UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Johnny Cruz, on behalf of himself and all others similarly situated, Plaintiff, v. Raytheon Company, Kelly B. Lappin, in her capacity as Plan Administrator for the Raytheon Company Pension Plan for Hourly Employees, the Raytheon Company Pension Plan for Salaried Employees, the Raytheon Non-Bargaining Retirement Plan, the Raytheon Bargaining Retirement Plan, and the Raytheon Retirement Plan for Engineers & Contractors, Inc. and Aircraft Credit Employees, and John/Jane Does 1-10, Defendants.	Case No. 1:19-cv-11425-PBS

DECLARATION OF DOUGLAS P. NEEDHAM

EXHIBIT I

Declaration of Professor Charles Silver

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FOR THE DISTRICT OF MASSACHUSETTS

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

I, Charles Silver, state as follows:

I. SUMMARY OF OPINIONS

1. This is the most "old school" class action I have seen in years. There are thousands of absent class members, all of whom have relatively small claims and are identically situated with respect to the alleged wrong, except for minor differences in the size of their losses. Their harms are strictly economic. There are no personal injuries, defective products requiring repair or replacement, or other complications that might create interest conflicts, necessitate testimony from individuals, or put other obstacles in the way of class certification. All plaintiffs' claims raise the same technical question that can be decided by a court for everyone at once on the basis of the law and expert testimony, and that, if decided in favor of the class, would create an entitlement to

damages that can be calculated administratively. Finally, the settlement requires cash payments without a claims process, a reversion of unclaimed funds, or any other feature that might signal inadequate representation.

2. The aspects of the proposed settlement that require attention and that are addressed herein are the reasonableness of the recovery (40 percent of the estimated shortfall in retirement payments before deductions), the reasonableness of the request for attorneys' fees (14.5 percent of the gross recovery), and the propriety of paying Class Counsel the discounted present value of the fee upfront instead of the undiscounted amount over time, as class members receive their own settlement benefits.

3. All three are easy calls. A recovery equal to 40 percent of class members' damages is excellent when the risk incurred and recoveries in other class actions are considered. A 14.5 percent fee is easy to support because it is low by comparison to both the prevailing market rate and prevailing class action practices. Finally, paying Class Counsel a discounted amount upfront is acceptable because class members will receive their payments starting immediately and will keep receiving them until all settlement funds are paid.

II. CREDENTIALS

4. I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, where I also serve as Co-Director of the Center on Lawyers, Civil Justice, and the Media. 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.

5. 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.

6. I have taught, researched, written, consulted with lawyers, and testified about class actions, other large lawsuits, attorneys' fees, professional responsibility, and related subjects for 30 years. I have published over 100 major writings, many of which appeared in peer-reviewed publications and many of which focus on subjects relevant to this Declaration. My writings are 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.

7. My first publication after joining the Texas Law faculty, an analysis of the restitutionary basis for fee awards in class actions, appeared in 1991. Charles Silver, A Restitutionary Theory of Attorneys' Fees in Class Actions, 76 Cornell L. Rev. 656 (1991). My most recent publication in the field, an empirical study of fee awards in securities fraud class actions, appeared in the Columbia Law Review nearly twenty-five years later. 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 this article as one of the ten best in the field of corporate and securities law in 2016. The study of attorneys' fees has been a principal focus of my academic career.

8. I have testified as an expert on attorneys' fees many times. Judges have cited or relied upon my opinions when awarding fees many class actions, including In re Enron Corp. Securities, Derivative & "ERISA" Litig., 586 F. Supp. 2d 732 (S.D. Tex. 2008), In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 991 F. Supp. 2d 437 (E.D.N.Y. 2014), 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.

9. Finally, because awards of attorneys' fees may be thought to raise issues relating to

the professional responsibilities of attorneys, I note that I have an extensive background, publication record, and experience as an expert witness testifying on matters relating to this field. I also served as the Invited Academic Member of the Task Force on the Contingent Fee created by the Tort Trial and Insurance Practice Section of the American Bar Association. In 2009, the Tort Trial and Insurance Practice Section of the American Bar Association gave me the Robert B. McKay Award in recognition of my scholarship in the areas of tort and insurance law.

10. I have attached a copy of my resume as Exhibit 1 to this declaration.

III. DOCUMENTS REVIEWED

11. In preparing this report, I reviewed the items listed below which, unless noted otherwise, were generated in connection with this case. I may also have reviewed other items including, without limitation, cases, studies, and published scholarly works.

- Complaint
- Memorandum and Order (denying Raytheon's motion to dismiss)
- Plaintiffs' Memorandum in Support of Unopposed Motion for Preliminary Approval of Class Settlement
- Declaration of Gregory Y. Porter in Support of Preliminary Approval of Class Action Settlement (including Exhibits)
- Declaration of Douglas P. Needham in Support of Plaintiff's Motion for Preliminary Approval of Class Settlement (including Exhibits)
- Declaration of Mitchell I. Serota
- Settlement Agreement
- Order Granting Preliminary Approval of Settlement
- Settlement Notice
- Settlement Website, https://www.raytheonpensionsettlement.com/
- Final Order and Judgment (draft)
- Memorandum in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses and a Case Contribution Award (draft)
- Jacklyn Wille, *Raytheon Inks First Class Deal in Outdated Pension Data Lawsuits*, BLOOMBERG LAW NEWS, Feb. 16, 2021

- Christina Davis, *Raytheon Retirees Garner $59M Settlement Over Outdated Mortality Rates*, TOP CLASS ACTIONS, Feb. 17, 2021
- Plaintiffs' Memorandum in Support of Motion for an Award of Attorneys' Fees, Class Representative Awards and Expenses, *Kelly v. The Johns Hopkins University*, No. 1:16-cv-2835-GLR (D. Md. Nov. 8, 2019)
- Plaintiffs' Motion for Award of Attorneys' Fees and Costs, *Kravitz v. U.S. Dept. of Commerce*, No. 18-cv-1041 (D. Md. Aug. 15, 2019)
- *Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses*, *Chesemore, et al. v. Alliance Holdings, Inc., et al*., Civil Action No. 09-CV-00413-wmc, (W.D. Wisconsin, June 12, 2014)

IV. FACTS

12. The litigation-related facts upon which my conclusions rest are set out in the documents listed above. Note that, as of the date that I finalized this report, Class Counsel had not yet finalized their briefing papers supporting final approval of the settlement and their motion for approval of fees and expenses. Class counsel have informed me that their expenses, hours and lodestar have all increased since the filing of the Motion for Preliminary Approval. Accordingly, the requested fee will represent an even smaller percentage of the present value of the Settlement, and the lodestar multiplier will be even lower, than the numbers on which I based my analysis below. This only strengthens the conclusions set out in this report.

13. In brief, this class action is based on a novel and technical legal theory concerning ERISA's "actuarial equivalence" requirement that Class Counsel pioneered and developed. The litigation effort required extensive assistance from experts with actuarial training and skills. Even before the Defendants filed their motion to dismiss, which the Court denied, it was clear that the case would turn on expert testimony.

14. The technical nature of the lawsuit should obscure neither its importance for the retirees who participate in the pension program nor the risks that Class Counsel incurred. For retirees living on fixed incomes, even small increases in monthly payments are meaningful. But when litigation commenced, the prospects for prevailing were at best unclear. Only one court had

ruled on the question presented, and it had done so only to the point of denying a motion to dismiss. No recovery had been secured on the theory asserted in any prior case.

15. Opposing motions for summary judgment were pending when settlement negotiations bore fruit. Prior to that, the litigation focused on discovery, data analysis, expert preparation, and a *Daubert* challenge. If the proposed settlement is approved, the lawsuit will have lasted about two years. Many class actions have resolved after similar lifespans.

V. FRACTION OF CLASS MEMBERS' LOSSES RECOVERED

16. If approved, the proposed settlement will recoup 40 percent of class members' estimated losses, before deductions for attorneys' fees and expenses. In view of the novelty of this litigation and the correspondingly high risk of loss, I believe this is a reasonable result.

A. The Recovery Is A Sizeable Fraction Of Class Members' Estimated Losses

17. Although I have had the good fortune to be involved in many class actions with outstanding recoveries, I know that, across the mill run of cases, the percentage of lost dollars recovered is often low. Rigorous studies of the ratio of recoveries to losses are limited, however, because the amount of class members' damages is often unknown.

18. NERA Economic Consulting has developed a model for estimating losses in securities fraud class actions. In the most recent issue of its RECENT TRENDS series, it describes the measure as follows.

> NERA-defined Investor Losses is a proprietary variable used as a proxy to measure the aggregate loss to investors from the purchase of a defendant's stock using publicly available data. Investor Losses are calculated based on the loss assuming an investor had alternatively purchased stock that performed similar to the S&P 500 index during the class period. NERA has examined more than 1,000 settlements and found that this variable is the most powerful predictor of settlement amount.

Janeen McIntosh and Svetlana Starykh, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2020 FULL-YEAR REVIEW (NERA 2021). Applying this measure to securities class actions that settled between 1996 and 2019, NERA found that recovery percentages decline as losses mount.

For example, in cases "with Investor Losses more than $5 billion, the ratio [of dollars recovered to dollars lost] is less than 1%" but in cases with smaller losses it is higher. In this ERISA case, Class Counsel estimates that the present value of class members' damages is approximately $150 million. In a securities case with a comparable loss, NERA's model predicts a settlement of less than $7 million. Here, by contrast, the proposed settlement requires the Defendants to pay almost $60 million, many multiples of that amount.

19. In 2015, Brian Fitzpatrick and Robert Gilbert examined 15 class actions brought on behalf of consumers who were charged excessive overdraft fees by the banks with which they had accounts. Brian T. Fitzpatrick and Robert C. Gilbert, *An Empirical Look At Compensation In Consumer Class Actions*, 11 N.Y.U. J. L. & BUS. 767 (2015). For the 13 cases with sufficient information to perform the calculation, they found that the settlements "recovered between 9% and 65% of the damages, with the variation based largely on the strength of the class's claims and the likelihood of winning certification of the class." In almost half of the cases the authors studied, the recovery to loss ratio was approximately 40 percent—the same fraction that the settlement proposed in this case will recoup.

20. Because the antitrust laws make treble damages available, one would expect to find higher ratios of recoveries to estimated losses in such cases. In fact, there are class actions in which U.S. purchasers recovered more than the overcharges they incurred, but recoveries below estimated overcharges were more common by far. Studying 71 cartel cases, two researchers found that victims recovered less than their estimated overcharges in 57 of them. In four cases, the victims recovered less than 1 percent of their damages, and in 12 they won less than 10 percent. Across all cases, the median recovery to overcharge ratio was 37 percent, similar to the recoupment ratio here. John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 IOWA L. REV. 1997 (2015).

21. Anecdotal reports indicate that recoveries below 40 percent of estimated losses are common in class actions of all types. The following passage, which appears in a brief filed in support of a proposed $2.67 billion antitrust settlement, is suggestive.

> A recovery of $2.67 billion represents 7.3% to 14.3% of th[e] estimated maximum full recovery, which falls within the range of reasonable recoveries. *Bennett v. Behring Corp*., 737 F.2d 982, 986-87 & n.9 (11th Cir. 1984) (approving $675,000 settlement representing 5.6% of claims with maximum potential recovery of $12,000,000); *In re Checking Account Overdraft Litig*., 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) ("[S]tanding alone, nine percent or higher constitutes a fair settlement even absent the risks associated with prosecuting these claims."); *Nichols v. SmithKline Beecham Corp*., No. CIV.A.00-6222, 2005 WL 950616, at *16 (E.D. Pa. Apr. 22, 2005) ("The Settlement Fund is $65 million, or between 9.3% and 13.9% of damages. This percentage is consistent with those approved in other complex class action cases."); *Lazy Oil Co. v. Wotco [sic] Corp*., 95 F. Supp. 2d 290, 318-19 (W.D. Pa. 1997) (approving settlement award representing 5.35% of expected recovery). . . . *In re Pool Prod. Distrib. Mkt. Antitrust Litig*., No. MDL 2328, 2015 WL 4528880, at *14 (E.D. La. July 27, 2015) (finding recovery of 8.5% of best case damages scenario appropriate, especially as weighed against "substantial risks of nonrecovery").

Subscriber Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Proposed Class Settlement, Doc. 2610-1, *In Re Blue Cross Blue Shield Antitrust Litigation MDL 2406*, Master File 2:13-cv-20000-RDP (N.D. Alabama), filed Oct. 30, 2020.

B. The Risk Of Losing Was Significant

22. The studies and anecdotes discussed in the preceding section show that a settlement recovering 40 percent of class members' estimated losses is an excellent result that falls well within the Court's discretion to approve. This conclusion is strengthened when one recalls that the legal theory supporting this ERISA case is novel. As Class Counsel reports, "Plaintiff's legal theory is both cutting-edge and complex. It has not been litigated through trial in any case and there are no appellate decisions on point. Only one case has proceeded through summary judgment." *Plaintiff's Memorandum In Support Of Unopposed Motion For Preliminary Approval Of Class Settlement*, p. 12. They later add that "[w]hen Plaintiff filed the case, in 2019, no cases had held that Plans were required to update the actuarial assumptions used to calculate benefits once those assumptions

ceased to be reasonable." *Id*., p. 24. By way of comparison, one should consider that securities law is extremely well developed. Every nuance has been litigated repeatedly. Yet, in securities fraud class actions, recoveries equal to 40 percent of investors' estimated losses are rare. Class Counsel have done a great job for Raytheon's retirees.

23. The risk of losing is made concrete when one considers how other cases brought on the same legal theory have fared. An article published in Bloomberg Law News begins by noting that this case "is the first class settlement in the recent series of lawsuits challenging the actuarial and interest rate assumptions employers use to calculate certain optional pension formats." It then observes that "[r]ulings in these cases have been mixed. UPS and AT&T won dismissal of the cases against them, while judges have allowed suits to move forward against Huntington Ingalls Industries Inc., U.S. Bancorp, Rockwell Automation Inc., and Partners Healthcare System Inc. Cases against Anheuser-Busch Cos. and PepsiCo were voluntarily dismissed after early rulings, and a case against American Airlines Inc. was resolved by individual settlement." Jacklyn Wille, *Raytheon Inks First Class Deal in Outdated Pension Data Lawsuits*, BLOOMBERG LAW NEWS, Feb. 16, 2021. Plainly, there was no guarantee that the plaintiff class would prevail in this litigation.

24. It also bears mentioning that no governmental investigation or prosecution preceded or accompanied this litigation. Governmental proceedings can reduce risks by signaling that serious wrongdoing occurred and easing the burden on lawyers for private parties. Because no such proceedings occurred in conjunction with this litigation, Class Counsel enjoyed neither advantage.

VI. BACKGROUND ANALYSIS: SETTING COMMON FUND FEES ACCORDING TO MARKET RATES MAXIMIZES CLASS MEMBERS' EXPECTED RECOVERIES

25. Throughout my academic career, I have urged courts to base fee awards from common funds on rates prevailing in the private market for legal services. Although the view was not widely shared when I first expressed it, it is now. It is not unusual for courts to want to know what market rates are and to give them weight when deciding how much to award lawyers whose

efforts create common funds, even when they are not legally bound to do so. In this report, I will show that Plaintiffs' Counsel's request for a fee equal to 14.5 percent of the monetary recovery falls well below the range of percentages that prevails in the private market, which typically runs from 25 percent to 40 percent.

A. Fee-Setting Is A Positive-Sum Interaction

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

27. 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.

28. 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.

29. Courts 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 (Jan. 15, 2002) (emphasis added). The Seventh Circuit made a similar point in *In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001). It rejected the so-called "mega-fund rule," according to which fees must be capped at low percentages when recoveries are very large, noting that "[p]rivate parties would never contract for such an arrangement" because it would encourage cheap settlements. *Id.* at 718. When fees are capped at low levels, lawyers' incentives are weakened and their interest in holding out for higher dollars, which are harder to recover and require lawyers to bear greater risks, may disappear. Private clients want lawyers to maximize the value of their claims, not to settle them cheaply.

B. Courts Should Mimic The Market When Awarding Fees

30. In the market for legal services, claimants negotiate fees when litigation starts, not when it ends. Upfront, in contingent fee cases, they see the risks that lie ahead and the virtue of paying fees that encourage lawyers to 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 Mktg. Litig., 264 F.3d at 724.

31. Unfortunately, courts typically set fee terms when class actions end, not when they start. Consequently, the hindsight bias may cause them to set fees too low, which can only harm class members in the long run by weakening lawyers' incentives. To guard against this, I believe that courts should try to determine the percentage that class members would have agreed to pay had they bargained directly with their lawyers when litigation was about to commence.

C. Quality Of Plaintiffs' Counsel Is A Critical Factor When The Market Sets Fees

32. When considering how much lawyers should be paid, it is important to remember a

basic market reality: the quality of counsel matters greatly. Lawyers' charges vary with experience, rank, and accomplishment. For example, it is well known that a select group of attorneys with outstanding reputations command exceedingly high rates, often more than $1,500 per hour. Because excellent lawyers represent the class in this case, they merit payment at rates like those other outstanding lawyers charge.

33. Izard, Kindall & Raabe (IRK) focuses its practice on class litigation under ERISA and the securities laws. Many courts have taken note of the firm's prominence and experience. See, e.g., *In re Tyco International, Ltd. Sec. Litig*., Case No. 02 1335, slip op. at 2 (D.N.H. Dec. 18, 2002) (stating that IKR has "extensive experience in both leading class actions and prosecuting ERISA claims."); *In re Cardinal Health, Inc. ERISA Litig*., 225 F.R.D.552, 555-556 (S.D. Ohio Jan. 14, 2005) (observing that IKR has "extensive experience in ERISA litigation"); and *Berry v. Wells Fargo,* Slip. Op., No. 3:17-cv-00304, Dkt. No. 175, at 25 (D.S.C. July 29, 2020) (commenting that IKR and its co-counsel "displayed extraordinary skill and determination throughout this litigation which fully supports their well-known reputation and clear ability to handle a case of this magnitude"). The recoveries IRK has won for class members reflect the firm's ability: $107 million in *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (D. Conn.); $100 million in *In re AOL Time Warner, Inc. Sec. and ERISA Litig*., No. 02-CV-1500 (S.D.N.Y.); $79 million in *Berry v. Wells Fargo,* No. 3:17-cv-00304 (D.S.C.), $49.5 million in *In re Merck & Co., Inc. Securities, Derivative & ERISA Litig.*, No. 05-2369, (D.N.J.); and $70.5 million in *In re Tyco International, Ltd., Securities Liti*g., No. 02-1335-B, (D. N.H.). No less important, the firm has often recovered substantial fractions of class members' losses: 85 percent of the estimated damages in *Griffin v. Flagstar Bancorp, Inc*., No. 2:10-CV-10610 (E.D. Mich.); and 76 percent of the amount by which a retirement program was underfunded in *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707, at *10 (D. Conn. Nov. 3, 2016).

34. Lawyers at Bailey & Glasser have represented corporate clients and government

entities in many large cases. In *Bank of America, NA v. FDIC-Receiver*, "[t]he firm was retained to represent the FDIC in its capacity as receiver of Colonial Bank. The case was resolved favorably to the FDIC as part of a multi-case, multi-agency settlement for $16.65 billion, the largest single-company settlement in U.S. history." Select Matters, Bailey & Glasser LLP website, http://www.baileyglasser.com/cases/first (visited June 19, 2015). Bailey & Glasser has also won large settlements for plaintiff classes. The firm recently negotiated a $143 million dollar settlement in a class action arising out of a natural gas over-pressurization event that harmed residents in several towns in Massachusetts. Bailey & Glasser is one of the few law firms in the country that maintains both a robust corporate and commercial litigation practice and a thriving practice in class actions and mass torts. Bailey Glasser ERISA's practice litigates complex class actions involving employee stock ownership plans, 401(k) plans, and defined benefit plans. Bailey Glasser ERISA lawyers have achieved groundbreaking appellate victories, including *Intel v. Sulyma*. 140 S. Ct. 768 (2020) (9-0 decision for plaintiff setting precedent on ERISA's statute of limitations); *Stegemann v. Gannet Co., Inc*, 970 F.3d 465 (4th Cir. 2020) (reversing dismissal and setting pleading standards for fiduciary breaches); *Brundle v. Wilmington Trust, N.A.*, 919 F.3d 763 (4th Cir. 2019) (affirming trial judgment for plaintiffs in the amount of $29.7 million and setting important fiduciary standards for ESOP trustees); *Allen v. GreatBanc*, 835 F.3d 670 (7th Cir. 2016) (reversing dismissal and setting pleading standards for ERISA prohibited transactions). Bailey Glasser lawyers have recovered hundreds of millions of dollars for plan participants and employees over the past several years. *Bekker v. Neuberger Berman Plan Inv. Comm*., No. 16-6123, --- F.Supp.3d ---, 2020 WL 7043869 (S.D.N.Y Dec. 1, 2020) ($17 million settlement); *Choate v. Wilmington Trust, N.A.*, 17-250 (D. Del.) ($19.5 million settlement); *Casey v. Reliance Trust Co.*, 18-424 (E.D. Tex.) ($6.25 million settlement); *Cryer v. Franklin Resources, Inc*., No. 16-4265 (N.D. Cal.) ($26.9 million settlement); *Nistra v. Reliance Trust Co.*, 16-cv-4773 (N.D. Ill.) ($13.3 million settlement); *Swain v. Wilmington Trust, N.A.*, 17-71 ($5 million settlement); *Brundle v. Wilmington Trust Ret. & Int'l Servs. Co.,* 241 F. Supp. 3d 610 (E.D. Va. 2017) ($29.7 million trial judgment); *Jessop v. Larsen*, 14-916 (D. Utah) ($19.8 million settlement); *Diebold v. Northern Trust*, No. 09-1934 (N.D. Ill.) ($34 million settlement); *Anderson v. Principal Life Ins. Co.*, No.

15-0119 (S.D. Iowa) ($3 million settlement); *Glass Dimensions, Inc. v. State Street Bank & Trust Co.*, No. 10-10588 (D. Mass.) ($10 million settlement). Except as noted, all these were cash settlements where class members had the option of receiving their funds in a tax-deferred retirement vehicle.

35. The Raytheon retirees are fortunate to have been represented by lawyers of this caliber, as the outcome of this contested, technical, and path-breaking lawsuit suggests.

VII. IN CONTINGENT FEE LITIGATION, PERCENTAGE-BASED COMPENSATION ARRANGEMENTS PREDOMINATE

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. This is not surprising in light of the recognition that "market rates, where available, are the ideal proxy for [class action lawyers'] compensation." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000). It is hard to do better than "ideal."

37. Having established that market rates are "ideal" proxies, it remains to consider how the market compensates plaintiffs' attorneys. In this section and the next, I explain what I know about this issue.

38. 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.

39. 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.

40. The finding just described 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; that case is more than 100 years old and was decided before the common fund doctrine was well established. Even wealthy named plaintiffs like prescription drug wholesalers and public pension funds that, in theory, might have paid lawyers by the hour 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.

41. The market also appears to favor 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 also 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).

Decl. of John C. Coffee, Jr. ¶ 22, *In re High Fructose Corn Syrup Antitrust Litig.*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004), ECF No. 1421. My experience is similar to Professor Coffee's. I know of no instance in which a large corporation used a scale of declining percentages when hiring a lawyer or firm to represent only itself.

42. 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. This is so because 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, increasing the sunk costs and the financial risk of a loss.

Flat percentages or percentages that increase with the recovery encourage plaintiffs' attorneys to shoulder the costs and attendant financial risk that come with turning down inadequate settlements.

VIII. CLIENTS NORMALLY PAY CONTINGENT FEES IN THE RANGE OF 25 TO 40 PERCENT, WITH FEES OF 33 PERCENT OR MORE PROMISED IN MOST CASES

43. 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.

44. Before doing so, I wish to note that there is broad agreement that a fee of 32 percent is at the lower end of the range prevailing in most types of plaintiff representations. *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").

45. Many courts have also observed that attorneys regularly contract for contingent fees between 30 percent and 40 percent in 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).

46. The point of surveying the evidence, then, is not to establish something new. It is to show that what everyone already knows is correct. In cases of diverse types, the market rate for contingent fee lawyers generally ranges from 25 to 40 percent of clients' recoveries, with 33 percent or more being promised in most cases.

A. Large Commercial Lawsuits

47. We do not know as much about fees paid in large commercial lawsuits as we might.[1] 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.[2] That said, the evidence available on the use of contingent fees by sophisticated clients shows that marginal percentages tend to be high.

1. Sophisticated Named Plaintiffs in Class Actions

48. Sophisticated business clients commonly agree to pay fees of 33 percent or greater when serving as lead plaintiffs in class actions. Here are a few examples.

- In *San Allen, Inc. v. Buehrer*, No. 07-cv-644950 (Ohio Com.Pl.), 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 Litig.*, No. 3:07-md-1894 (AWT) (D. Conn.), 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.

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[1] I have studied the costs insurance companies incur when *defending* liability suits. *See* Bernard Black, David A. Hyman, Charles Silver & 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.

[2] Businesses sometimes use hybrid arrangements that combine guaranteed payments with contingent bonuses. In a recent case against Bank of America, for example, a group of bankruptcy creditors with about $58 million at stake agreed to pay a law firm $1 million upfront and 5 percent of the net recovery. Petra Pasternak, *It's BIG, You're in Charge! Firm Picked for Pending Case Against BofA, Citi*, CORP. COUNS. (April 9, 2010), https://www.law.com/corpcounsel/almID/1202447747478&Heller_Creditors_Pick_McGrane_Firm_for_Big_Suit/?slreturn=20200720105106. Hybrid arrangements hold few lessons for class actions, however, because lawyers representing plaintiff classes must work on straight contingency.

- In *In re Int'l Textile Grp. Merger Litig.*, No. 2009-CP-23-3346 (S.C. Com.Pl., Greenville County), 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.)

2. Patent Cases

49. Consider also patent infringement representations, another situation in which contingency arrangements are frequently employed by sophisticated business clients. There are many anecdotal reports of high percentages in this area. 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*, Wash. Post, Mar. 18, 2006, at D03.

50. 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.[3]

51. Clearly, in the segment of the market where sophisticated business clients hire lawyers to litigate patent cases on contingency, successful lawyers earn enormous 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.

3. Other Large Commercial Cases

52. 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*, Wash. 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-

[3] 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 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/.

1e918d030144/. After many years of litigation, a series of settlements and a $1 billion judgment against a remaining defendant yielded a gross 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 J. of the Inst. for the Study of Legal Ethics, 243, 245 (1999). 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 could possibly be made.

53. 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 five 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, 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 from which NCUA had paid $1,214,634,208 in fees.[4]

54. 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

[4] The following documents provide information about NCUA's fee arrangement and the recoveries obtained in the litigations: National Credit Union Administration, *Legal Services Agreement* (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 (last modified Feb. 13, 2019); Office of the Inspector General, National Credit Union Administration, *Letter to the Hon. Darrell E. Issa* (Feb. 6, 2013), https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20130206IssaResponse.pdf.

objective was to recover as much of that amount as possible. It also knew that dozens 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.

55. In *In re Merry-Go-Round Enters., 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.

56. Based on what lawyers who write about fee arrangements in business cases have said, contingent percentages 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 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).

57. 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 25 to 40 percent, with fees of 33 percent or more being promised in most cases.

4. Personal Injury Cases[5]

58. Typically, most personal injury cases also involve contingent fee agreements ranging from 25 to 40 percent, with cases entailing greater risks or requiring larger investments providing fees of 33 percent or more.[6] The percentage is higher still in medical malpractice cases, which are

[5] On fees in personal injury cases, *see* Deborah R. Hensler *et al*., *Compensation for Accidental Injuries in the United States*, Rand, 135-36 & Table 5.11 (1991), http://www.rand.org/pubs/reports/2006/R3999.pdf (reporting that randomly selected accident victims who hired attorneys on contingency paid median fees of 33 percent and mean fees of 29 percent); Herbert M. Kritzer, *Investing in Contingency Fee Cases*, Wis. Law. 11-12 (1997) (reporting that in a sample of 989 plaintiff representations in Wisconsin, slightly more than half of the claimants agreed to pay a one-third contingent fee); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. Rev. 805, 846 (2011) (reporting that "every one of the twelve [high volume plaintiffs' firms she] studied charge[d] a tiered contingency fee," with most charging "at least 33%--and perhaps as high as 40%").

[6] On fees in mass tort cases, *see* James S. Kakalik, *et al*., Costs of Asbestos Litigation, Rand, Table S.2 (1983) (finding that asbestos claimants whose cases closed before August, 1982, paid legal fees and other litigation expenses equal to about 42 percent of their recoveries); James S. Kakalik *et al*., Variation in Asbestos Litigation Compensation and Expenses, Rand, xviii Fig. S.1 (1984) (finding that asbestos claimants paid legal fees and expenses equal to 39 percent of their recoveries). For anecdotal reports of fees in mass tort cases, *see In re A.H. Robins Co.*, 182 B.R. 128, 131 (E.D. Va. 1995) (reporting that thousands of women injured by the Dalkon Shield signed contingent fee arrangements providing for fees between one-quarter and one-half of the recovery, with most charging one-third); Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. Times (Nov. 19, 2010), http://www.nytimes.com/2010/11/20/nyregion/20zero.html (reporting that thousands of rescue and clean-up workers who were harmed as a result of the terrorist attacks on September 11, 2001, entered into fee agreements paying one-third of their recoveries); Martha Neil, *Frustration Over Uncontained Gulf Oil Spill – and Tort Claim Contingency Fees of Up to 50 Percent*, *ABA JOURNAL* (May 24, 2010), http://www.abajournal.com/news/article/frustration_over_uncontained_gulf_oil_spill--and_tort_legal_fees_of_up_to_5/ (reporting that thousands of clients with claims against BP arising out of the Deepwater Horizon catastrophe promised to pay contingent fees in the range of 40 percent to 50 percent).

exceptionally risky and costly.[7] Lower rates prevail in commercial airplane crash cases, where liability is usually conceded and the risk and investment borne by counsel is therefore minimized.[8]

IX. FEE AWARDS IN COMPARABLE CASES

59. In my experience, courts want to know how other courts have handled fees in similar cases. Being familiar with empirical studies of fee awards, I can confidently report that Plaintiffs' Counsel's request for a fee equal to 14.5 percent of the monetary recovery falls well below the range that courts typically award.

A. ERISA Cases

60. Judges have awarded fees in excess of 14.5 percent in many ERISA class actions. The table below presents a small sample of cases with fees equal to one-third of the recovery.

[7] On factors affecting the size of contingent fees charged in medical malpractice cases, *see* ABA/TIPS Task Force on Contingent Fees, *Report on Contingent Fees In Medical Malpractice Litigation* (Sept. 20, 2004), http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf.

[8] *See id.*, at 27. *See also* ABA Formal Opinion 94-389, n. 13 (1994) (reporting that "[i]n cases where airline insurers voluntarily . . . [made] an early settlement offer and concede[d] all legal liability, average contingent fee rates dropped to 17% and were often only charged on a portion of the recovery") (citing L. Kriendler, *The Letter: It Shouldn't be Sent*, 12 The Brief 4, 38 (Nov. 1982)).

TABLE 1. ERISA CLASS ACTIONS WITH FEE AWARDS EQUAL TO ONE-THIRD OF THE RECOVERY	
CASE	**FEE %**
Cassell v. Vanderbilt Univ., No. 16-2086, Doc. 174 (M.D. Tenn. Oct. 22, 2019)	33.33
Tussey v. ABB, Inc., No. 06-4305-NKL, Doc. 870 (W.D. Mo. August 16, 2019)	33.33
Sims v. BB&T Corp., No. 15-1705, 2019 WL 1993519 (M.D. N.C. May 6, 2019)	33.33
Clark v. Duke, No. 16-1044, 2019 WL 2579201 (M.D. N.C. June 24, 2019)	33.33
Ramsey v. Philips N.A., No. 18-1099, Doc. 27 (S.D. Ill. Oct. 15, 2018)	33.33
In re Northrop Grumman Corp. ERISA Litig., No. 06-6213, 2017 WL 9614818 (C.D. Cal. Oct. 24, 2017)	33.33
Gordan v. Mass. Mut. Life Ins. Co., No. 13-30184, 2016 WL 11272044 (D. Mass. Nov. 3, 2016)	33.33
Kruger v. Novant Health, Inc., No. 14-208, 2016 WL 6769066 (M.D.N.C. Sept. 29, 2016)	33.33
Spano v. Boeing Co., No. 06-743, 2016 WL 3791123 (S.D. Ill. Mar. 31, 2016)	33.33
Abbott v Lockheed Martin Corp., No. 06-701, 2015 WL 4398475 (S.D. Ill. July 17, 2015)	33.33
Krueger v. Ameriprise Fin., Inc., No. 11-2781, 2015 WL 4246879 (D. Minn. July 13, 2015)	33.33
Beesley v. Int'l Paper Co., No. 06-703, 2014 WL 375432 (S.D. Ill. Jan. 31, 2014)	33.33
Nolte v. Cigna Corp., No. 07-2046, 2013 WL 12242015 (C.D. Ill. Oct. 15, 2013)	33.33
George v. Kraft Foods Global, Inc., Nos. 08-3899, 07-1713, 2012 WL 13089487 (N.D. Ill. June 26, 2012)	33.33
Will v. Gen. Dynamics Corp., No. 06-698, 2010 WL 4818174 (S.D. Ill. Nov. 22, 2010)	33.33
Martin v. Caterpillar Inc., No. 07-1009, 2010 WL 11614985 (C.D. Ill. Sept. 10, 2010)	33.33

61. Although their datasets tend to contain few ERISA cases, empirical studies of class actions also support the conclusion that fee awards in excess of the one sought here are common. The table below is reproduced from a study of class actions that settled from 2009 to 2013. As the highlighted line shows, the mean and median awards were both 26 percent of the recovery.

TABLE 4. FEE AND CLASS RECOVERIES, BY CASE CATEGORY, 2009–2013

		Recoveries		*Fees*		*Fee Percentages*	
Case Category	*N*	*Mean (millions of dollars)*	*Median (millions of dollars)*	*Mean (millions of dollars)*	*Median (millions of dollars)*	*Mean (%)*	*Median (%)*
Antitrust	19	501.09	37.3	64.1	10.25	27	30
Civil Rights	21	6.51	3	1.66	0.91	28	30
Consumer	52	18.8	8.75	4.81	2.21	26	25
Corporate	9	19.47	16	5.01	2.2	27	29
Derivative	6	18.68	2.88	5.61	0.77	29	31
Employment	25	5.6	0.67	1.63	0.17	28	30
ERISA	22	25.75	6.6	4.92	1.75	26	26
FCRA	4	1.34	1.41	0.34	0.36	29	29
FDCPA	2	0.41	0.41	0.1	0.1	26	26
FLSA	108	4.15	1.03	1.19	0.3	30	33
Health Care	5	72.08	4	14.64	1.21	28	30
Labor	23	9.44	1	2.17	0.33	29	30
Mass Tort	13	23.34	4.2	5.5	1.11	27	28
Other	60	13.27	4.14	3.11	1.04	25	25
Products Liability	10	24.99	16.2	7.47	4.56	28	30
Securities	74	106.45	22.25	18.75	5.16	23	25
TILA	2	168.4	168.4	25.75	25.75	23	23
Unknown	3	0.86	1	0.22	0.18	27	30

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

62. The table below is from an exhaustive study of federal class actions that settled 2006-2007. It reports similar mean and median fee percentages for ERISA cases.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

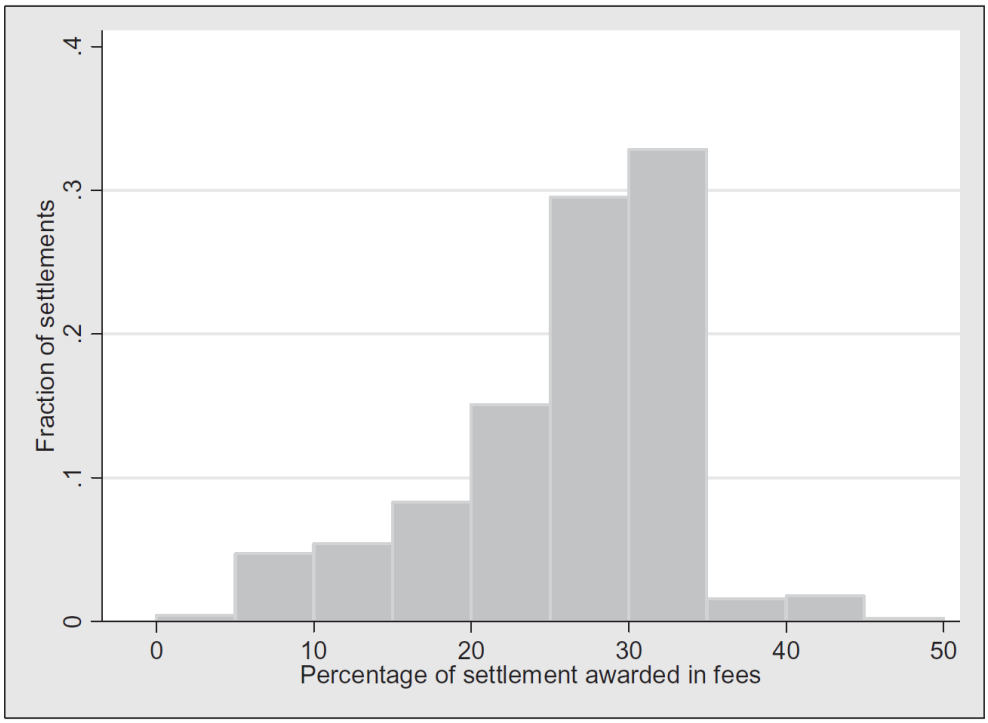
	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

Source: Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 820 (2010).

63. The preceding figures also show that, in percentage terms, fee awards in ERISA cases are on par with those made in class actions of other types. Taking this as true, one can infer that awards equal to 15 percent or less are exceedingly uncommon. The figure below shows that distribution of awards by size of fee percentage Professor Brian Fitzpatrick's study of federal class actions. As is visually apparent, the awards cluster in the 25 percent to 35 percent range. Cases

with awards of 15 percent are less are uncommon. Because fee percentages are often smaller in cases with enormous recoveries, mega-fund settlements likely dominate this group.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.

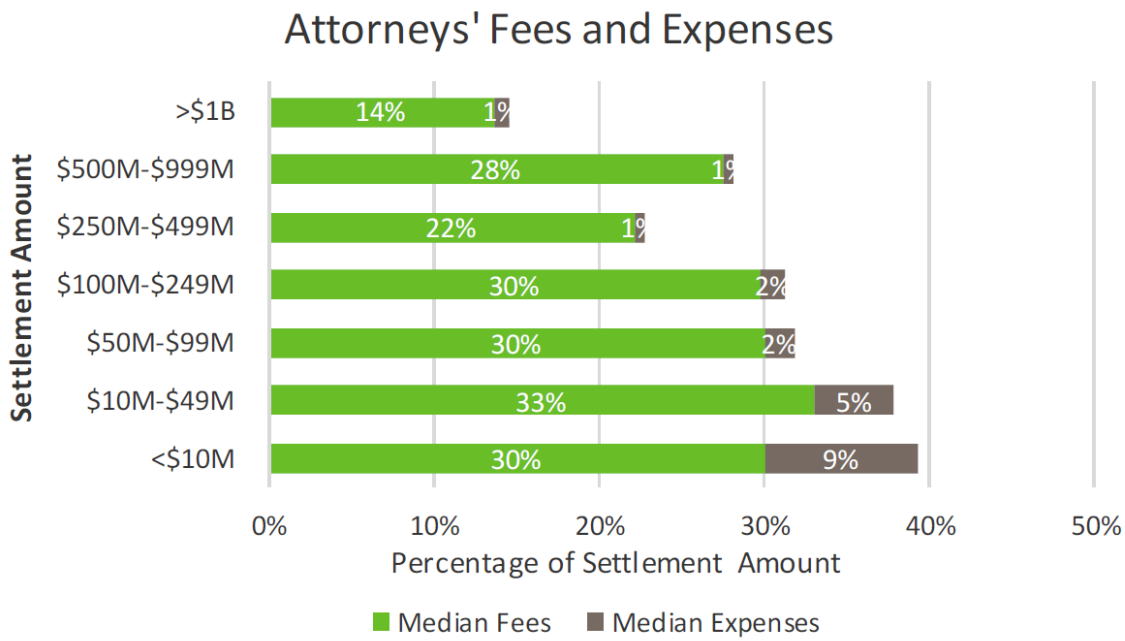


Source: Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 820 (2010).

B. Cases With Comparable Recoveries

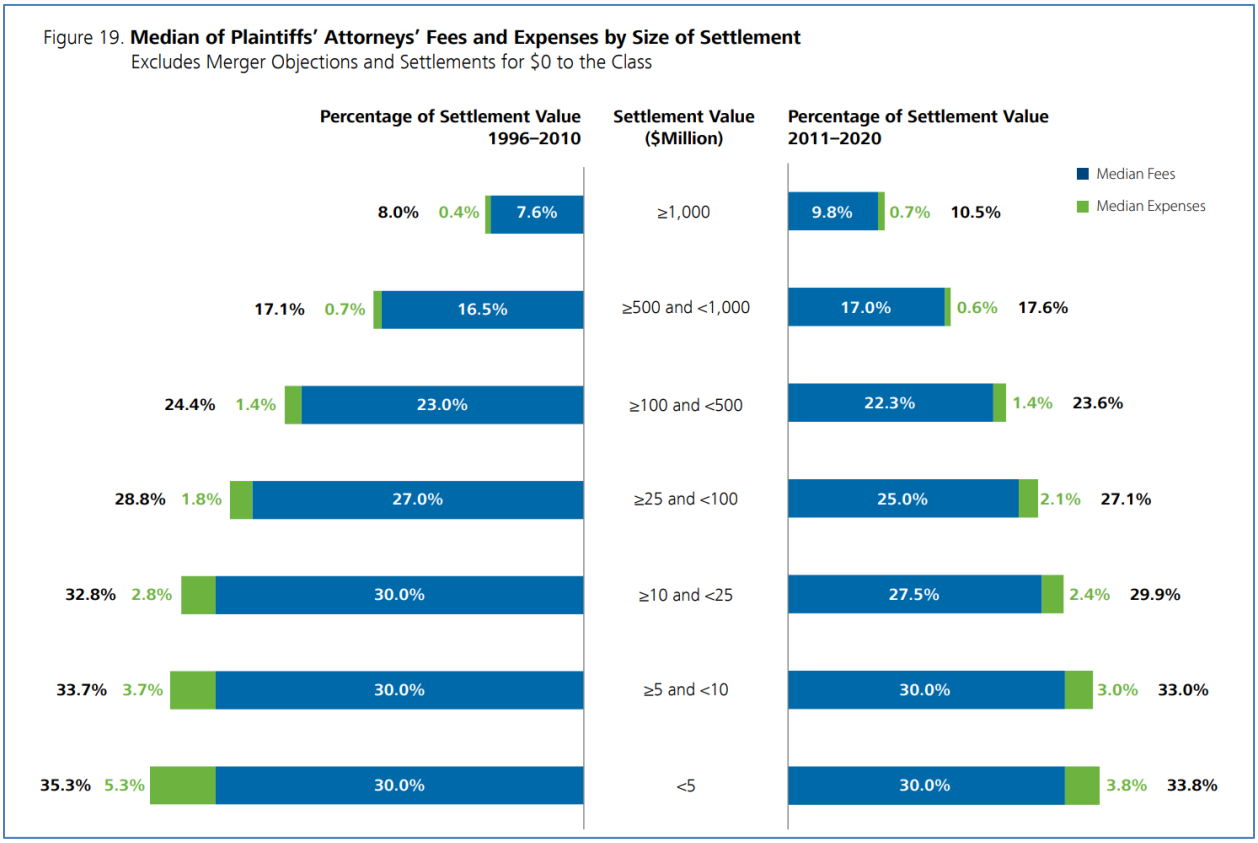
64. When one switches from subject matter to recovery size, the datasets become larger and the finding that awards rarely fall at or below 15 percent becomes more robust. The figure below, which reports results for antitrust class actions, comes from the 2018 ANTITRUST ANNUAL REPORT. Only when recoveries exceed $1 billion does the median fee award become comparable to the percentage sought here. (This is the scaling effect mentioned above.) At all lower recovery levels, median awards are considerably higher.

Figure 12: **Attorneys' Fees and Expenses**
2013 - 2018



Source: 2018 ANTITRUST ANNUAL REPORT, p.13, Fig. 12.

65. The same pattern of fee percentages is found in securities class actions. The figure below appears in the 2020 edition of an annual report on class actions of this type produced by NERA Economic Consulting. The scaling effect is evident again, but for present purposes the relevant datum is that, for class actions with recoveries ranging from 25 million to $100 million, the median fee award was 25 percent during the 2011-2020 period.



Source: Janeen McIntosh and Svetlana Starykh, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2020 FULL-YEAR REVIEW (NERA 2021).

66. I do not know of a study of ERISA cases that breaks down fee awards by size of recovery. But it seems likely that such a study would replicate the findings reported above. No study has found that judicial practices vary much from the patterns displayed above.

X. LODESTAR CROSS-CHECK

67. When awarding fees as a percentage of the settlement, courts often gauge their reasonableness by performing a lodestar cross-check. 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.

68. Before discussing numbers, I wish to note three 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. I see no point in doing either.

69. Second, lodestar cross-checks weaken the connection between fees and recoveries, the connection that motivates class counsel to do the best job possible for absent plaintiffs. The desire to preserve this connection explains why claimants never use the lodestar multiplier when hiring lawyers directly. They always base fees on percentages of their recoveries, and the percentages nearly always fall within the range extending from 30 percent to 45 percent. Because real plaintiffs never use the lodestar method, I see no reason for courts to employ it either.

70. Third, the market-based approach that I endorse *is* a cross-check on the reasonableness of Class 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.

71. In keeping with the points just made, the First Circuit and district courts sitting therein have long recognized the "distinct advantages" of the percentage of fund approach in determining a reasonable fee award in a common fund case. *In re Thirteen Appeals*, 56 F.3d 295, 307 (1st Cir. 1995). *See also Bacchi v. Massachusetts Mut. Life Ins. Co.*, 2017 WL 5177610, at *4 (D. Mass. 2017). The percentage approach "is less burdensome to administer, it reduces the possibility of collateral disputes, it enhances efficiency throughout the litigation, it is less taxing on judicial resources, and it better approximates the workings of the marketplace." *In re Lupron*, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005) (citing *In Re Thirteen Appeals*, 56 F. 3d at 307).

72. Turning to the lodestar cross-check itself, Class Counsel reports that as of the date the motion for preliminary approval was filed, its lodestar basis was $1.4 million and that dividing the requested fee by this number yields a multiplier of 6.1. Both figures are reasonable.

A. Hourly Rates

73. The lodestar basis reflects the multiplication of Class Counsel's billing rates by the number of hours expended. Both quantities are described in declarations submitted in support of the settlement. See *Declaration Of Gregory Y. Porter In Support Of Preliminary Approval Of Class Action Settlement*, p. 3 (reporting rates for timekeepers at Bailey & Glasser LLP); and *Declaration of Douglas P. Needham In Support Of Plaintiff's Motion For Preliminary Approval Of Class Settlement*, p. 12 (reporting rates for timekeepers at Izard, Kindall & Raabe).

74. The rates for the timekeepers at Izard, Kindall & Raabe fall within a range extending from $925 for one partner to a low of $180 for a paralegal. The blended hourly rate for the firm's contribution is $720. For the lawyers at Bailey & Glasser, the requested hourly rates run from a high of $900 for one partner to a low of $265 for a paralegal. The blended hourly rate for all timekeepers is $645.

75. When considering the reasonableness of these rates, there are several sources one can consult. There are many sources of information that may help assess the reasonableness of the blended hourly rate. For example, one can study the fee applications that lawyers submit in bankruptcy proceedings. Using this approach, one learns that many lawyers are compensated at rates far higher than those of Class Counsel. F

76. In the Sears bankruptcy proceeding, the fee application submitted in 2019 by Weil, Gotshal & Manges LLP, the debtors' attorneys, includes dozens of lawyers whose hourly charges exceed $1,000, with nine lawyers charging $1,500 per hour or more. Unlike Class Counsel, these lawyers did not work on contingency and did not advance costs. Even so, the bankruptcy judge approved the fee request in full. *See Summ. Sheet for Second Appl., In re Sears Holdings Corp.*, No. 18-23538-rdd (Bankr. S.D.N.Y Aug. 15, 2019), ECF No. 4860.

77. Even higher hourly rates were sought in the Toys R' Us bankruptcy, in which

Kirkland & Ellis LLP served as debtors' counsel. There, in the fee application filed in 2019, 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. *See Summ. Cover Sheet to the Final Fee Appl. of Kirkland & Ellis, In re Toys "R" Us, Inc.*, No. 17-34665 (Bankr. E.D. Va. Mar. 18, 2019), ECF No. 6729.

78. The rates sought by the law firm of Davis Polk & Wardwell LLP in the ongoing Purdue Pharm bankruptcy proceeding provide a third 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. *See Decl. of Marshall S. Huebner in Support of the Appl. of Debtors for Entry of an Order Authorizing the Debtors to Employ and Retain Davis Polk & Wardwell LLP as Att'ys for the Debtors* at 10, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. Nov. 5, 2019), ECF No. 419-1.

79. As a last example, in the ongoing PG&E Bankruptcy proceedings, PG&E was charged $1,640 per hour for litigation attorneys with over 30 years of experience, $1,535–1,640 for some 20–29 year attorneys, $1,190 for a 16-year attorney, $915 for a 3-year litigation associate, and up to $455 per hour for paralegal work. *See Summ. Sheet to Third Interim Appl. of Simpson Thacher & Bartlett LLP for Allowance and Payment of Compensation and Reimbursement of Expenses for the Period of Sept. 1, 2019 through Dec. 31, 2019, In re PG&E Corp.*, No. 19-30088 (N.D. Cal. Bankr. Mar. 16, 2020), ECF No. 6331

80. Looking at bankruptcy cases more broadly, a survey published in 2016 of almost 3,000 fee requests found that, "[i]n major markets, bankruptcy partners make $1,000 an hour or more." Katelyn Polantz, *In Bankruptcy, Flat is Fine; Median Rates at Large Firms Ran $595 Per Hour*, The Nat'l Law J., May 16, 2016.

81. One can also examine opinions containing lodestar cross-checks to learn what hourly rates courts find reasonable. For example, when presiding over *Pantelyat v. Bank of Am., N.A.*, No. 16-cv-8964 (AJN), 2019 WL 402854 (S.D.N.Y. Jan. 31, 2019), which settled for $22 million, Judge Alison J. Nathan of the Southern District of New York approved a 25 percent fee based on a blended hourly rate of $695. This is similar to the blended rate requested here.

82. As explained, Class Counsel are excellent lawyers who should be paid at rates comparable to those charged by other lawyers in the top tier. Having considered a variety of sources, it is my opinion that the rates upon which Class Counsel's lodestar is based are both reasonable and in line with rates in other cases that judges have approved.

B. Multiplier

83. As Class Counsel reports, many judges have approved multipliers similar to the one sought here. Rather than rely on simple comparisons, however, I think it better to make the general point that, when performing lodestar cross-checks, judges do not rely on rigid formulas. They award multipliers that, in their informed assessments, lawyers deserve in light of relevant considerations, such as the quality of the effort put forward, the dispatch with which counsel conducted the litigation, the risk incurred, and the results obtained.

84. It is also important to remember that some federal circuits and district courts have adopted, formally or informally, 25 percent of the recovery as the benchmark fee. In these courts, lodestar multipliers tend to be relatively small because judges are reluctant to exceed the benchmark rate. In time-consuming cases that yield low recoveries, multipliers can even be negative, again to avoid exceeding the benchmark.

85. When considering the reasonableness of the multiplier Class Counsel requests, it is also important to note that this case is unusual. The complaint focuses on a legal issue—the meaning of ERISA's Actuarial Equivalence requirement—a matter to be decided by a court. The relevant

factual evidence is limited and computerized, so it required only expert analysis and testimony to develop. To their credit, both Class Counsel and Defendants handled the lawsuit expeditiously. After the Court denied Defendants' motion to dismiss on the ground that more information was needed about the manner of calculating the retirement plans' conversion factors, the parties conducted discovery, prepared and exchanged expert reports, and filed cross-motions for summary judgment. They negotiated the proposed settlement while those motions were pending.

86. I believe that judges should reward lawyers for being efficient. Neither courts, class members, nor defendants benefit when litigation is protracted unnecessarily. The percentage method encourages efficiency automatically by generating higher effective hourly rates for lawyers who produce good results expeditiously. The lodestar method does not. It relies on judges to do so by awarding substantial multipliers in cases that resolve quickly. That is what should happen here.

87. As mentioned, there are many cases with multipliers similar to the one Class Counsel requests. 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 Healthsouth Corporation Securities Litigation (UBS Defendants)*, No. 05-cv-01500. ECF No. 1721 (N.D. Ala. Jul 26, 2010), which settled for $117 million, the multiplier was 7.01. Other cases with substantial multipliers include: *In re Doral Financial Corp. Secs. Litig*., No. MDL 1706, ECF No. 107 (S.D.N.Y. July 17, 2007) (10.26); *Cosgrove v. Sullivan*, 759 F. Supp. 166, 167 n. 1 (S.D.N.Y.1991) (8.7); *New England Carpenters Health Benefits Fund v. First Databank, Inc*., No. 05 Civ. 11148, 2009 WL 2408560 (D. Mass. Aug. 3, 2009) (8.3); *In re Rite Aid Corp. Sec. Litig*., MDL No. 1360, 2005 WL 697461 at *2-3 (E.D. Pa. Mar. 24, 2005) (6.96); *In re UnitedHealth Grp. Inc. PSLRA Litig*., 643 F. Supp. 2d 1094 (D. Minn. 2009) (6.5); *In re Credit Default Swaps Antitrust Litig*., No. 13MD2476 DLC, ECF No. 554 (S.D.N.Y. April 18, 2016) (6.36); *In re Cardinal Health Inc. Sec. Litigations*, 528 F. Supp. 2d 752 (S.D. Ohio 2007) (6.0); and *Spartanburg Regional Health Servs. District, Inc. v. Hillenbrand*

Indus., Inc., No. 03-DV-2141, ECF No. 377 (D.S.C. Aug. 15, 2006) (6.0).

88. I therefore conclude that a lodestar cross-check confirms that Class Counsel's portion of the fee request is in line with the market and with awards in comparable cases and thus is reasonable.

XI. PAYMENT OF FEES UPFRONT

89. As the Court is aware, the proposed settlement requires the Defendants to pay Class Counsel's fee up front, based upon the $59.17 million present value of the recovery. As the *Memorandum in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses and a Case Contribution Award notes,* this approach has been used in other cases where class members will receive benefits over time rather than as a lump sum.

90. Paying the fee upfront, rather than over time, has no effect on the size of the payments class members will receive. This is so because the settlement requires the Defendants to advance the funds needed to pay Class Counsel and to recoup the dollars from class members' payments as dollars flow to them. In effect, class members wind up paying the Defendants the amounts they would have paid Class Counsel had fees been parceled out over time.

91. Paying Class Counsel up front could be a concern if the value of the settlement depended upon, for example, the number of claims filed, the value of claims following review by an third party, or some other condition with the potential to vary. Then, a court would have to worry that the dollar value of the settlement had been inflated for the purpose of justifying a larger fee.

92. Here, however, no such conditions exist. The value of the settlement is known. Class members will be paid automatically. There is no prospect that unpaid funds will revert to the Defendants. The settlement is what it appears to be. Everything is transparent. Consequently, the Court can approve the payment of Class Counsel's fees up front with perfect confidence and propriety.

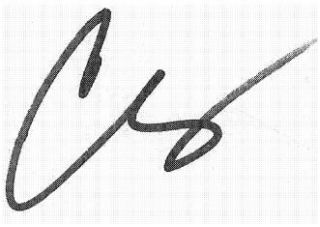
XII. COMPENSATION

93. I received a flat fee of $35,000 for preparing this report.

XIII. CONCLUSION

94. For the reasons set out above, I believe that Plaintiffs' Counsel's request for a fee award equal to 14.5 percent of the monetary recovery is s is reasonable.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 14th day of April, 2021, at Empire, Michigan.



CHARLES SILVER

EXHIBIT 1: 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

Books

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).

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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).

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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).

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2. "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).*

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4. "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).*

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

8. "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).

9. "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).

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

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

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

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18. "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).

19. "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).

20. "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).

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26. **"**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).*****

27. "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).

28. "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).*****

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30. "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).*****

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38. "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).

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

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

42. "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).

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

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

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

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

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

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

Liability Insurance and Insurance Defense Ethics

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

50. "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).

51. "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).*****

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

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

54. "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.

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59. "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).

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

61. "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).

62. "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).

63. "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).

64. "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).

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

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

67. "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).

68. "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

69. "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).

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

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

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

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

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

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

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

77. "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).

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

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

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

General Legal Ethics and Civil Litigation

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

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

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

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

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

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

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

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

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

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

91. "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).

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

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

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

95. "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,).

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

Legal and Moral Philosophy

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

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100. "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).

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102. "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).

103. "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).

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

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105. "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.