains are the terms that real clients and lawyers agree to in similar circumstances.

34. At the same time, the mimic-the-market approach provides an objective basis for fee awards and cabins trial judges' discretion. In this respect, it differs greatly from the multi-factor approach that many courts employ. The latter is "not a rule of law or even a principle" because "it would support equally a fee award of 16%, 20%, 25%, 30%, or 33-1/3%." *Nilsen v. York Cty*., 400 F. Supp. 2d 266, 277 (D. Me. 2005). "[S]ome of the factors," such as the time and labor expended, also clash with the logic of the contingent percentage approach, "which is designed to create incentives for the lawyer to get the most recovery . . . by the most efficient manner (and [to] penalize the lawyer who fails to do so)." *Id*. *See also In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig*., 56 F.3d 295, 307 (1st Cir. 1995) (observing that the percentage-of-fund method eliminates incentive to be inefficient, as inefficiency just reduces the lawyer's own recovery); and *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir.2005) (the percentage method "directly aligns the interests of the class and its counsel" and provides a powerful incentive for efficiency and early resolution). Real clients would never penalize their agents for serving them efficiently.

35. As discussed in more detail below, the information I have gathered over years of study shows that claimants typically agree to pay contingent fees in the range extending from 33 percent to 40 percent, even when sophisticated clients hire lawyers to handle complex

commercial lawsuits with the potential to generate enormous recoveries. To encourage lawyers to maximize class members' net recoveries, I believe that courts should set fee awards from common funds in this range.

VIII. FEES PREVAILING IN THE PRIVATE MARKET FOR LEGAL SERVICES

A. Market Rates Increasingly Dominate The Fee-Setting Process

36. In both scholarly works and expert reports written over decades, I have urged judges to take guidance from the market for legal services when sizing fee awards. As mentioned, more and more judges are embracing the "mimic the market" approach. They increasingly understand "market rates, where available, are the ideal proxy for [class action lawyers'] compensation." *Goldberger v. Integrated Resources, Inc*., 209 F.3d 43, 52 (2d Cir. 2000). It is hard to do better than "ideal."

37. Although only the Seventh Circuit mandates the exclusive use of market rates, federal judges across the country recognize the superiority of this approach and use it often. Examples include *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL 6889901, at *21 (S.D.N.Y. Dec. 18, 2019); *In re TRS Recovery Servs., Inc. & Telecheck Servs., Inc., Fair Debt Collection Practices Act (FDCPA) Litig*., No. 2:13-MD-2426-DBH, 2016 WL 543137, at *9 (D. Me. Feb. 10, 2016); *In re Capital One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 788 (N.D. Ill. 2015); *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163-MAP, 2014 WL 6968424, at *6 (D. Mass. Dec. 9, 2014); *In re New Motor Vehicles Canadian Exp. Antitrust Litig*., 842 F. Supp. 2d 346 (D. Me. 2012); *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), *order modified and remanded*, 629 F.3d 741 (7th Cir. 2011); *In re Cabletron Sys., Inc. Sec. Litig*., 239 F.R.D. 30, 40 (D.N.H. 2006).

38. When awarding fees from the enormous settlement in *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1203 (S.D. Fla. 2006), which exceeded $1 billion, the federal district court judge "conclude[d] that the most appropriate way to establish a bench mark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal." Anchoring the fee to the market rate avoids arbitrariness by providing an objective basis for awarding a particular amount and also creates desirable incentives.

39. State court judges see the wisdom of mimicking the market too. For example, in *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 376 P.3d 672 (2016), the Supreme Court of California cited the desirability of approximating the market as a reason for permitting judges to grant percentage-based fee awards from common funds.

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, ***a better approximation of market conditions in a contingency case***, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation … convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 1 Cal. 5th at 503, 376 P.3d at 686, (emphasis added) (citations omitted).

B. In Contingent Fee Litigation, Percentage-Based Compensation Predominates

40. Having established that market rates are "ideal" proxies, *Goldberger*, 209 F.3d at 52, it remains to consider how the market compensates plaintiffs' attorneys. In this section and the next, I explain what I know about this issue.

41. I start by noting that when clients hire lawyers to handle lawsuits on straight contingency, the market sets lawyers' compensation as percentages of claimants' recoveries.

Even sophisticated business clients with complex, high-dollar legal matters use the percentage approach.

42. Abundant evidence supports this contention. When two co-authors and I studied hundreds of settled securities fraud class actions specifically looking for terms included in fee agreements between lawyers and investors seeking to serve as lead plaintiffs, all the agreements we found provided for contingent percentage fees. *Is the Price Right*, *supra*. No lead plaintiff agreed to pay its lawyers by the hour; nor did any retain counsel on a lodestar-multiplier basis. Contracting practices are the same in antitrust cases, as discussed below.

43. The finding that sophisticated businesses use contingent fee arrangements when hiring lawyers to handle securities class actions was expected. Over the course of my academic career, I have studied or participated in hundreds of class actions, many of which were led by sophisticated business clients. To the best of my recollection, I have encountered only one in which a lead plaintiff paid class counsel out of pocket, and that case is more than 100 years old. Even wealthy named plaintiffs like prescription drug wholesalers and public pension funds that can afford to pay lawyers by the hour have used contingent, percentage-based compensation arrangements instead. Because percentage-based compensation arrangements dominate the market, courts should also use them when awarding fees from common funds.

44. The market also favors fee percentages that are flat or that rise as recoveries increase. Scales with percentages that decline at the margin are rarely employed. Professor John C. Coffee, Jr., the country's leading authority on class actions, made this point in a report filed in the antitrust litigation relating to high fructose corn syrup.

> I am aware that "declining" percentage of the recovery fee formulas are used by some public pension funds, serving as lead plaintiffs in the securities class action context. However, I have never seen such a fee contract used in the antitrust context; nor, in any context, have I seen a large corporation negotiate such a

> contract (they have instead typically used straight percentage of the recovery formulas).

Declaration of John C. Coffee, Jr., submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004), ECF No. 1421, ¶ 22. My experience is similar to Professor Coffee's. I know of few instances in which large corporations used scales with declining percentages when hiring attorneys.

45. In view of the rarity with which declining scales are used, the mimic-the-market approach suggests that flat percentages and scales with percentages that rise at the margin create better incentives. There is a sound economic rationale for this. Flat percentages and rising scales reward plaintiffs' attorneys for recovering higher dollars that are harder to obtain because they demand a willingness on the part of counsel to proceed ever closer to trial, thereby increasing their costs and exposing them to greater risk of loss. Flat percentages and percentages that increase with the recovery encourage plaintiffs' attorneys to shoulder the costs and risks that must be borne when lawyers encourage clients to turn down inadequate settlements.

C. Sophisticated Clients Normally Pay Fees Of 33 Percent Or More When Hiring Lawyers To Handle Commercial Lawsuits On Straight Contingency

46. Countless plaintiffs have hired lawyers on contingency to handle cases of diverse types. Consequently, the market for legal services is a rich source of information about lawyers' fees. In this section, I survey this evidence.

47. Before doing so, I wish to note that there is broad agreement that in most types of plaintiff representations contingent fees range from 30 percent to 40 percent of the recovery, and that higher fees prevail in litigation areas like medical malpractice and patents where costs and risks are unusually great. *See, e.g.*, *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1382 (N.D. Ga. 2019) ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range of the private marketplace, where contingency-fee arrangements are often between 30

and 40 percent of any recovery"); and *Leung v. XPO Logistics, Inc*., 326 F.R.D. 185, 201 (N.D. Ill. 2018) ("a typical contingency agreement in this circuit might range from 33% to 40% of recovery"). The same range is known to prevail in high-dollar, non-class, commercial cases. *See, e.g.*, *Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-CV-01007-NR, 2019 WL 5394751, at *10 (W.D. Pa. Oct. 22, 2019); and *Cook v. Rockwell Int'l Corp*., No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017).

48. The point of surveying the evidence, then, is not to establish something new. It is to show that what everyone already knows is correct. The market rate for contingent fee lawyers generally ranges from 30 to 40 percent of clients' recoveries, with 33 percent being especially common.

49. We do not know as much about fees paid in large commercial lawsuits as we might.[3] No publicly available database collects information about this sector of the market, and businesses that sue as plaintiffs rarely reveal their fee agreements. Consequently, most of what is known is drawn from anecdotal reports.[4] That said, the evidence available on the use of contingent fees by sophisticated clients shows that marginal percentages tend to be high.

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[3] I have studied the costs insurance companies incur when *defending* liability suits. *See* Bernard Black, David A. Hyman, Charles Silver and William M. Sage, *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L, & ECON, REV. 185 (2008). Unfortunately, this information sheds no light on the amounts that businesses pay when acting as plaintiffs.

[4] Businesses sometimes use hybrid arrangements that combine guaranteed payments with contingent bonuses. For example, when representing Caldera International, Inc. in a dispute with IBM, Boies, Schiller & Flexner LLP billed two-thirds of its lawyers' standard hourly rates and stood to receive a contingent fee equal to 20 percent of the recovery. Letter from David Boies and Stephen N. Zack to Darl McBride dated Feb. 26, 2003, available at https://www.sec.gov/Archives/edgar/data/1102542/000110465903028046/a03-6084_1ex99d1.htm. According to Wikipedia, the damages sought in the lawsuit initially totaled $1 billion, but were later increased to $3 billion, and then to $5 billion. Wikipedia, *SCO Group, Inc. v. International Business Machines Corp*., https://en.wikipedia.org/wiki/SCO_Group,_Inc._v._International_Business_Machines_Corp.

1. Patent Cases

50. Patent infringement cases are often high-dollar contests in which sophisticated business clients are plaintiffs. There are many anecdotal reports of high percentages in these cases. The most famous one relates to the dispute between NTP Inc. and Research In Motion Ltd., the company that manufactures the Blackberry. NTP, the plaintiff, promised its law firm, Wiley Rein & Fielding ("WRF"), a 33⅓ percent contingent fee. When the case settled for $612.5 million, WRF received more than $200 million in fees. Yuki Noguchi, D.C. *Law Firm's Big BlackBerry Payday: Case Fees of More Than $200 Million Are Said to Exceed Its 2004 Revenue*, WASHINGTON POST, March 18, 2006, D03.

51. The fee percentage that WRF received is typical, as Professor David L. Schwartz found when he interviewed 44 experienced patent lawyers and reviewed 42 contingent fee agreements.

> There are two main ways of setting the fees for the contingent fee lawyer [in patent cases]: a graduated rate and a flat rate. Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated rates typically set milestones such as "through close of fact discovery," "through trial," and "through appeal," and tied rates to recovery dates. As the case continued, the lawyer's percentage increased. Of the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%.

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 360 (2012). In a case like this one that required the lawyers to bear significant litigation and trial preparation hours and expenses with no guarantee of payment or reimbursement, a high fixed percentage would apply.[5]

[5] Professor Schwartz's findings are consistent with reports found in patent blogs, one of which stated as follows.

> *Contingent Fee Arrangements*: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid

52. Clearly, in the segment of the market where sophisticated business clients hire lawyers to litigate patent cases on contingency, successful lawyers earn sizeable premiums over their normal hourly rates. The reason is obvious. When waging patent cases on contingency, lawyers must incur large risks and high costs, so clients must promise them hefty returns. Patent plaintiffs have the option of paying lawyers to represent them on an hourly basis, but still prefer a contingency arrangement, even at 30-40 percent, to bearing the risks and costs of litigation themselves.

2. Other Large Commercial Cases

53. Turning from patent lawsuits to business representations more generally, many examples show that compensation tends to be a significant percentage of the recovery. A famous case from the 1980's involved the Texas law firm of Vinson & Elkins ("V&E"). ETSI Pipeline Project ("EPP") hired V&E to sue Burlington Northern Railroad and other defendants, alleging a conspiracy on their part to prevent EPP from constructing a $3 billion coal slurry pipeline. V&E took the case on contingency, "meaning that if it won, it would receive one-third of the settlement and, if it lost, it would get nothing." David Maraniss, *Texas Law firm Passes Out $100 Million in Bonuses*, WASHINGTON POST, Aug. 22, 1990, https://www.washingtonpost.com/archive/politics/1990/08/22/texas-law-firm-passes-out-100-million-in-bonuses/8714563b-10b8-4f85-b74a-1e918d030144/. After many years of litigation, a series of settlements and a $1 billion judgment against a remaining defendant yielded a gross

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from damages obtained in a verdict or settlement. Typically, the law firm will receive between 33-50% of the recovered damages, depending on several factors. This is strictly a results-based system.

Matthew L. Cutler, *Contingent Fee and Other Alternative Fee Arrangements for Patent Litigation*, HARNESS DICKEY, (JUNE 8, 2020), https://www.hdp.com/blog/2020/06/08/contingent-fee-and-other-alternative-fee-arrangements-for-patent-litigation/.

recovery of $635 million, of which the firm received around $212 million in fees. Patricia M. Hynes, *Plaintiffs' Class Action Attorneys Earn What They Get*, 2 JOURNAL OF THE INSTITUTE FOR THE STUDY OF LEGAL ETHICS, 243, 245 (1991). It bears emphasizing that the clients who made up the plaintiffs' consortium, Panhandle Eastern Corp., the Bechtel Group, Enron Corp., and K N Energy Inc., were sophisticated businesses with access to the best lawyers in the country. No claim of undue influence by V&E can possibly be made.

54. The National Credit Union Administration's ("NCUA") experience in litigation against securities underwriters provides a more recent example of contingent-fee terms that were used successfully in large, related litigations. After placing 5 corporate credit unions into liquidation in 2010, NCUA filed 26 complaints in federal courts in New York, Kansas, and California against 32 Wall Street securities firms and banks. To prosecute the complaints, which centered on sales of investments in faulty residential mortgage-backed securities, NCUA retained two outside law firms, Korein Tillery LLP and Kellogg, Hansen, Todd, Figel, & Frederick PLLC, on a straight contingency basis. The original contract entitled the firms to 25 percent of the recovery, net of expenses. As of June 30, 2017, the lawsuits had generated more than $5.1 billion in recoveries on which NCUA had paid $1,214,634,208 in fees.[6]

55. When it retained outside counsel on contingency, NCUA knew that billions of dollars were at stake. The failed corporate credit unions had sustained $16 billion in losses, and NCUA's objective was to recover as much of that amount as possible. It also knew that dozens

[6] The following documents provide information about NCUA's fee arrangement and the recoveries obtained in the litigations: Legal Services Agreement dated Sept. 1, 2009, https://www.ncua.gov/services/Pages/freedom-of-information-act/legal-services-agreement.pdf; National Credit Union Administration, Legal Recoveries from the Corporate Crisis, https://www.ncua.gov/regulation-supervision/Pages/corporate-system-resolution/legal-recoveries.aspx; Letter from the Office of the Inspector General, National Credit Union Administration to the Hon. Darrell E. Issa, Feb. 6, 2013, https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20130206IssaResponse.pdf.

of defendants would be sued and that multiple settlements were possible. Even so, NCUA agreed to pay a straight contingent percentage fee in the standard market range on all the recoveries. It neither reduced the fees that were payable in later settlements in light of fees earned in earlier ones, nor bargained for a percentage that declined as additional dollars flowed in, nor tied the lawyers' compensation to the number of hours they expended.

56. In *In re Merry-Go-Round Enterprises, Inc*., 244 B.R. 327 (D. Md. 2000), the bankruptcy trustee wanted to assert claims against Ernst & Young. He looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40 percent of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees, 21 times its lodestar. The bankruptcy judge granted the request, writing: "[v]iewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." *Id.* at 335.

57. Based on what lawyers who write about fee arrangements in business cases have said, contingent fees of 33⅓ percent or more remain common. In 2011, The Advocate, a journal produced by the Litigation Section of the State Bar of Texas, published a symposium entitled "Commercial Law Developments and Doctrine." It included an article on alternative fee arrangements, which reported typical contingent fee rates of 33 percent to 40 percent.

> A pure contingency fee arrangement is the most traditional alternative fee arrangement. In this scenario, a firm receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the contingency is approximately 33%, with the client covering litigation expenses; however, firms can also share part or all of the expense risk with clients. Pure contingency fees, which are usually negotiated at approximately 40%, can be useful structures in cases where the plaintiff is seeking monetary or monetizable damages. They are also often appropriate when the client is an individual, start up,

> or corporation with limited resources to finance its litigation. Even large clients, however, appreciate the budget certainty and risk-sharing inherent in a contingent fee arrangement.

Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*, 66 THE ADVOCATE (TEXAS) 20 (2011).

58. In sum, when seeking to recover money in class actions involving large stakes and in commercial lawsuits, sophisticated business clients typically pay contingent fees ranging from 30 percent to 40 percent, with fees of 33 percent or more being promised in most cases.

3. Sophisticated Named Plaintiffs In Class Actions

59. The pharmaceutical antitrust cases discussed at the beginning of this Declaration show that sophisticated business clients commonly agree to pay fees in the usual range when serving as named plaintiffs in class actions. Other cases also support this assessment.

- In *San Allen, Inc. v. Buehrer*, Case No. CV-07-644950 (Ohio – Court of Common Pleas), which settled for $420 million, seven businesses serving as named plaintiffs signed retainer contracts in which they agreed to pay 33.3 percent of the gross recovery obtained by settlement as fees, with a bump to 35 percent in the event of an appeal. Expenses were to be reimbursed separately.
- In *In re U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT) (D. Ct.), a RICO class action that produced a $297 million settlement, both of the businesses that served as named plaintiffs were represented by counsel in their fee negotiations and both agreed that the fee award might be as high as 40 percent.
- In *In re International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-3346 (Court of Common Pleas, Greenville County, South Carolina), which settled in 2013 for relief valued at about $81 million, five sophisticated investors serving as named plaintiffs agreed to pay 35 percent of the gross class-wide recovery as

fees, with expenses to be separately reimbursed. (The fee was initially set at over 40 percent but was later bargained down to 35 percent.)

60. In sum, when sophisticated business clients seek to recover money in risky commercial lawsuits involving large stakes, they typically pay contingent fees ranging from 30 percent to 40 percent, with fees of 33 percent or more being promised in most cases. As well, there is little variation in fee percentages across cases of different sizes.

IX. RISK INCURRED

61. In the market for legal services, the percentages that contingent fee lawyers charge vary with the risks they incur. Lawyers who handle medical malpractice cases typically receive higher fees than lawyers who handle personal injury cases of other types because they incur greater costs and face more daunting prospects before judges and juries. Lawyers who handle commercial airplane crash cases often charge lower fees than others because major carriers often concede liability, leaving only damages to be determined.

62. My review of the preliminary approval materials convinces me that the risks associated with this litigation were and continue to be severe. They include difficult pleading requirements, serious summary judgment issues, challenges to the plaintiffs' damages model, a difficult path to class certification, and many others. Because Class Counsel know these risks better than I do and describe them in detail the *Joint Declaration of Daniel L. Brockett and Merrill G. Davidoff in Support of (1) Plaintiffs' Motion for Final Approval of Two Settlement, Final Approval of the Plan of Allocation, and for Certification of the Settlement Class; and (2) Co-Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses*, I will not add to their account of the particulars. Instead, I will focus on general properties of antitrust class actions that bear on their riskiness.

1. Duration Of Litigation

63. The duration of litigation is a proxy for risk. Easier cases tend to resolve more quickly than harder ones; the hours class counsel must expend and the expenses they must incur mount with time; and unpaid interest accumulates on both expenses and time until litigation ends.[7]

64. This case has already taken longer than usual to resolve, and the litigation is far from over. "From 2009-2019, most antitrust class actions that reached final approval did so within 5-7 years." Josh Paul Davis and Rose Kohles, *2019 Antitrust Annual Report: Class Action Filings in Federal Court* 2 (Sept. 21, 2020). At 7 years 3 months and counting, this lawsuit is already past the high end of that range and major defendants are still hotly contesting their liability.

65. The protracted nature of the litigation stems from its inherent complexity, which creates an enormous number of issues for the parties to contest, including the discoverability of communications and data, the sufficiency of the pleadings, the soundness of experts' analyses, and many others. Although there are surely other lawsuits with comparably drawn-out pretrial motions practice and discovery periods, this one is surely at the high end of the complexity/protractedness spectrum.

2. Costs Incurred

66. The expenses that lawyers incur when litigating class actions correlate directly with risk. The greater the outlay on expert witnesses, discovery, and other goods and services, the greater the foregone earnings that would have been received had the money been invested and the greater the downside potential associated with the risk of loss.

[7] Unpaid interest accumulates on time because, had class counsel handled an hourly rate matter instead of litigating a class action on contingency, they could have invested their fees and earned a return for the duration of the litigation.

67. Here, reflecting the intensity of discovery, the difficulty of collecting and processing data, the need to work with expensive experts, and other matters, Co-Lead Counsel's expenses are substantial—approximately $8 million. It takes courage to put so large a sum at risk in a complex lawsuit. This is so partly because of the sheer magnitude of the outlay and partly because the risk is undiversified. The gamble is all or nothing, with "nothing" being the possible outcome at many points along the way. Defendants' filing of a motion to dismiss in February 2015 created one such possibility, as demonstrated by the Court's decision to dismiss the conspiracy claims that arose before 2006. The 2018 decision to grant UBS' motion to dismiss provides further evidence of the significance of the risk. The many decisions on discovery motions, some of which the class lost, also attest to the risk because they affected Co-Lead Counsel's ability to obtain the evidence needed to craft a sufficient complaint.

68. As litigation against the remaining Defendants continues, more opportunities for the gamble to turn out poorly will arise. Co-Lead Counsel will have to overcome the hurdle of class certification, survive one or more motions for summary judgment, and establish the credibility of their experts in response to Defendants' *Daubert* motions. The road ahead is littered with landmines.

69. The litigation that arose out of the collapse of Enron shows that aggressive defendants can defeat class actions after more conservative ones settle. After a series of partial settlements generated billions of dollars for Enron's shareholders, the remaining defendants appealed the district court's class certification order to the Fifth Circuit, which both decertified the class and restricted securities fraud claims against secondary actors like investment banks. *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*, 2007 WL 816518 (5th

Cir. March 19, 2007). In complex, high-dollar lawsuits filed against well-heeled defendants the future is never guaranteed.

70. Class action settlements are not risk-free either. Class members can oppose them and may succeed in having them overturned. The *Payment Card* litigation handled by Judge Gleeson provides a memorable example. After almost a decade of litigation, Judge Gleeson approved a proposed settlement with an estimated value of $7.25 billion (assuming no opt outs). Certain class members appealed his decision to the Second Circuit which, despite the enormity of the recovery, reversed. *See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 827 F.3d 223 (2d Cir. June 30, 2016). A second settlement was approved in 2019 and is currently on appeal. For about a decade and a half, the lawyers representing the class have been neither paid nor reimbursed for expenses, despite devoting hundreds of thousands of hours and bearing tens of millions of dollars in expenses.

71. As mentioned, Co-Lead Counsel have incurred about $8 million in expenses to this point. There is no reason to fear that they spent any of this money unwisely. Because contingent fee lawyers only recoup their expenses when they win, they have every reason to be frugal. Rationally, their incentive is to incur only expenses that increase class members' expected recoveries by several multiples of the cost. It makes more sense to worry that contingent fee lawyers may devote too few resources to litigation than to fear that they will spend too much.

3. No Prior Governmental Investigation Uncovered Wrongdoing

72. Co-Lead Counsel report "Quinn Emanuel began [its] investigation into the possibility of gold benchmark manipulation in early November 2013, *before any government investigations or the possibility of gold price manipulation were reported in the press*." *Joint Declaration*, p. 4 (emphasis added). Thereafter, Co-Lead Counsel "immediately began investigating potential antitrust violations." *Id*. Its efforts included the retention of a private

investigation firm, the engagement of two economists, and the purchase of gold tick data. *Id*. "Berger Montague had also been investigating potential claims in the gold market, including by way of their existing clients which included gold traders." *Id.*

73. Co-Lead Counsel's willingness to explore the merits of this litigation in the absence of a known governmental investigation, and to continue to invest heavily in it for many years after the later-discovered government investigations were purportedly wound-down, demonstrates an unusual willingness to bear risks. The safer course for class action lawyers is to sue on the heels of actions by regulators. Governmental investigations often signal the existence of violations and, relatedly, that private civil claims are worth exploring. Many antitrust cases that produced recoveries above $100 million were assisted substantially by criminal prosecutions and guilty pleas. *See, e.g.*, *In re Vitamins Antitrust Litig*., No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001) ($365 million class recovery and 34.6% fee award in case supported by criminal prosecutions and guilty pleas); *In re TFT-LCD (Flat Panel) [Indirect Purchaser] Antitrust Litig*., MDL No. 1827, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013) ($1.08 billion class recovery and approximately 30% fee to class counsel and state attorneys general in case supported by sweeping criminal prosecutions and guilty pleas).

74. By maintaining these capacities, Quinn Emanuel and Berger Montague perform a public service of great value. They supplement public enforcement of antitrust laws and other regulatory statutes and often take its place when government agencies are unwilling to act.

75. In a survey of the empirical literature, Robert Lande describes the importance of the contribution that law firms make to antitrust deterrence by comparing the penalties that public and private actions impose. "From 1990 through 2011," he reports, "the total of DOJ corporate antitrust fines, individual fines, and restitution payments totaled $8.2 billion." Robert

H. Lande, *Class Warfare: Why Antitrust Class Actions are Essential for Compensation and Deterrence*, 30 Antitrust 81, 83 (Spring 2016). Monetizing prison terms added another $3.6 billion, bringing the total financial deterrent from public enforcement to $11.8 billion. Although these are substantial numbers, antitrust class actions saddled defendants with greater losses. Just 49 class actions that settled during the same period generated recoveries equal to $19.4–$21.0 billion. Lande concludes that "[t]he total amount of payouts in class action cases is so high that it probably deters more anticompetitive conduct than even the DOJ's anti-cartel enforcement efforts." *Id*.

76. Private law firms like Quinn Emanuel and Berger Montague can supplement and even take the place of public enforcers because they use the dollars they take in to maintain their capacities. Their earnings come from fees, including awards they receive from recoveries in successful class action lawsuits. Instead of drawing funds from taxpayers, as government agencies do, Co-Lead Counsel use wrongdoers' money to maintain a system of antitrust enforcement. The fee award the Court approves in this case will help keep the system running.

4. Class Certification

77. Because Co-Lead Counsel will ask the Court to certify a plaintiff class for litigation against the remaining Defendants, it would be inappropriate for me to discuss the probability that, on the facts as currently known, such a motion will be granted. I will therefore provide only background information on the risks associated with antitrust class actions in general.

78. Professor Brian Fitzpatrick, who gathered all federal class action settlements that occurred in 2006 and 2007, found 30 antitrust cases, an average of 15 per year. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 811, 818 Table 1 (2010) (hereinafter "*Fitzpatrick Study*").

Settlements of cases of other types were far more numerous. Professor Fitzpatrick identified 257 settled securities class actions, 94 settled labor and employment class actions, and 87 settled consumer protection class actions. Only settlements of commercial class actions were fewer in number than antitrust settlements.

79. A study published in 2017 reported that

> [t]he most common class action case category during the 2009–2013 period was Fair Labor Standards Act (FLSA) cases with 108 cases. The next largest case categories were Securities (74), Consumer (52), Employment (25), Labor (23), Employee Retirement Income Security Act (ERISA) (22), Civil Rights (21), and Antitrust (19).

Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N. Y.U. L. REV. 937, 951 (2017).

80. These comparative figures confirms the relative risks associated with these cases, including the difficulty of winning contested motions for certification. For a discussion, see Robert H. Klonoff, *The Decline of Class Actions*, 90 WASHINGTON UNIVERSITY LAW REVIEW 729 (2013). These contests often boil down to battles between experts who offer conflicting views based on sophisticated models and reams of data.

> In antitrust class actions, expert economic evidence is offered in certification proceedings most often on issues of whether impact and damages are susceptible of class-wide proof. To show that impact is susceptible to class-wide proof, class action plaintiffs are required to proffer a plausible method of proving that the vast majority of the class has been injured. On a class motion, an expert report must support plaintiffs' "minimum burden of showing there is a reasonable probability of establishing . . . common impact."

The Sedona Conference Working Group on the Role of Economics in Antitrust, *Best Practices in Using Economics for Class Certification Motions Under Rule 23 of the Federal Rules of Civil Procedure*, 6 SEDONA CONFERENCE JOURNAL 46, 47 (2005) (quoting *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 247 (E.D.N.Y. 1998)).

81. Finally, although not quantifiable statistically, I note from personal experience that winning a large class action lawsuit also requires luck. I served as co-counsel in a RICO class action that involved over $1 billion in overcharges for workers' compensation insurance. The defendants, all of which were large insurance carriers, put us to the test and forced the district court judge to hold a week-long certification hearing, which produced a lengthy and truly excellent opinion in the class' favor. Then the Fifth Circuit reversed, partly because the judges on the panel misunderstood the requirements for proving causation in RICO cases predicted on mail fraud. Compare *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co*., 319 F.3d 205 (5th Cir. 2003) (holding that proof of reliance is required in RICO cases predicated on mail fraud); with *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008) (holding that a plaintiff asserting a RICO claim for mail fraud did not need to show reliance, either as an element of the claim or as a prerequisite to establishing proximate causation). We were right but we still failed to hold onto class certification. The difficulty of winning an enormous class action is hard to overstate.

X. FEE AWARDS IN CASES WITH COMPARABLE MONETARY RECOVERIES

82. In my experience, judges want to know about other judges' fee-related practices. I therefore provide this information below, even though judges' practices provide at best indirect evidence of market rates. Because some circuits with lots of class actions adhere to benchmarks from which judges may be reluctant to depart, the data may say as much about benchmarks as anything else. That said, being familiar with empirical studies of fee awards, I can confidently report that Plaintiffs' Counsel's request for a fee equal to roughly 27.6 percent of the monetary recovery falls within the range that courts typically award.

83. The study by Eisenberg, Miller, and Germano referenced above contains the table below, which breaks out fee awards by federal circuit. The mean and median for the Second

Circuit are 28 percent and 30 percent, respectively. Because these numbers are based on 116 class actions, they are robust. It also bears mentioning that the mean recovery in the Second Circuit cases is $113 million, which is extremely close to the gross amount the class will receive if the pending settlements are approved.

TABLE 3. FEE AND CLASS RECOVERIES, BY FEDERAL CIRCUIT, 2009–2013

		Recoveries		Fees		Fee Percentages	
Circuit	N	Mean (millions of dollars)	Median (millions of dollars)	Mean (millions of dollars)	Median (millions of dollars)	Mean (%)	Median (%)
1st	11	45.77	8.2	9.62	1.85	26	23
2nd	116	113.14	3.38	14.31	0.99	28	30
3rd	46	24.48	6.45	5.84	1.71	29	32
4th	22	25	3.66	5.9	0.91	26	25
5th	12	27.72	13.75	6.61	2.66	23	24
6th	23	23.2	5.2	6.38	1.5	26	30
7th	14	30.76	7.38	9.17	2.17	28	30
8th	21	50.74	4.2	5.04	1.11	29	32
9th	144	23.86	3	5.96	0.78	26	25
10th	18	30.07	6.21	7.5	1.36	27	25
11th	11	2.2	2.02	0.65	0.65	30	33
D.C.	6	34.72	11.64	6.57	2.21	19	19
Fed.	6	14.25	1.79	4.26	0.57	29	30
Total	450	48.8	3.83	8.2	1	27	29

Source: Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N. Y.U. L. REV. 937 (2017).

84. The statistics reported in this section clearly demonstrate that, in light of prevailing judicial practices, Co-Lead Counsel's application for fees and expense reimbursements is reasonable.

XI. LODESTAR CROSS-CHECK

85. When awarding fees as a percentage of the settlement, courts often gauge their reasonableness by performing lodestar cross-checks. These cross-checks employ two components: the lodestar calculation, which multiplies hourly rates by time expended; and an imputed multiplier, which is a factor that brings the lodestar calculation into line with the fee request. I discuss both quantities here.

86. Before doing so, I wish to note two things. First, I oppose the use of lodestar cross-checks and have argued against them repeatedly. By assigning significant weight to hours worked, courts inadvertently encourage lawyers to expend time rather than to conserve it. In other words, courts unintentionally penalize efficiency and reward delay. Lodestar cross-checks also weaken the connection between fees and recoveries, the connection that lashes class counsel's interests fast to class members' wellbeing. To the best of my knowledge, claimants never use the lodestar multiplier when hiring lawyers directly. I therefore see no reason for courts to rely on it when assessing the reasonableness of class counsel's fees.

87. Second, the market-based approach that I endorse *is* a cross-check on the reasonableness of Plaintiffs' Counsel's fee request. It provides an objective and independent standard on the basis of which an assessment can be made. Unless a cross-check can only be made in lodestar terms, a question of law on which I take no position, I see no obvious reason for a second cross-check to be made.

88. Turning to the lodestar cross-check itself, I understand Co-Lead Counsel have taken a conservative approach to their calculations. They have excluded time expended by cooperating law firms, counted their own hours only through the execution date of the HSBC settlement, and applied discounted rates. The result is a lodestar basis of nearly $40 million, which reflects approximately 105,000 hours of work, for an approximate blended rate of only $378. If the Court grants the requested fee award, the lodestar multiplier will be .71, which by ordinary standards is minuscule.

89. When considering the reasonableness of the fee request, it is important to keep in mind the quality of the attorneys. As discussed above, complex and risky cases need to attract high-quality attorneys if they are to generate the best recoveries. Based on a review of the

exhibits to the declarations of Mr. Brockett and Mr. Davidoff, as well as my own experience and knowledge of the industry, it is plain that both law firms rank among the antitrust bar's elite.

90. Turning now to the reasonableness of the requested rates directly, there are many relevant sources of information. Fee applications submitted in bankruptcy proceedings are especially helpful because they are sworn to under oath and are reviewed by judges. Studying them, one learns that many lawyers are compensated at rates comparable to those requested here.

- In the Sears bankruptcy proceeding, the fee application submitted in 2019 by Weil, Gotshal & Manges LLP, the debtors' attorneys, included dozens of lawyers whose hourly charges exceed $1,000, with nine lawyers charging $1,500 per hour or more.
- Even higher hourly rates were sought in the Toys R' Us bankruptcy, where Kirkland & Ellis LLP served as debtors' counsel. There, the highest hourly rate was $1,795, the blended rate for all partners, of which there were dozens, was $1,227, and the blended rate for all timekeepers, including paralegals and support staff, was $901.
- The rates sought by the law firm of Davis Polk & Wardwell LLP in the ongoing Purdue Pharma bankruptcy proceeding provide another anecdotal example. In late November of 2019, the firm sought rates that included $1,645 per hour for seven partners, $1,445-$1,585 for four more partners, and $1,225 for six lawyers described as being "of counsel." Davis Polk also sought rates exceeding $1,000 per hour for fifteen associates and rates exceeding $900 per hour for many more.
- Finally, an article covering the bankruptcy proceeding involving Pacific Gas & Electric (PG&E) reported that lawyers from Cravath Swaine & Moore billed at rates of $415 to $1,500 per hour and that lawyers at Weil, Gotshal & Manges charged $560 to $1,600 per hour. Xiumei Dong, *PG&E Legal Bills Already Top $84M in Chapter 11 Case*, THE

RECORDER, Apr. 2, 2019, https://www.law.com/therecorder/2019/04/02/pge-legal-bills-already-top-84m-for-chapter-11-case/?slreturn=20200903170457.

91. Turning from bankruptcy to antitrust class actions, I gained familiarity with rates charged in the latter proceedings by preparing many expert reports that were submitted in them. I also reviewed several fee applications submitted and fee awards granted in several cases with recoveries exceeding $100 million to determine the rates that were sought and approved. The review led me to conclude that the rates requested in this case are reasonable. Here are two examples from cases that settled recently.

- In the Euribor litigation, which settled in 2019 for $182.5 million, the requested lodestar basis, which the court approved, produced a blended rate for all timekeepers of $468 dollars per hour ($194,977,526 divided by 434,977 hours = $468). *See Memorandum of Law in Support of Class Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses*, *Sullivan et al. v. Barclays plc et al*, 13-cv-2811 (PKC), Dkt. 402 (S.D.N.Y., March 23, 2018); and *Order Granting Class Counsel's Motion for Award of Attorneys' Fees*, *Sullivan et al. v. Barclays plc et al*, 13-cv-2811 (PKC), Dkt. 425 (S.D.N.Y., May 18, 2018).
- In the Forex litigation, 15 settlements produced an aggregate fund of over $2.3 billion. In 2018, the court approved a fee award in the amount of $300,335,750, which equaled a lodestar basis of $174,613,808 times a multiplier of 3.4. Because class counsel expended 330,600 hours, the blended rate for all timekeepers was $528 per hour. *Opinion and Order, In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 1:13-cv-07789-LGS, Dkt. 1140 (S.D.N.Y., November 8, 2018).

92. In view of the sources I have discussed and my decades of experience reviewing fee applications, it is my opinion that the rates requested by class counsel are clearly reasonable.

93. I turn now to the multiplier portion of the lodestar. As explained, Co-Lead Counsel's fee request entails a multiplier of .71. The multiplier is less than 1 because the lodestar basis (approximately $40 million) exceeds the requested fee ($28.2 million). Multipliers this small are nearly unheard of in settlements of this magnitude. In their 2017 study, Eisenberg, Miller, and Germano reported a mean (average) multiplier of 1.61 for the 15 antitrust cases in their dataset, and a mean multiplier of 1.93 for the 76 Second Circuit cases in this dataset. Eisenberg, Miller, and Germano, *Attorneys' Fees In Class Actions: 2009-2013*, *supra*, at 965, Tables 12.A (by Circuit) and 12.B (by Case Type).

94. The best-known feature of multipliers is that they increase sharply as settlements become larger. The policy of connecting multipliers to settlement size has solid grounding in the economics of litigation, because the multiplier is the component of the lodestar method that ties the fee award to the recovery. Neither lawyers' hourly rates nor the time they expend does this more than weakly. Unless the multiplier increases as settlements grow larger, lawyers will be incentivized to settle cheaply because, by doing so, they will protect their fees instead of putting them at risk—which they do whenever they pass up opportunities to settle. Unless the upside potential of securing a larger recovery justifies incurring the downside risk of losing fees, the pressure on lawyers to settle will be strong. Awarding larger multipliers when class actions settle for larger sums provides the upside potential that is needed to encourage lawyers to take significant risks.

95. Because multipliers increase as settlements grow, judges presiding over antitrust cases with mega-fund settlements exceeding $100 million have often awarded multipliers far larger than the one sought here.

- In *In re Buspirone*, 01-md-1410 (S.D.N.Y. Apr. 11, 2003), which settled for $220 million, the court awarded a lodestar multiplier of 8.46.
- In *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 DLC, ECF No. 554 (S.D.N.Y. April 18, 2016), which settled for $1.86 billion, the multiplier was 6.36.
- In *King Drug Co. of Florence v. Cephalon, Inc.*, Civil Action No. 06-cv-01797-MSP, Dkt. 870 at 8 (E.D. Pa. Oct. 15, 2015), the settlement equaled $512 million, and the multiplier was 4.12.
- In *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437 (E.D.N.Y. 2014), which ended with a whopping $5.7 billion recovery, the multiplier was 3.54.
- In *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998), which settled for slightly more than $1 billion, the multiplier was 3.97.
- In *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 523 (E.D.N.Y. 2003*), aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), where the settlement had an estimated present value of almost $3.4 billion, the multiplier was 3.5.
- *In Deloach v. Philip Morris Companies*, No. 1:00CV01235, 2003 WL 23094907, at *11 (M.D.N.C. Dec. 19, 2003), which settled for $200 million in cash and other relief, the multiplier was 4.45.

This list could be expanded considerably, especially by including securities fraud class actions and cases of other types.

96. When performing cross-checks, judges do not adhere to simple-minded rules. They award fees that, in their informed judgment, are justified in light of the effort lawyers expended, the risks they incurred, and the results they obtained. In this case, the lawyers have worked long and hard, incurred great expenses, and borne substantial risks. They have also set the class on a course that may lead to additional recoveries in the future. In view of all this, the reasonableness of the requested multiplier is clear.

97. I conclude that a lodestar cross-check confirms that Plaintiffs' Counsel's fee request is in line with the market and with awards in comparable cases and thus is reasonable.

XII. COMPENSATION

98. I received a flat fee of $50,000 for the time I spent preparing this report.

XIII. CONCLUSION

99. For the reasons set out above, I believe that Class Counsel's request for a fee award of roughly 28 percent of the gross recovery and reimbursement of approximately $8 million in expenses is reasonable.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 7th day of July 2021, at Empire, Michigan.

CHARLES SILVER

APPENDIX I: RESUME OF PROFESSOR CHARLES SILVER

CHARLES SILVER

School of Law
University of Texas
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1337 (voice)
csilver@mail.law.utexas.edu (preferred contact method)
Papers on SSRN at: http://ssrn.com/author=164490

ACADEMIC EMPLOYMENTS

School of Law, University of Texas at Austin, 1987-2015
Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure
W. James Kronzer Chair in Trial & Appellate Advocacy
Cecil D. Redford Professor
Robert W. Calvert Faculty Fellow
Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow
Assistant Professor

University of Michigan Law School, Fall 2018
Visiting Professor

Harvard Law School, Fall 2011
Visiting Professor

Vanderbilt University Law School, Fall 2003
Visiting Professor

University of Michigan Law School, Fall 2018 & Fall 1994
Visiting Professor

University of Chicago, 1983-1984
Managing Editor, *Ethics: A Journal of Social, Political and Legal Philosophy*

EDUCATION

Yale Law School, JD (1987)
University of Chicago, MA (Political Science) (1981)
University of Florida BA (Political Science) 1979

PUBLICATIONS

SPECIAL PROJECTS

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (with Samuel Issacharoff, Reporter, and Robert Klonoff and Richard Nagareda, Associate Reporters) (American Law Institute 2010).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Class Action Litigation," 25 Rev. Litig. 459 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Mass Tort Litigation," 42 Tort Trial & Insurance Practice Law Journal 105 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Medical Malpractice Litigation," 25 Rev. Litig. 459 (2006).

PRACTICAL GUIDE FOR INSURANCE DEFENSE LAWYERS (2002) (with Ellen S. Pryor and Kent D. Syverud, Co-Reporters); published on the IADC website (2003); revised and distributed to all IADC members as a supplement to the Defense Counsel J. (2004).

BOOKS

MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHAT IT DOES, AND WHY TORT REFORM HASN'T HELPED (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage) (Cato Institute, 2021).

OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE (with David A. Hyman) (Cato Institute, 2018).

HEALTH LAW AND ECONOMICS, Vols. I and II (coedited with Ronen Avraham and David A. Hyman) (Edward Elgar 2016).

LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, (coedited with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley) (Foundation Press, 2nd Ed. 2012) (updated annually through 2018).

PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (with William T. Barker) (LexisNexis 2012) (updated annually through 2017).

ARTICLES AND BOOK CHAPTERS BY SUBJECT AREA
(* INDICATES PEER REVIEWED)

Health Care Law & Policy

1. "Paying Beneficiaries, Not Providers," Regulation 34 (2020) (with David A. Hyman).

2. "Pharmaceutical Pricing When Success Has Many Parents," 37 Yale J. Reg. 101 (2020) (with David A. Hyman).

3. "Pricing and Paying for Cancer Drugs: Policy Options for Fixing A Broken System," 26:4 The Cancer Journal 298-303 (2020) (with David A. Hyman).*

4. "Medicare For All: Four Inconvenient Truths," 20 Hous. J. of Health L. & Policy 133 (2020) (with David A. Hyman).

5. "Health Care's Government Bureaucracy: A Comment on *Health Care's Market Bureaucracy*, by Allison K. Hoffman," (unpublished) (with David A. Hyman).

6. "Surprise Medical Bills: How To Protect Patients and Make Care More Affordable," 108 Georgetown L. J. 1655 (2020) (with David A. Hyman and Ben Ippolito).

7. "There is a Better Way: Make Medicaid and Medicare More Like Social Security," 18 Georgetown J. of L. & Pub. Pol'y 149 (2020) (with David A. Hyman).

8. "Why Are We Being Overcharged for Pharmaceuticals? What Should We Do About It?" 39 J. Legal Med. 137 (2019) (with David A. Hyman).

9. "Regulating Pharmaceutical Companies' Financial Largesse," 7:25 Israeli J. Health Policy Res. (2018), https://doi.org/10.1186/s13584-018-0220-5 (with Ronen Avraham).*

10. "Medical Malpractice Litigation," (with David A. Hyman) OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (2019), DOI: 10.1093/acrefore/9780190625979.013.365.*

11. "It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and Healthcare Spending," (with David A. Hyman) OXFORD HANDBOOK OF AMERICAN HEALTH LAW, I. Glenn Cohen, Allison Hoffman, and William M. Sage, eds. (2017).*

12. "Compensating Persons Injured by Medical Malpractice and Other Tortious Behavior for Future Medical Expenses Under the Affordable Care Act," (with Maxwell J. Mehlman, Jay Angoff, Patrick A. Malone, and Peter H. Weinberger)25 Annals of Health Law 35 (2016).

13. **"**Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation," (with David A. Hyman) 63 DePaul L. Rev. 574 (2014) (invited symposium).

14. "Five Myths of Medical Malpractice," (with David A. Hyman) 143:1 Chest 222-227 (2013).*

15. "Health Care Quality, Patient Safety and the Culture of Medicine: 'Denial Ain't Just A River in Egypt,'" (with David A. Hyman), 46 New England L. Rev. 101 (2012) (invited symposium).

16. "Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?" (coauthored with David A. Hyman) MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE (Ken Oliphant & Richard W. Wright, eds. 2013)*; originally published in 87 Chicago-Kent L. Rev. 163 (2012).

17. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman).*

18. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

19. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

20. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

21. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?" 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

22. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

23. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

24. "The Case for Result-Based Compensation in Health Care," 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).*

Studies of Medical Malpractice Litigation

25. "Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and After HB 4," 51 Tex. Tech L. Rev. 627 (2019). (with David A. Hyman and Bernard Black) (invited symposium on the 15th anniversary of the enactment of HB4).

26. "Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010," 13 J. Empirical Legal Stud. 183 (2016) (with Bernard S. Black, David A. Hyman, and Mohammad H. Rahmati).

27. "Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance," 5 U.C. Irvine L. Rev. 559 (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik) (invited symposium).

28. "Does Tort Reform Affect Physician Supply? Evidence from Texas," Int'l Rev. of L. & Econ. (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik), available at http://dx.doi.org/10.1016/j.irle.2015.02.002.*

29. "How do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform? Evidence From Texas" (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage), Amer. L. & Econ. Rev. (2012), doi: 10.1093/aler/ahs017.*

30. "Will Tort Reform Bend the Cost Curve? Evidence from Texas" (with Bernard S. Black, David A. Hyman, Myungho Paik), 9 J. Empirical Legal Stud. 173-216 (2012).*

31. "O'Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers," 7 J. Empirical Legal Stud. 379 (2010) (with Bernard S. Black and David A. Hyman).*

32. "The Effects of 'Early Offers' on Settlement: Evidence From Texas Medical Malpractice Cases, 6 J. Empirical Legal Stud. 723 (2009) (with David A. Hyman and Bernard S. Black).*

33. **"**Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," 1 J. Legal Analysis 355 (2009) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue).*

34. "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate (Texas) 25 (2008) (with Bernard S. Black and David A. Hyman) (invited symposium).

35. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 3 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with Bernard S. Black, David A. Hyman, William M. Sage and Kathryn Zeiler).*

36. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," 36 J. Legal Stud. S9 (2007) (with Bernard S. Black, David A. Hyman, William M. Sage, and Kathryn Zeiler).*

37. "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003," J. Empirical Legal Stud. 3-68 (2007) (with Bernard S. Black, David A. Hyman, William M. Sage, and Kathryn Zeiler).*

38. "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," 2 J. Empirical Legal Stud. 207–259 (July 2005) (with Bernard S. Black, David A. Hyman, and William S. Sage).*

Empirical Studies of the Law Firms and Legal Services

39. "Screening Plaintiffs and Selecting Defendants in Medical Malpractice Litigation: Evidence from Illinois and Indiana," 15 J. Empirical Legal Stud. 41-79 (2018) (with Mohammad Rahmati, David A. Hyman, Bernard S. Black, and Jing Liu)*

40. "Medical Malpractice Litigation and the Market for Plaintiff-Side Representation: Evidence from Illinois," 13 J. Empirical Legal Stud. 603-636 (2016) (with David A. Hyman, Mohammad Rahmati, Bernard S. Black).*

41. "The Economics of Plaintiff-Side Personal Injury Practice," U. Ill. L. Rev. 1563 (2015) (with Bernard S. Black and David A. Hyman).

42. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 Fordham Urb. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

43. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 Amer. Law & Econ. Rev. 185 (2008) (with Bernard S. Black, David A. Hyman, and William M. Sage).*

Attorneys' Fees—Empirical Studies and Policy Analyses

44. "The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status Report on Securities Fraud Class Actions," RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, Sean Griffith, Jessica Erickson, David H. Webber, and Verity Winship, Eds. (2018).

45. "Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions," 115 Columbia L. Rev. 1371 (2015) (with Lynn A. Baker and Michael A. Perino).

46. "Regulation of Fee Awards in the Fifth Circuit," 67 The Advocate (Texas) 36 (2014) (invited submission).

47. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66 Vanderbilt L. Rev. 1677 (2013) (with Lynn A. Baker and Michael A. Perino).

48. "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal," 63 Vanderbilt L. Rev. 107 (2010) (with Geoffrey P. Miller).

49. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul L. Rev. 471 (2008) (with Sam Dinkin) (invited symposium), reprinted in L. Padmavathi, Ed., SECURITIES FRAUD: REGULATORY DIMENSIONS (2009).

50. "Reasonable Attorneys' Fees in Securities Class Actions: A Reply to Mr. Schneider," 20 The NAPPA Report 7 (Aug. 2006).

51. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006).

52. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

53. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

54. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

55. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

Liability Insurance and Insurance Defense Ethics

56. "Liability Insurance and Patient Safety," 68 DePaul L. Rev. 209 (2019) (with Tom Baker) (symposium issue).

57. "The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique," 68 Rutgers U. L. Rev. 83 (2015) (with William T. Barker) (symposium issue).

58. "The Basic Economics of the Duty to Defend," in D. Schwarcz and P. Siegelman, eds., RESEARCH HANDBOOK IN THE LAW & ECONOMICS OF INSURANCE 438-460 (2015).*

59. "Insurer Rights to Limit Costs of Independent Counsel," ABA/TIPS Insurance Coverage Litigation Section Newsletter 1 (Aug. 2014) (with William T. Barker).

60. "Litigation Funding Versus Liability Insurance: What's the Difference?," 63 DePaul L. Rev. 617 (2014) (invited symposium).

61. "Ethical Obligations of Independent Defense Counsel," 22:4 Insurance Coverage (July-August 2012) (with William T. Barker), available at http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html.

62. "Settlement at Policy Limits and The Duty to Settle: Evidence from Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard S. Black and David A. Hyman).*

63. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

64. "Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

65. "Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases," 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

66. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

67. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

68. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

69. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6 Coverage 47 (1996) (with Michael Sean Quinn).

70. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6 Coverage 21 (1996) (with Michael Sean Quinn).

71. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud); reprinted in IX INS. L. ANTHOL. (1996) and 64 Def. L. J. 1 (Spring 1997).

72. "Wrong Turns on the Three Way Street: Dispelling Nonsense about Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

73. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

74. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994); reprinted in Practicing Law Institute, INSURANCE LAW: WHAT EVERY LAWYER AND BUSINESSPERSON NEEDS TO KNOW (1998).

75. "A Missed Misalignment of Interests: A Comment on *Syverud, The Duty to Settle*," 77 Va. L. Rev. 1585 (1991); reprinted in VI INS. L. ANTHOL. 857 (1992).

Class Actions, Mass Actions, and Multi-District Litigations

76. "In Defense of Private Claim Resolution Facilities," J. of L. and Contemporary Problems (forthcoming 2021) (with Lynn A. Baker)*

77. "What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on *Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*," 5 J. of Tort L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited symposium).

78. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 Fordham L. Rev. 1985 (2011) (invited symposium).

79. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda).*

80. "A Rejoinder to *Lester Brickman, On the Theory Class's Theories of Asbestos Litigation,"* 32 Pepperdine L. Rev. 765 (2005).

81. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

82. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

83. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

84. "Representative Lawsuits & Class Actions," in B. Bouckaert & G. De Geest, eds., INT'L ENCY. OF L. & ECON. (1999).*

85. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

86. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

87. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

88. "Justice in Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman).*

General Legal Ethics and Civil Litigation

89. "A Private Law Defense of Zealous Representation" (in progress), available at http://ssrn.com/abstract=2728326.

90. "The DOMA Sideshow" (in progress), available at http://ssrn.com/abstract=2584709.

91. "The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations," 79 Fordham L. Rev. 1985 (2011).

92. "Fiduciaries and Fees," 79 Fordham L. Rev. 1833 (2011) (with Lynn A. Baker) (invited symposium).

93. "Ethics and Innovation," 79 George Washington L. Rev. 754 (2011) (invited symposium).

94. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

95. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

96. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

97. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

98. "What's Not To Like About Being A Lawyer?" 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

99. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

100. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

101. "Bargaining Impediments and Settlement Behavior," in D.A. Anderson, ed., DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (1996) (with Samuel Issacharoff and Kent D. Syverud).

102. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

103. "Do We Know Enough about Legal Norms?" in D. Braybrooke, ed., SOCIAL RULES: ORIGIN; CHARACTER; LOGIC: CHANGE (1996) (invited contribution).

104. "Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas," 58 Law and Contemporary Problems 213 (1995) (with Amon Burton, John S. Dzienkowski, and Sanford Levinson,).

105. "Thoughts on Procedural Issues in Insurance Litigation," VII INS. L. ANTHOL. (1994).

Legal and Moral Philosophy

106. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987).*

107. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985).*

108. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984).*

Practice-Oriented Publications

109. "Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996).

110. "Getting and Keeping Clients," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996) (with James M. McCormack and Mitchel L. Winick).

111. "Advertising and Marketing Legal Services," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

112. "Responsibilities of Senior and Junior Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

113. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

Miscellaneous

114. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro).*

PERSONAL

Married to Cynthia Eppolito, PA; Daughter, Katherine; Step-son, Mabon.

Consults with attorneys and serves as an expert witness on subjects in his areas of expertise.

First generation of family to attend college.

APPENDIX II: TABLE OF FEE AWARDS IN DIRECT PURCHASER PHARMACEUTICAL ANTITRUST CLASS ACTIONS

Direct-Purchaser Pharmaceutical Antitrust Settlements, April 2003-April 2020

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
11/09/18	*Hartig Drug Company Inc. v. Senju Pharmaceutical Co. Ltd. et al*, No. 14-00719 (D. Del.)	$9,000,000	33.33%	N/A	None	No
10/24/18	*In Re: Blood Reagents Antitrust Litigation*, No. 09-md-02081 (E.D. Pa.)	$41,500,000	33.33%	N/A	None	No
09/20/18	*In re Lidoderm Antitrust Litigation,* No. 14-md-02521 (N.D. Cal.)	$166,000,000	27.11%	33.33%	None	Yes
07/18/18	*In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation*, No. 14-md-02503 (D. Mass.)	$72,500,000	31.45%	N/A	None	No
04/18/18	*American Sales Company, LLC v. Pfizer, Inc.*, No. 4-cv-00361 (E.D. Va.)	$94,000,000	32.69%	33.33%	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
12/19/17	*In re Aggrenox Antitrust Litigation,* No. 14-md-02516 (D. Conn.)	$146,000,000	33.33%	33.33%	None	Yes
12/07/17	*In re Asacol Antitrust Litigation,* No. 15-cv-12730 (D. Mass.)	$15,000,000	33.33%	N/A	None	Yes
10/23/17	*Castro v. Sanofi Pasteur, Inc.*, No. 11-cv-7178 (D.N.J.)	$61,500,000	33.33%	N/A	None	Yes
10/05/17	*In re K-Dur Antitrust Litigation*, No. 01-cv-01652 (D.N.J.)	$60,200,000	33.33%	N/A	None	Yes
10/15/15	*King Drug Company of Florence, Inc. v. Cephalon, Inc., et al*, No. 06-cv-01797 (E.D. Pa.)	$512,000,000	27.50%	N/A	None	Yes
05/20/15	*In re Prograf Antitrust Litig.*, No. 11-md-2242 (D. Mass.)	$98,000,000	33.33%	N/A	None	Yes
01/20/15	*In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141 (E.D. Mich.)	$19,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
09/16/14	*Mylan Pharmaceuticals, Inc. v. Warner Chilcott PLC*, No. 12-cv-3824 (E.D. Pa.)	$15,000,000	33.33%	N/A	None	No
08/06/14	*Louisiana Wholesale v. Pfizer, Inc., et al*, No. 02-cv-01830 (D.N.J.)	$190,416,438	33.33%	N/A	None	Yes
06/30/14	*In re Skelaxin (Metaxalone) Antitrust Litigation*, No. 12-md-2343 (E.D. Tenn.)	$73,000,000	33.33%	N/A	None	Yes
4/16/14	*In Re: Plasma-Derivative Protein Therapies Antitrust Litigation*, No. 09-07666 (N.D. Ill.)	$64,000,000	33.33%	N/A	None	No
06/14/13	*American Sales Company, Inc. v. Smithkline Beecham Corporation*, No. 08-cv-03149 (E.D. Pa.)	$150,000,000	33.33%	N/A	None	Yes
04/10/13	*Louisiana Wholesale Drug Company, Inc. v. Becton Dickinson & Company, Inc.*, No. 05-cv-01602 (D.N.J.)	$45,000,000	33.33%	N/A	None.	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
11/07/12	*In re Wellbutrin XL Antitrust Litigation*, No. 08-cv-2431 (E.D. Pa.)	$37,500,000	33.33%	N/A	None	Yes
05/31/12	*Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc.*, No. 07-cv-142 (D. Del.)	$17,250,000	33.33%	N/A	None	Yes
01/12/12	*In re Metoprolol Succinate Antitrust Litigation*, No. 06-cv-52 (D. Del.)	$20,000,000	33.33%	N/A	None	Yes
11/28/11	*In re DDAVP Direct Purchaser Antitrust Litigation*, No. 05-cv-2237 (S.D.N.Y.)	$20,250,000	33.33%	N/A	None	Yes
11/21/11	*In re Wellbutrin SR Antitrust Litigation*, No. 04-cv-5525 (E.D. Pa.)	$49,000,000	33.33%	N/A	None	Yes
08/11/11	*Meijer, Inc. v. Abbott Laboratories*, No. 07-cv-05985 (N.D. Cal.)	$52,000,000	33.33%	N/A	None	Yes
01/31/11	*In re Nifedipine Antitrust Litigation*, No. 03-mc-223 (D.D.C.)	$35,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
01/25/11	*In re Oxycontin Antitrust Litigation*, No. 04-md-1603 (S.D.N.Y.)	$16,000,000	33.33%	N/A	None	Yes
04/23/09	*In re Tricor Direct Purchaser Litigation*, No. 05-340 (D. Del.)	$250,000,000	33.33%	N/A	None	Yes
04/20/09	*Meijer, Inc. v. Barr Pharmaceuticals, Inc.*, No. 05-cv-2195 (D.D.C.)	$22,000,000	33.33%	N/A	None	Yes
11/09/05	*In re Remeron Direct Purchaser Antitrust Litigation*, No. 03-cv-00085 (D.N.J.)	$75,000,000	33.33%	N/A	None	Yes
04/19/05	*In re Terazosin Hydrochloride Antitrust Litigation*, No. 99-md-1317 (S.D. Fla.)	$74,572,327	32.41%	N/A	None	Yes
11/30/04	*North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.*, No. 04-cv-248 (D.D.C.)	$50,000,000	33.33%	N/A	None	No

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agree-ment	Class Member Objections	Class Member Support
04/09/04	*In re Relafen Antitrust Litigation*, No. 01-cv-12239 (D. Mass.)	$175,000,000	33.33%	N/A	None	No
04/11/03	*Louisiana Wholesale Drug Co. v. Bristol-Myers Squibb Co.*, No. 01-cv-7951 (S.D.N.Y.)	$220,000,000	32.96%	N/A	None	Yes
			N=33 **Median= 33.33%** **Mean= 32.85%**	**3/33**	**0/33**	**26/33**