EXHIBIT E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

In re UNDER ARMOUR SECURITIES LITIGATION	)))))	**Civil No. RDB-17-388** **CLASS ACTION**
This Document Relates To: **ALL ACTIONS.**	)))))	

DECLARATION OF PROFESSOR CHARLES SILVER CONCERNING THE REASONABLENESS OF CLASS COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES

I, CHARLES SILVER, declare as follows:

I. SUMMARY OF OPINIONS

1. Class Counsel's request for a fee award equal to 25.83 percent of the recovery is justifiable and reasonable. Even though the litigation was exceptionally risky and the recovery is enormous, the fee request falls below the market rate, which normally extends from 30 percent to 40 percent of the recovery. The Lead Plaintiff also agreed to the fee when litigation commenced. This case is a model of how attorney's fees in securities class actions should be handled.

II. CREDENTIALS

2. I have testified as an expert on attorneys' fees many times. Judges have cited or relied upon my opinions when awarding fees in the following large cases, as well as many smaller

ones: *Allapattah Services, Inc. v. Exxon Corp*.[1] (30 percent fee award on recovery exceeding $1 billion); *In re Checking Account Overdraft Litigation*, No. 09-md-2036,(S.D. Fla. 2011) (fee award of 30 percent on recovery of $410 million);[2] *In re Enron Corp. Securities, Derivative & "ERISA" Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008) ($688 million fee award on a $7.2 billion recovery); *Silverman v. Motorola, Inc*., No. 07 C 4507 (N.D. Ill. May 7, 2012) (unpublished) (fee award of 27.5 percent on recovery of $200 million).

3. Most recently, Vice Chancellor Laster of the Delaware Court of Chancery cited four of my research publications when he awarded $266.7 million (26.67 percent) in connection with the massive $1 billion settlement of fiduciary duty claims against Dell. See *In re Dell Techs. Inc. Class V S'holders Litig*., 300 A.3d 679, 716 n. 27 (Del. Ch. 2023), *as revised* (Aug. 21, 2023), *aff'd*, No. 349, 2023, 2024 WL 3811075 (Del. Aug. 14, 2024) (citing Lynn A. Baker, Michael A. Perino & Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1433–34 (2015); Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 869 (1992); and Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656, 700–01, 702–03 (1991)). See also *In re Dell Techs. Inc. Class V S'holders Litig*., 300 A.3d at 733 n. 38 (citing Charles Silver & Sam Dinkin, *Incentivizing Institutional Investors to Serve as Lead Plaintiffs in SECURITIES FRAUD CLASS ACTIONS*, 57 DEPAUL L. REV. 471, 481 (2008)). A few weeks ago, the Supreme Court of Delaware affirmed Vice Chancellor Laster's decision, which was appealed by

[1] See Order on Petitions for an Award of Attorneys' Fees, Costs, and Reimbursable Expenses and for Incentive Awards to Named Plaintiffs, *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006).

[2] See Order of Final Approval of Settlement, Authorizing Service Awards, Granting Application for Attorneys' Fees, and Overruling Objections to Settlement, available at http://www.bofaoverdraftsettlement.com/CourtDocuments.aspx.

an objector that argued, unconvincingly, that, in mega-fund cases, fee percentages should decline as recoveries increase.

4. Along with two other law professors, I submitted an amicus curiae brief in the Dell appeal. See Brief of Amici Professors Baker, Fitzpatrick and Silver in Support of Appellee and Affirmance, In re Dell Techs. Inc. Class V S'holders Litig., Case No. 349, 2023 (Supreme Court of Delaware, Filing ID 71706106, Dec. 28, 2023) ("Dell Amicus Brief"). I have attached a copy of the brief to this Declaration as Exhibit A and will refer to it herein. As the Court will see, there, as in all my writings, my colleagues and I argue that class action attorneys should be paid at market rates. Over decades, more and more judges have come to appreciate the wisdom of this view and have applied the law consistently with it. I will express the same position here in support of my conclusion that Class Counsel's pending fee request is reasonable.

5. Professionally, 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, the Vanderbilt University Law School, and the Harvard Law School.

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 taught, researched, written, consulted with lawyers, and testified about class actions, other large lawsuits, attorneys' fees, professional responsibility, and related subjects for over 15 years. I have published over 70 major writings, many of which appeared in peer-reviewed

publications and many of which focus on subjects relevant to this Report. My writings are cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996) and the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004).

8. 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.

9. I have attached a copy of my resume as Exhibit B to this declaration.

III. DOCUMENTS REVIEWED

10. When preparing this Report, I reviewed the items listed below which, unless noted otherwise, were generated in connection with this case. I also reviewed other items including, without limitation, cases, news reports, and published scholarly works.

- Lead Plaintiff's Notice of Motion and Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Class
- Declaration of Robert R. Henssler Jr. in Support of Lead Plaintiff's Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Class
- Lead Plaintiff's Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Class
- Consolidated Third Amended Complaint for Violations of the Federal Securities Laws

- Memorandum Opinion Granting Defendants' Motion to Dismiss Plaintiffs' Consolidated Second Amended Complaint
- Memorandum Opinion Denying Defendants' Motion for Summary Judgment
- Memorandum Opinion Granting Plaintiffs' Motion for Class Certification
- Memorandum Opinion Granting Motion for Indicative Ruling Under Federal Rule of Civil Procedure 62.1
- Order Preliminarily Approving Settlement and Providing for Notice
- Notice of Pendency of Class Action
- Settlement Agreement
- Retention Agreement between Aberdeen City Council as Administrating Authority for the Aberdeen City Council Pension Fund (known as North East Scotland Pension Fund) and Robbins Geller Rudman & Dowd LLP, March 29, 2017
- Home Page, Under Armour Securities Litigation Settlement Website
- Craig Williams, Councils Pension Fund Settles Under Armour Legal Claim, BBC Scoptland News, June 22, 2024
- Kevin LaCroix, Under Armour Securities Suit Settles for $434 Million, D&O Diary, June 25, 2024
- ISS SCAS, The Top 100 U.S. Class Action Settlements of All-Time: As of December 31, 2023 (2023)
- Alison Frankel, How Law Firm Robbins Geller Won $434 Mln Post-Dismissal Settlement with Under Armour, Reuters, June 25, 2024

IV. FEE-SETTING IS A POSITIVE-SUM INTERACTION

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

12. In reality, fee-setting is a positive-sum interaction in which higher fees can generate higher recoveries for claimants. To see this, imagine how class members would fare if judges set common fund fee awards at 0 percent. If the fee was zero, the expected recovery would be zero too because lawyers cannot afford to litigate class actions on these terms. From class members' perspective, a fee greater than zero is better than a fee equal to zero because a positive recovery is better than no recovery.

13. The point just made is not controversial. A task force appointed by the Third Circuit understood it decades ago. Its report correctly states that "[t]he 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). In other words, the cheapest lawyer may not be the best one. Lawyers vary greatly in quality, and the best attorneys are in high demand. Rationally, class members should want outstanding lawyers to handle their cases, and this desire should be especially strong when the stakes are high because that is when inferior attorneys can harm them the most. Class members should therefore want judges, who are their fiduciaries, to regulate fees in a manner calculated to attract outstanding lawyers to their cases.

V. TO ENSURE THAT CLASS MEMBERS RECEIVE ZEALOUS REPRESENTATION, COURTS SHOULD PAY LAWYERS WHO WIN CLASS ACTIONS AT MARKET RATES

14. If judges should *not* set fees as close to zero as possible, what should they do? Like other academics, I believe they should try to create incentives that motivate lawyers to maximize class members' expected recoveries net of fees and costs. As my coauthors and I observed in a study of fee awards that appeared in the Columbia Law Review, when regulating fee awards judges

> are creating incentives for attorneys. Realizing this, their only object should be to select fee terms that motivate lawyers to maximize net recoveries for claimants. Choosing a fee arrangement for any other reason would disserve class members by discouraging their lawyers from representing them zealously, thereby creating a serious risk that class members would be denied due process of law.

Lynn A. Baker, Michael Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1448 (2015) [hereinafter "*Is the Price Right?*"].

15. This normative position follows naturally from the requirement of adequate representation. To be adequately represented is to enjoy the services of lawyers whose interests cohere with class members' desire to benefit to the greatest possible extent from lawsuits brought on their behalf.

16. If the premise that judges should regulate fees with the object of encouraging lawyers to maximize class members' net recoveries is accepted, the remaining question is practical: Which fee terms do this best? Logic alone cannot provide the answer. For that reason, I have studied fee practices employed by sophisticated clients with sizeable stakes. Such clients have every reason to compensate lawyers on terms that create strong incentives to maximize net expected recoveries, and no obvious reason to do otherwise.

17. This approach spares judges from having to "reinvent the wheel." They need only base class action lawyers' fees on the same terms that sophisticated clients employ. In other words, judges can create the desirable incentives that adequate representation requires by "mimicking the market."

18. Professor John C. Coffee, Jr., one the country's leading commentators on stockholder actions, urged this approach long ago:

> [T]he "law should mimic the market." In the class action context, that would mean attempting to award the fee that informed private bargaining, if it were truly possible, might have reached. The simplest way for the law to duplicate the bargain that informed parties would reach if agency costs were low is to look to fee award levels in actions brought by sophisticated private parties under the same or comparable statutes…. [I]f courts were to ask what fee structure an informed, sophisticated client would use to compensate his attorney when close monitoring is not feasible, they would at least have focused on the correct question.

John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 696-697 (1986). For decades, I have also endorsed this approach.[3]

19. Many judges agree that market rates provide essential guidance. The Seventh Circuit has required judges to "mimic the market" since 1992, when Judge Richard A. Posner wrote that "it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 568 (7th Cir. 1992). See also *Id.* at 572 ("The object in awarding a reasonable attorney's fee ... is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation, had one been feasible.").[4]

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[3] See, e.g., Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL LAW REVIEW 656 (1991) ("Silver, *Restitutionary Theory*") (urging judges to compensate lawyers at market rates); and Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TULANE LAW REVIEW 1809 (2000) (explaining that the lodestar method should be abandoned because it creates undesirable incentives).

[4] Other Seventh Circuit cases establishing the rule are *In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 409 (7th Cir. 2000); *Gaskill v. Gordon*, 160 F.3d 361 (7th Cir. 1998); *Florin v. Nationsbank of Georgia, N.A.*, 60 F.3d 1245 (7th Cir. 1995) (Florin II); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560 (7th Cir.

20. When the Second Circuit took up the subject of class action lawyers' compensation in 2000, it "agree[d] that "that lawyers who successfully prosecute [class actions] deserve reasonable compensation, and that market rates, where available, are the ideal proxy for their compensation." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52 (2d Cir. 2000).

21. Most recently, Vice Chancellor J. Travis Laster endorsed the "mimic the market" approach when he awarded 26.67 percent of a $1 billion recovery as fees in *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679 (Del. Ch. 2023), *as revised* (Aug. 21, 2023), *aff'd*, No. 349, 2023, 2024 WL 3811075 (Del. Aug. 14, 2024). In one of the best opinions on fee awards that I have had the pleasure to read, Vice Chancellor Laster canvassed the literature on fee arrangements employed by sophisticated clients. He also obtained information from the parties and their attorneys about the fee terms they customarily employ, including the terms that are used by other professionals, such as investment managers. He then awarded a contingent percentage fee at a flat, market-based rate, and rejected the fee objectors' argument that percentages should decline as recoveries increase. On appeal of his decision, the Supreme Court of Delaware affirmed.

22. The Fourth Circuit gives district court judges the option of awarding percentage-based fees or lodestar-based fees. *Amaya v. DGS Constr., LLC*, 2023 WL 8188628, at *2 (D. Md. Nov. 27, 2023) ("In a class action case, '[t]here are two main methods for calculating the reasonableness of attorneys' fees—the lodestar method and the percentage-of-recovery method."); *McAdams v. Robinson*, 26 F.4th 149, 162 (4th Cir. 2022) ("A district court may choose the method it deems appropriate based on its judgment and the facts of the case."). But when it comes to

1994) (Florin I); and *In re Continental Illinois Securities Litigation*, 985 F.2d 867 (7th Cir. 1993) (Continental II).

creating good incentives, the percentage method is the only option. I say this because, as Professors Lynn Baker, Brian Fitzpatrick, and I explained in the amicus brief we submitted in *Dell*:

> [R]real clients always use [the percentage approach] when engaging [contingent fee] attorneys. We have studied fee arrangements in the United States for decades, and we know of not a single instance in any type of litigation in which a sophisticated client used the lodestar method when hiring attorneys on contingency…. In view of this, the only plausible conclusion is that it is wrongheaded to evaluate the reasonableness of contingent lawyers' compensation in lodestar-based terms when percentage terms are an option. If the lodestar method was a good way of compensating lawyers for bearing costs and risks, sophisticated clients would have recognized this and agreed to pay lawyers a contingent hour rate time a multiplier. Instead, clients prefer percentage-based contingency arrangements that eliminate the need to review monthly bills, discourage lawyers from dragging out cases, and reward lawyers for maximizing recoveries. Given that the lodestar method is a bad way of paying lawyers, it must also be a bad way of evaluating the reasonableness of their fees. If sophisticated clients do not care about lodestar multipliers when percentages are available, judges should not care about them either.

Brief of Amici Professors Baker, Fitzpatrick and Silver in Support of Appellee and Affirmance, pp. 7-8, filed in *In re Dell Techs. Inc. Class V S'holders Litig*., Case No. 349 (2023), Filing ID 71706106 (Del. Dec. 28, 2023).

VI. THIS HIGH-RISK CLASS ACTION DEMONSTRATES THE NEED FOR GOOD INCENTIVES

23. The proposed $434 million settlement did not magically appear. It is the result of seven years of litigation, culminating on the eve of trial, during which there were:

> (1) two dismissals – including one with prejudice (ECFs 75, 99); (2) an opposed motion to reopen the litigation following the publication of a November 3, 2019 article by *The Wall Street Journal* ("*WSJ*") that revealed governmental investigations into Under Armour's public statements and accounting practices concerning customer demand and pull-forwards (ECF 150); (3) an opposed motion for an F.R.C.P. 62.1 indicative ruling that brought the litigation back to this Court from a pending appeal to the Fourth Circuit (ECF 140); (4) the defeat of Defendants' motion to dismiss the Consolidated Third Amended Complaint for Violations of the Federal Securities Laws ("TAC") (ECF 174); (5) an opposed motion for class certification (ECF 246); (6) the defeat of Defendants' motion for summary judgment (ECF 378); and (7) the defeat of Defendants' motion to exclude (in whole or in part) every one of Lead Plaintiff's proposed expert witnesses scheduled to testify at trial. ECF 389.6 Accordingly, the Settlement was only

> reached after the merits of the claims were tested at every turn and by counsel who had a keen understanding of the claims at an advanced stage of the litigation.

Lead Plaintiff's Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Class, pp. 2-3.

24. I have followed class actions as an academic and a consultant for decades, but never before have I seen one that involved items (2) and (3). The litigation seemed to be "dead as a doornail," having been dismissed with prejudice by the Court, but Class Counsel revived it, and eventually the class members' claims posed a threat so dire that the Defendants felt compelled to offer a mega-fund settlement.

25. Time-to-close is another measure of risk, and by class action standards, seven years is a long time for a securities lawsuit to be actively litigated. According to Cornerstone Research, a consulting firm that tracks these cases, the median time from filing date to settlement hearing was 3.7 years for cases that resolved in 2023. Dr. Laarni T. Bulan, SECURITIES CLASS ACTIONS: 2023 REVIEW AND ANALYSIS 14 (Cornerstone Research 2024). This case has taken twice as long. Only a small fraction of securities class actions—15 percent from 2014-2023, according to Cornerstone—lasted longer than 5 years. *Id*., Figure 12.

26. The intensity with which a defendant resists a claim also affects the amount of risk a plaintiffs' attorney incurs. The greater the effort and resources a defendant expends, the greater the risk a plaintiffs' attorney incurs and the more dedicated a plaintiffs' attorney must be to winning. Here, the Defendants litigated with unusual intensity. According to Cornerstone, over the 2019-2023 period only 4 percent of settled securities class actions made it as far into the litigation process as this one did. Most defendants throw in the towel much earlier, as the following table shows.

Table 1. Resolution Stage at Time of Settlement, Securities Class Actions 2019-2023		
Litigation Stage	**# of Settlements**	**% of Settled Cases**
Before filing of MTD	39	10.5%
After filing of MTD but before ruling	54	14.5%
After ruling on MTD, before filing of MCC	111	29.8%
After filing of MCC but before ruling	76	20.4%
After ruling on MCC before filing of MSJ	56	15.0%
After filing of MSJ but before ruling	22	5.9%
After ruling on MSJ	15	4.0%
Total	**373**	**100.0%**

Source: Derived from Dr. Laarni T. Bulan, SECURITIES CLASS ACTIONS: 2023 REVIEW AND ANALYSIS, Figure 13 (Cornerstone Research 2024)

27. Presumably, the Defendants resisted the complaint with exceptional intensity because they thought they were going to win. This is a further indication that Class Counsel bore great risks. The Defendants were represented by excellent attorneys who must have supplied professional assessments of their clients' prospects throughout the litigation and whose confidence in ultimately prevailing must have been supported by good reasons. Their informed, optimistic assessments reflected the significant risk that the class action would be dismissed by the Court, be lost at trial in front of a jury, or be tossed out on appeal.

28. But for the possibility of winning a sizeable fee award, Class Counsel would have had no incentive to bear the costs and risks this litigation plainly entailed. The fee terms agreed to by the Lead Plaintiff when litigation started provided the financial motivation that was required, as the next section explains.

VII. THE FEE AGREEMENT DESERVES RESPECT

29. In published writings, I have repeatedly argued that lawyers who handle securities class actions and the clients who serve as lead plaintiffs in these lawsuits should negotiate fees at or near the commencement of litigation. I favor *ex ante* fee agreements for several reasons, an

important one being that in the market for legal services, claimants negotiate fees when litigation starts, not when it ends. Upfront, the participants 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 Marketing Litigation, 264 F.3d 712, 724 (7th Cir. 2001).

30. In class actions, judges more often set fees when settlements occur than when litigation commences. Because of a well-documented psychological affliction known as the hindsight bias, this practice may, and likely does, cause them to underestimate risks and set fees too low. People who know that success was achieved tend to think that the odds of winning were better than, in fact, they were.[5]

31. The Court cannot blind itself to what it knows about the case. But the Court can prevent the hindsight bias from affecting its judgment by taking guidance from the private market for legal services—the market in which fee terms reflect expected risks and costs accurately because they are set when lawsuits begin, not when they end.

A. The *Ex Ante* Fee Agreement Negotiated by the Lead Plaintiff is Presumptively Reasonable

32. Here, the Court has two sources of information about market rates, the first being the *ex ante* agreement between the Aberdeen City Council as Administrating Authority for the

[5] For a discussion, including evidence that the hindsight bias afflicts judges, see Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL LAW REVIEW 777, 799 (2001) (citations omitted).

Aberdeen City Council Pension Fund (the "Lead Plaintiff") and the law firm of Robbins Geller Rudman & Dowd, LLP. As the Court observed, the Lead Plaintiff is an "institutional investor[], precisely the type of litigant Congress intended to serve as class representative in securities cases." *Memorandum Opinion [Granting Motion for Class Certification]*, Doc. 245, p. 27. Consequently, the *ex ante agreement*, which appears to have been negotiated at arms' length, is entitled to respect. Financially, the Lead Plaintiff's stood to gain the most by offering Class Counsel fee terms that were expected to maximize the net recovery. By overpaying, it would have reduced its expected net recovery and harmed itself. This is why it made sense for Congress to empower lead plaintiffs to "select and retain" counsel for investor classes. 15 U.S. Code § 78u–4 ("The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."). To "retain" a lawyer, one must ordinarily agree on the amount to be paid for the services supplied.

33. The point just made explains why a presumption of reasonableness attaches to *ex ante* fee agreements negotiated by lead plaintiffs. Here, an important fact strengthens that presumption: The fee terms agreed to resemble those used by lead plaintiffs in other cases. In his *Dell* opinion, Vice Chancellor Laster described some of the evidence supporting this assessment. He cited two recent cases that proceeded in the Chancery court. In one, *S'holder Representative Servs. LLC v. Shire US Hldgs., Inc.*, 2021 WL 1627166, at *2 (Del. Ch. Apr. 27, 2021), "the fee agreement with a major law firm provided for a fixed, one-third contingency fee which the court described as 'quite typical and commercially reasonable.'" *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d at 717. In the other, *In re Nine Sys. Corp. S'holders Litig.*, 2015 WL 2265669, at *1 (Del. Ch. May 7, 2015), "the plaintiff hired a white-shoe firm under a contingency agreement that contemplated reimbursement of out of-pocket expenses plus '40% of

any excess recovery as attorneys' fees.' The court enforced the agreement." *Id*. Here, the Lead Plaintiff negotiated a lower fee. Consequently, the agreed fee is reasonable.

B. The Agreed Fee is Reasonable When Compared to the Larger Private Market

34. When one turns from securities cases to the broader market for legal services, one learns, first, that contingent percentage fee agreements predominate. Even wealthy named plaintiffs like prescription drug wholesalers and public pension funds that can afford to pay lawyers by the hour use contingent, percentage-based compensation arrangements instead.[6] One also discovers, second, that clients, including sophisticated corporate clients that hire lawyers to handle large commercial cases, typically agree to pay contingent fees of 30 percent to 40 percent.[7] Finally, third, the market also favors fee percentages that are flat or that rise as recoveries increase or litigation reaches advanced stages. Scales with percentages that decline at the margin are rarely employed.

35. The point that the contingent percentage fee dominates the market for plaintiff representations is well known. The discussions that follow therefore focus on the prevailing market rate and the preference for percentages that are flat or rising.

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[6] 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.

[7] I have previously expressed the opinion that the range extends down to 25 percent. But I cannot recall seeing fee agreements at this low level in recent years, except in securities class actions where public pension funds served as lead plaintiffs. Consequently, I have truncated the range prevailing in the broader market at 30 percent.

1. When Clients Hire Lawyers on Contingency, They Typically Pay 30 Percent to 40 Percent of their Recoveries as Fees

36. 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. For example, it is widely known that clients regularly pay mass tort lawyers 40 percent of their recoveries. *See* Lester Brickman, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 7 (2011) (observing that "contingency fees in many mass tort litigations have standardized at the 40% level");[8] Task Force on Contingent Fees of the American Bar Association's Tort Trial & & Insurance Practice Section, *Contingent Fees in Mass Tort Litigation*, 42 Tort Trial & Ins. Prac. L.J. 105, 108 (2006) (reporting that "[mass tort] claimants who appear to have viable cases will be signed up to contingent fee contracts that specify that the lawyer will receive a percentage, often 33 percent or 40 percent, of any recovery the client receives net of expenses"). *See also In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428, 432-436 (Tex. App. 2000) (reporting that "approximately 37,000 plaintiffs who owned in excess of 67,000 property units" agreed to pay their attorneys "forty percent (40%) of the gross value of any recovery made from any party").

37. In the paragraphs that follow, I survey this evidence relating to the size of contingent fees that I have discovered. 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 patents where costs and risks are unusually great. *See, e.g.*, *Lea v. Tal Educ. Grp.*, No. 18-CV-5480-KHP, 2021 WL 5578665,

[8] For the record, I disagree with Professor Brickman about the ethics and economics of the contingent fee. I cite him here only to show that there is broad agreement on the facts. I have consulted with many lawyers who handle mass tort lawsuits and have observed many fee agreements that entitle them to 40 percent of clients' recoveries.

at *12 (S.D.N.Y. Nov. 30, 2021) ("[O]ne-third [] is a percent that has been approved as reasonable in this Circuit.") (collecting cases); *DeLeon v. Wells Fargo Bank, N.A.*, No. 12 Civ. 4494 (RLE), 2015 WL 2255394, at *6 (S.D.N.Y. May 11, 2015) ("Class Counsel's request for one-third of the fund is reasonable and 'consistent with the norms of class litigation in this circuit.'") (citation omitted); *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"); *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").

38. The same range is known to prevail in high-dollar, non-class, commercial cases. *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, No. CV 08-00235-CCC, 2019 WL 4877563, at *8 (D.N.J. Oct. 3, 2019) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *Cook v. Rockwell Int'l Corp.*, No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017) ("'In non-class contingency fee litigation, a 30% to 40% contingency fee is typical'") (quoting *Montague v. Dixie Nat. Life Ins. Co.*, CIV.A. 3:09–00687, 2011 WL 3626541, at *2–3 (D.S.C. Aug. 17, 2011)).

39. 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 one third (33.33 percent) being especially common.

2. Sophisticated Clients Serving as Named Plaintiffs in Class Actions

40. I begin this analysis of class actions with sophisticated named plaintiffs 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 litigation 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 and the plaintiffs sometimes lost.

41. In keeping with the customary practice, the class's attorneys worked on contingency. This was so 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.

42. 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, 1161–62 (2021). The cases supporting Professor Fitzpatrick's findings are presented in a table in Exhibit C. As the entries show, many of the pharmaceutical antitrust cases generated sizeable settlements.

43. These antitrust cases provide a model that courts should follow when awarding fees from common funds. 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.

44. Other sophisticated business clients have also offered their lawyers fees in the customary range when serving as lead plaintiffs in class actions.

- In *In re U.S. Foodservice, Inc. Pricing Litigation*, Case 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.
- 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 International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-3346 (Court of Common Pleas, Greenville Cty., S.C.), 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.)

45. Sophisticated clients sometimes agree to pay fees below the percentages mentioned in these examples. But fees below 25 percent are uncommon.

3. Sophisticated Clients Hiring Lawyers to Handle Commercial Lawsuits

46. We do not know as much about fees paid in large commercial lawsuits as we might.[9] No publicly available database collects information about this market segment, and businesses that sue as plaintiffs rarely reveal their fee agreements. Consequently, most of what is known is drawn from anecdotal reports.[10] 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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[9] 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.

[10] 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*

a) Patent Cases

47. Patent infringement cases are often high-dollar contests in which sophisticated business clients are plaintiffs. There are many reports of high percentage attorneys' fees in these cases. The most famous one relates to the dispute between NTP Inc. and Research In Motion Ltd., the company that manufactured the Blackberry. NTP, the plaintiff, agreed to pay 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, https://www.washingtonpost.com/archive/business/2006/03/18/dc-law-firms-big-blackberry-payday-span-classbankheadcase-fees-of-more-than-200-million-are-said-to-exceed-its-2004-revenuespan/8a76dbb5-0918-46b9-a7b2-4d9284d5e0d3/.

48. 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 substantial litigation

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Machines Corp., https://en.wikipedia.org/wiki/SCO_Group,_Inc._v._International_Business_Machines_Corp.

and trial preparation hours and expenses with no guarantee of payment or reimbursement, a high fixed percentage would apply.[11]

49. 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 to 40 percent, to bearing the risks and costs of litigation themselves.

b) Other Large Commercial Cases

50. Turning from patent lawsuits to business representations more generally, many examples show that contingency fee 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*

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[11] 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/.

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 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. INST. STUD. LEGAL ETHICS, 243, 245 (1991). It bears emphasizing that the clients who made up the plaintiffs' consortium, Panhandle Eastern Corporation, the Bechtel Group, Enron, 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 have possibly been (or was) made.

51. 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 lawsuits 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.[12]

[12] 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; NCUA, Legal Recoveries from the Corporate Crisis, https://www.ncua.gov/regulation-supervision/Pages/corporate-system-resolution/legal-recoveries.aspx; Letter from the Office of

52. When it retained outside counsel on contingency, NCUA knew that billions of dollars were at stake. The failed 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 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.

53. 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.

54. 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

the Inspector General, NCUA to the Hon. Darrell E. Issa, Feb. 6, 2013, https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20130206IssaResponse.pdf.

"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).

4. Declining Percentages are Disfavored

55. The preceding discussions show that the prevailing market rate extends from 30 percent to 40 percent of the recovery in cases of many types, including high-dollar securities and antitrust class actions. The brief discussion here will show that scholars who study the market for legal services agree that flat percentages and percentages that rise with the recovery or the stage of litigation are more common than percentages that decline.

56. Professor John C. Coffee, Jr. expressed the opinion that declining scales are rare in an expert report he prepared for 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 that of Professor Coffee. I cannot recall any instances in which large corporations used scales with declining percentages when hiring attorneys.

57. Professor Brian Fitzpatrick, one of my coauthors on the Dell amicus brief, agrees. He recently observed that "the data from sophisticated clients" he studied "did not find any marginally decreasing rates." The most he could say about such fee schedules is that they are "not unheard of in the marketplace." Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1169–70 (2021). Professor Fitzpatrick also discouraged judges from using declining scales. He wrote that "judges should either stick with fixed percentages that do not vary with recovery or use percentages that escalate with litigation maturity, like sophisticated clients usually do." *Id*.

58. In sum, there is broad agreement among researchers that contingent fee agreements rarely contain declining scales. 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, to bear the larger risks that are associated with additional litigation, and for securing dollars quickly by using time efficiently. Flat percentages and percentages that increase with the recovery also encourage class action lawyers to hold out for better terms when defendants offer inadequate settlements.

VIII. LODESTAR CROSS-CHECKS ARE NOT USED IN THE MARKETPLACE AND HAVE NO ROLE IN MY ANALYSIS

59. 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. The size of the multiplier is thought to be an indicator of the reasonableness of the request, with smaller multipliers being generally preferred to larger ones.

60. In keeping with my belief that judges should mimic the market, I oppose the use of lodestar cross-checks. As my colleagues and I stated in our *Dell* amicus brief:

> We have studied fee arrangements in the United States for decades and we know of not a single instance in any type of litigation in which a sophisticated client used the lodestar method when hiring attorneys on contingency. To the best of our knowledge, they do so only in jurisdictions like England that prohibit percentage-based contingent fees. In view of this, the only plausible conclusion is that it is wrongheaded to evaluate the reasonableness of contingent lawyers' compensation in lodestar-based terms when percentage terms are an option. If the lodestar method was a good way of compensating lawyers for bearing costs and risks, sophisticated clients would have recognized this and agreed to pay lawyers a contingent hourly rate times a multiplier. Instead, clients prefer percentage-based contingency arrangements that eliminate the need to review monthly bills, discourage lawyers from dragging out cases, and reward lawyers for maximizing recoveries. Given that the lodestar method is a bad way of paying lawyers, it must also be a bad way of evaluating the reasonableness of their fees. If sophisticated clients do not care about lodestar multipliers when percentages are available, judges should not care about them either.

Dell Amicus Brief, p. 8. *See also* Fitzpatrick, *A Fiduciary Judge*, supra, at 1159-63 (finding no evidence that real clients ever use lodestar cross-checks when hiring lawyers on contingency).

61. The more important it is for class members to obtain relief quickly, the more potential lodestar cross-checks have to cause lawyers' and class members' interests to diverge. For class members, dollars recovered today are always worth more than dollars recovered in the future. In the Flint Water Crisis litigation, for example, the class would have been better served if the $626 million settlement had been won within a year instead of requiring a decade to take effect. See Paul Egan, *10 Years after Lead Poisoning, Flint Residents Still Haven't Been Paid from $626.25M Fund*, DETROIT FREE PRESS, March 8, 2024 (reporting that the flow of relief to Flint residents whose drinking water was contaminated continues to be delayed). An early settlement would have also helped the states and municipalities with opioid-related claims, as Judge Aaron

Polster made clear when the multi-district litigation was consolidated in his court. See Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, NEW YORK TIMES, Mar. 5, 2018 (reporting that Judge Poster "ordered [the lawyers] to prepare for settlement discussions immediately").

62. To me, it is obvious that fee formulas that harmonize the interests of lawyers and clients will reward speed, not delay. Percentage-based contingent fee arrangements do this, because an earlier victory means a faster pay-day for an attorney than a later one. Lodestar cross-checks do the opposite. Because they emphasize time expended, such cross-checks create opportunities for lawyers to enrich themselves by performing unnecessary tasks for the purpose of logging hours. Academics, lawyers, and judges have all taken note of this defect.

63. For example, a task force created by the Tort Trial & Insurance Practice Section of the ABA of which I was a member included the following comments in its report on fee awards in class actions.

> By using the number of hours worked as a starting point for calculating the fee, the lodestar method encourages lawyers to ensure that the number of hours in the case is high. Lawyers are rewarded for delaying settlement, which might otherwise be advantageous to the class, because they have not had sufficient time to accrue enough hours to earn a generous fee. They might do duplicative or otherwise unnecessary work. They might send two lawyers rather than one to a deposition, or three rather than two to a discovery hearing. Work that could be done by an associate or a paralegal might be done by a partner and billed at the partner's higher rate. The lodestar method also imposes a significant burden on the judge who must calculate the lodestar with the knowledge that the lawyers have these incentives. The judge must review voluminous billing records and decide what activities were necessary, how long they should have taken, and which lawyer (with which billing rate) should have undertaken them.

Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, *Report on Contingent Fees in Class Action Litigation*, 25 REV. LITIG. 459, 468–69 (2006).[13]

64. Professor Brian Fitzpatrick put the matter succinctly.

> Under the lodestar method, class counsel's compensation increased the longer the litigation wore on; class members, by contrast, prefer cases to end as quickly as possible so they can receive their compensation as quickly as possible…. To better align the interests of class counsel and the class, judges began compensating class counsel by awarding them a percentage of the class's recovery. This way, the more the class recovers, the more class counsel are paid, and class counsel have no incentive to drag cases on unnecessarily

Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2051–52 (2010).

IX. COMPENSATION

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

X. CONCLUSION

66. For the reasons set out above, I believe that Class Counsel's request for 25.83 percent of the settlement fund as compensation for services provided is reasonable.

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[13] See also John C. Coffee, Jr., *Understanding the Plaintiff's Attorney*, *supra*, 86 COLUM. L. REV. at 718 (mentioning the "obvious incentive for delay under the lodestar formula, which would not arise under a percentage of the recovery formula"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (stating that the lodestar method "encourages abuses such as unjustified work and protracting the litigation," and "conclud[ing] that in class action common fund cases the better practice is to set a percentage fee"); and *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 418 (2d Cir. 2010) (the lodestar method inspires class counsel "to bill as many hours as possible to do unnecessary work, and for these reasons also can create a disincentive to early settlement").

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 September 2024, at Manor, Texas.

CHARLES SILVER

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE DELL TECHNOLOGIES INC. CLASS V STOCKHOLDERS LITIGATION	No. 349, 2023 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, Cons. C.A. No. 2018-0816-JTL

BRIEF OF *AMICI* PROFESSORS BAKER, FITZPATRICK AND SILVER
IN SUPPORT OF APPELLEE AND AFFIRMANCE

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Dated: December 28, 2023

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INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

In the proceeding below, a group of law professors submitted an amicus brief in which they addressed a question about court-awarded fees in common fund cases posed by Vice Chancellor Laster: "What do law professors say in favor or against the declining percentage method?" Corrected Brief of Law Professors as Amici Curiae ("Corrected Brief" or "CB"). Vice Chancellor Laster found that brief unpersuasive. *See In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679 (Del. Ch. 2023). The same group has now submitted a new brief in this Court urging reversal of Vice Chancellor Laster's opinion. *See* Brief of Law Professor *Amici* in Support of Objector-Appellant and Reversal ("Amicus Brief" or "AB").

We are also law professors with substantial bodies of scholarly work on fee awards and related matters. The Corrected Brief, the Amicus Brief, and Vice Chancellor Laster's opinion all cite us. We write separately because our views differ substantially from those of the opposing amici. In our opinion, Vice Chancellor Laster decided the issue below correctly.[1]

The question raised by Vice Chancellor Laster is whether a court should award a smaller fee percentage simply because plaintiffs' counsel recovered more money for their clients. Some courts do this. One of us (Professor Fitzpatrick) authored a

[1] We have no financial interest in the outcome of this proceeding. We are submitting this amicus brief on our own initiative, with the sole object of bringing our views to the attention of the Court. No party engaged us or offered to pay us for our time.

leading empirical study of prevailing practices. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811 (2010). But the way that most of these courts apply the declining percentage method is so indefensible that not even opposing amici defend it. Most courts simply award a smaller percentage *of the entire recovery* as the recovery grows in size. Thus, a court that might have awarded 20% of a $999 million settlement will award 10% of a settlement at $1 billion. This approach can make counsel *worse off* for recovering *more money*. In the example, recovering an additional $1 million reduces the fee from $199.8 million to $100 million. No rational client would hire a lawyer on terms like this, and, to our knowledge, no actual client has. Opposing amici agree that "*fixed* declining percentages . . . suffer from the problem" of encouraging lower net stockholder recoveries. AB.20-21.

But the Amicus Brief argues that Vice Chancellor Laster should have done the same thing on a *marginal basis*. Remarkably, the authors don't say what the marginal formula should be.[2] This is a telling omission. Setting declining marginal percentages is a tricky business. Judges need to assign both fee percentages and inflection points. For example, should it be 30% of the first $100 million, 25% of

[2] Opposing amici imply at various points that 15% is the correct percentage, but they nowhere explain what marginally declining formula led them to that number. *See* AB.7,14; CB.8 ("[A] 15% fee []would be more appropriate here than a 28% award."); CB.15.

the next $100 million, 20% of the next $100 million, and so on? Or should the percentages fall after every $200 million? Every $300 million? Should they step down 5% each time? 1%? Opposing amici have no answers whatsoever to these questions. Nor do we. Without more, the recommendation to apply declining marginal percentages is worse than useless: it is likely to create perverse incentives that harm claimants by discouraging lawyers from maximizing recoveries.

Opposing amici contend otherwise because lawyers tend to be paid more per hour of work in bigger common fund cases. From this, they infer that lawyers can be paid less in these cases without adverse consequences for investors because lawyers will continue to pursue them. A glaring flaw mars this contention: it assumes that, once lawyers choose to file a case, they will work just as hard and expend resources just as willingly no matter how they are compensated. This assumption is obviously false. Someone who is paid 30% of all funds recovered obviously has a stronger incentive to litigate than someone who is paid 30% of the first $10 million, 25% of the second $10 million, 20% of the third $10 million, and so forth.

But our larger point is this: there is no need for courts to try to figure out which amicus brief is right or wrong about the likely effects of declining marginal percentages because the people who have the greatest interest in figuring all this out—real clients in real marketplaces for real legal representation—have already rendered their verdict. All of the available empirical evidence suggests that, when people hire lawyers on contingency, they almost always either pay their lawyers with fixed percentages or with *increasing* percentages based on procedural maturity (e.g., higher percentages if a case goes to trial than if it is resolved before trial). As far as anyone can tell, marginally declining percentages are used only rarely—and there is reason to believe that even the few examples we know of are tainted by clients seeking to maximize something other than their own net recoveries.

In our view, when judges must award attorneys' fees for clients they should not adopt novel arrangements that clients themselves do not voluntarily use. They should instead follow what real clients do in the real world. In other words, they should "mimic the market." After all, clients know best how to maximize their own net recoveries. That is what Vice Chancellor Laster did here and his decision should be affirmed.

ARGUMENT

I. FEE AWARDS SHOULD ENCOURAGE LAWYERS TO MAXIMIZE STOCKHOLDERS' NET RECOVERIES

In an article published in the *Columbia Law Review*, two of us (Professors Baker and Silver) urged trial judges to "keep uppermost in their minds that," when regulating fee awards,

> they are creating incentives for attorneys. Realizing this, [judges'] only object should be to select fee terms that motivate lawyers to maximize net recoveries for claimants. Choosing a fee arrangement for any other reason would disserve class members by discouraging their lawyers from representing them zealously, thereby creating a serious risk that class members would be denied due process of law.

Lynn A. Baker, Michael Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1448 (2015) [hereinafter "*Is the Price Right?*"].

This is not just a policy prescription; it is a legal obligation. As Professor Fitzpatrick has noted, judges who award attorneys' fees for clients say they sit in a fiduciary relationship to those clients. *See* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1152 n.8 (2021) [hereinafter "*A Fiduciary Judge*"] (citing 4 Newberg and Rubenstein on Class Actions § 13:40 (6th ed.) ("[S]o central is the protection of absent class members' rights that the court is said to have a 'fiduciary duty' toward absent class members in assessing . . . the reasonableness of class counsel's fees.")). Opposing amici agree with this goal; they repeatedly emphasize the desire to put more dollars into stockholders' pockets. *See, e.g.,* AB.8-10 (promoting "net stockholder recovery").

But what is the best way to maximize the net recoveries of lawyers' clients? One way to do it is to rely on economic models, but, as Professor Fitzpatrick has explained with regret, the models are "indeterminate." Fitzpatrick, *A Fiduciary Judge*, at 1159. The answer depends on too many variables, including difficult ones to quantify, such as how well lawyers can be monitored.

Instead of relying on models, many courts[3] and academic commentators, including us,[4] believe that judges should "mimic the market" when awarding fees.

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[3] The Seventh Circuit makes the market rate the sole determination in awarding class fees, *see, e.g.*, *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (holding that the district court must "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case"), and most other Circuits make the market rate at least one factor in the determination *see, e.g.*, *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 496 (3d Cir. 2017) ("the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained"); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (followed by many Circuits) (the attorney's "customary fee"), *overruled on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) ("the market rate").

[4] In addition to articles previously cited, see Charles Silver, *The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status Report on Securities Fraud Class Actions*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION (Sean Griffith et al. eds., 2018).

Professor John C. Coffee, Jr., perhaps the country's leading scholar of stockholder actions, urged this approach long ago:

> [T]he "law should mimic the market." In the class action context, that would mean attempting to award the fee that informed private bargaining, if it were truly possible, might have reached. The simplest way for the law to duplicate the bargain that informed parties would reach if agency costs were low is to look to fee award levels in actions brought by sophisticated private parties under the same or comparable statutes…. [I]f courts were to ask what fee structure an informed, sophisticated client would use to compensate his attorney when close monitoring is not feasible, they would at least have focused on the correct question.

John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 696-697 (1986).

The key insight supporting this development is that sophisticated plaintiffs with large claims can be expected to hire lawyers on terms that maximize their expected net recoveries—exactly the goal that judges, as absent class members' fiduciaries, should strive to achieve. Instead of "reinventing the wheel" and using novel compensation arrangements, judges can follow the lead of sophisticated plaintiffs and be reasonably confident of fulfilling their charge.

What does the market tell us about the optimal way to pay lawyers who work on contingency? First, it tells us that judges should adopt percentage-based fee formulas and reject lodestar formulas because real clients always use the former when engaging such attorneys. We have studied fee arrangements in the United

States for decades and we know of not a single instance in any type of litigation in which a sophisticated client used the lodestar method when hiring attorneys on contingency. To the best of our knowledge, they do so only in jurisdictions like England that prohibit percentage-based contingent fees. In view of this, the only plausible conclusion is that it is wrongheaded to evaluate the reasonableness of contingent lawyers' compensation in lodestar-based terms when percentage terms are an option. If the lodestar method was a good way of compensating lawyers for bearing costs and risks, sophisticated clients would have recognized this and agreed to pay lawyers a contingent hourly rate times a multiplier. Instead, clients prefer percentage-based contingency arrangements that eliminate the need to review monthly bills, discourage lawyers from dragging out cases, and reward lawyers for maximizing recoveries. Given that the lodestar method is a bad way of paying lawyers, it must also be a bad way of evaluating the reasonableness of their fees. If sophisticated clients do not care about lodestar multipliers when percentages are available, judges should not care about them either.

Second, the market tells us that judges should award either flat percentages of 25% to 40% or percentages that increase with the procedural maturity of the litigation (e.g., 25% of the recovery when a claim settles before a complaint is filed, one-third thereafter, and 40% in the event of an appeal).[5] These are overwhelmingly the fee terms selected by real clients, including sophisticated clients, who hire lawyers on contingency. *See* Fitzpatrick, *A Fiduciary Judge,* at 1159-63. Of course, upward and downward deviations from these ranges should be allowed when evidence shows that, in similar matters, clients tend to pay more or less. But, in sum, a judge applying the "mimic the market" approach would review the evidence and do his or her best to estimate the terms that would have been agreed to had a sophisticated client, acting as an agent for all class members, negotiated with class counsel directly at the start of litigation.

Vice Chancellor Laster followed this prescription. His percentage fell within the most common fixed-percentage range. He even considered that the settlement took place at a "late stage"—only 19 days before trial was scheduled to begin—which, frankly, argues in favor of an even higher percentage than he awarded.

[5] Although 33.3% appears to be the high end in Delaware stockholder litigation, we are aware of many contingent fee agreements in other contexts in which the agreed fee is 40%. *See, e.g.*, Eric Helland & Seth A. Seabury, *Contingent-Fee Contracts in Litigation: A Survey and Assessment*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 383, 387-88 (Jennifer Arlen ed., 2013).

II. THE MARKET HAS REJECTED THE DECLINING PERCENTAGE APPROACH

Opposing amici do not criticize the "mimic the market" approach. They offer no reason for thinking that sophisticated clients with large claims routinely, or even occasionally, prefer inferior compensation formulas to better ones. Yet, they urge the Court to endorse a fee formula that the market has rejected. With the exception of one context, which we address below, they do not show that sophisticated clients ever use their preferred approach. Instead, opposing amici ask the Court to have greater faith in them than in the lessons the market for legal services teaches about the advantages and deficiencies of various compensation structures. We are more cautious.

In *A Fiduciary Judge*, Professor Fitzpatrick examined the empirical evidence regarding how sophisticated parties pay lawyers they hire on contingency. His conclusion: "the data from sophisticated clients . . . did not find any marginally decreasing rates." *Id*. at 1170.[6] The reasons are easy to understand. Marginally

[6] This conclusion was based on a published study of corporations that hire lawyers on contingency to bring patent infringement cases and new data collected in corporate antitrust class actions, where, over nearly 20 years, large corporations never objected to large fee percentages even in the biggest class actions. Opposing amici argue that the antitrust data is distinguishable from this case because "M&A settlements rarely secure 100% of potential damages" while "antitrust cases typically allow for treble damages." AB.23. They think this is significant because antitrust plaintiffs can "settle for 50% of treble damages, give 33% of that award to their attorneys, and still recover actual damages." *Id*. In other words, they seem to think antitrust plaintiffs have money to burn, so why not give a little extra to the lawyers?

declining percentages mean marginally declining incentives to wrest more money from the defendant. That forces clients to monitor their lawyers even more to prevent them from shirking. But perhaps more importantly, marginally declining percentages require the parties to agree on when percentages should start declining and by how much. At what recovery should the rate start to fall? Should it fall to 30%? To 25%? At what recovery should it next fall? And so on. The answers to these questions are extremely difficulty to determine. For example, in order to construct declining percentages that maximize their own recoveries, clients would

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We did not know corporations were so magnanimous. But the premise of the argument is flawed. Antitrust class actions do not settle for "50% of treble damages"; on average, they settle for 19% of single damages. *See* John M. Connor & Robert H. Lande*, Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages,* 100 IOWA L. REV. 1997, 2010 (2015). Opposing amici also argue that the antitrust data is distinguishable because the representative plaintiffs in the antitrust cases received large incentive awards and these awards might have offset the gains they could have made by objecting to a fee request; they even attached a chart showing that they varied from four figures to perhaps as high as the low six figures. (It is difficult to tell precisely from their chart because they lumped together incentive awards to all representative plaintiffs in a given case.) *See* AB.23 & Ex. C. The flaws in this argument are many-fold. First, class members are allowed to object to fee requests without objecting to or otherwise impairing the underlying settlements and their incentive awards. Second, many of the representative plaintiffs in these cases had millions upon millions of dollars at stake; even an incentive award of six figures would not offset what they could have gained by shaving even a few percentage points off the fee award. Finally, incentive awards do not explain why *absent* corporate class members never objected any of these fee requests. Opposing amici also argue that the antitrust data actually supports their argument because the fee requests there "decline[d]" with size of recovery. AB.22. But the fee requests varied over a very narrow range—27.11% to 33.33%—*exactly* within the market range and *well above* the percentage they recommend.

need to know their lawyers' so-called "production functions"—essentially, what the outcome of the litigation would be at each additional unit of time invested by the lawyer. *See, e.g.*, Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503, 515-23 (1996). No one knows this, including the lawyer. For one thing, it depends on what the defendant will do in response to each additional unit of time invested by the lawyer. Moreover, even if the parties knew the production function, it would still be complicated to figure out where to set the inflection points in light of the other variables involved in the calculation. *See id*. All of this is so difficult that we are unaware of any academics who have attempted to calculate optimal declining percentages. Opposing amici realize all this, *cf.* CB.9 ("This approach, however, would require the investor to determine this baseline amount when selecting lead counsel and incorporate it into the retainer agreement."); not even they are willing to do it in this very case. *See supra* note 2.

The best that Professor Fitzpatrick could say about marginally declining rates is that they are "not unheard of in the marketplace." Fitzpatrick, *A Fiduciary Judge,* at 1170. Opposing amici base the portion of their brief entitled "Declining Percentages are Used in the Marketplace" on these "'not unheard of'" examples. AB.20 (quoting Fitzpatrick, *supra*). These examples are public pension funds that hire lawyers to bring securities fraud class actions. *See id.* (citing "sophisticated public-sector funds"). Opposing amici even cite *Is the Price Right?*, the *Columbia*

Law Review article that Professors Baker and Silver coauthored, to support them. *See* AB.20 n. 11. But opposing amici do not tell the rest of the story.

The rest of the story is politics. Nearly twenty years ago, Professor Coffee had this to say about these cases:

> 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 . . . a large corporation negotiate such a contract (they have instead typically used straight percentage of the recovery formulas). My belief is that public pension funds prefer the "declining percentage" formula largely for political reasons, while private corporations disdain such formula for economic reasons. That is, public pension funds are frequently administered by elected political officials who are potentially subject to media and political criticism for conferring "windfall" fees on their attorneys. Necessarily, they seek to avoid criticism, and the declining percentage formula seems primarily a defensive strategy to protect political officials from such criticism. Corroborating this conclusion is the rareness of its use by private corporations (as Coca-Cola, PepsiCo and Admiral Beverage have implicitly confirmed in this case [by paying straight percentage fees in the typical range]).

Declaration of John C. Coffee, Jr., ¶ 22, *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004). Professor Silver has endorsed this conclusion as well. *See* Declaration of Charles Silver, ¶ 53, *In re Takata Airbag Product Liability Litigation (Economic Loss Track Cases Against Honda and Nissan)*, No. 15-md-02599 (S.D. Fla. Jan. 24, 2018). In other words, the examples from public pension funds are tainted; the public officials in those cases may not be trying to maximize the pension fund plaintiffs' net recoveries. But, because everyone agrees courts should try to maximize the plaintiffs' net recoveries here, it follows that courts should not emulate these examples.

III. OPPOSING AMICI'S ANALYSIS IS BASED ON LODESTAR MULTIPLIERS AND THE MARKET HAS DECISIVELY REJECTED LODESTAR MULTIPLIERS AS A BASIS FOR FEES

What then recommends marginally declining percentages? Opposing amici say their approach is recommended by an examination of class action lawyers' lodestar multipliers. *See* AB.12 ("A lodestar cross-check could, and should, be used . . . ."); CB.6-9 (examining "average multiplier[s] to lodestar"). They argue that class action lawyers reap larger multipliers on their time from fee awards in bigger cases than in smaller cases, *see id.*, and this makes class action lawyers "overcompensated" in bigger cases, CB.2 (arguing that eschewing "a declining-percentage fee" would lead to "overcompensating class attorneys" in "large settlements"); CB.7 ("attorneys are . . . overcompensated after [a motion to dismiss] in cases involving high-market capitalization firms like Dell").[7] Given that lawyers are "overcompensated" in bigger cases, they argue that fees could be cut and the lawyers would still file these cases. *See* CB.8 ("[T]he conjecture that plaintiffs' firms will not pursue meritorious cases under a declining-fee approach ignores the significant money that firms make in those cases.").

[7] They make the assertion more colorfully in one of the law review articles on which their amicus briefs are based: "[B]eing appointed as lead counsel in a securities class action that is likely to end with a large settlement is like receiving a winning lottery ticket." Stephen J. Choi, Jessica Erickson & A. C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions*, 17 J. EMPIRICAL L. STUD. 438, 464 (2020).

There are so many flaws in this logic that it is difficult to know where to begin. But let's start with the "overcompensation" point. The fact that one multiplier is bigger than another says nothing about which multiplier is too big and which multiplier is too small. For example, maybe lawyers are correctly compensated in big cases and undercompensated in smaller cases? Maybe lawyers are undercompensated in all cases but less so in big cases?[8] Without a theory for what the optimal lodestar multiplier is to begin with, comparing one lodestar multiplier to another tells us nothing.

Moreover, even if it were true that lawyers would *file* all the same cases if the courts awarded lower fee percentages, this does not tell us whether class members would be better off on net. Opposing amici argue that smaller fee awards for attorneys should leave larger net recoveries for stockholders, *see* AB.9 (providing a made-up example), and this is indeed possible. But is it *likely*? We think not. Net recoveries are a function of both the fee percentage *and* the number of dollars recovered. When lawyers receive declining percentages, their incentives also

[8] *See, e.g.*, I.J. Alexander Dyck, et al., *How Pervasive is Corporate Fraud?* (Feb. 17, 2021), https://ssrn.com/abstract=2222608 (finding that lawyers currently pursue less than half of all securities fraud). Indeed, Pentwater itself contends that counsel failed to maximize the recovery in this case. *See* A367-381 (arguing that the settlement, although enormous, is small by comparison to the losses incurred). If Pentwater is right, counsel was incentivized insufficiently despite the possibility of earning large profits.

diminish. Even if a lawyer is willing to file a case, what they do or don't do after they file is driven by how they are paid.

One passage in particular demonstrates opposing amici's indifference to the quality of lawyers' efforts. They praise a Texas rule that "restricts contingency fees in class actions to 400% of lodestar." AB.9. Remarkably, they do so without noting that the rule was part of a sweeping package of lawsuit restrictions (also known as tort reforms) adopted in 2003 with the purpose to make many types of lawsuits unprofitable.[9] Sadly, based on our experience and study of Texas litigation, the package has had its desired effect.[10]

But there is no need to try to figure out who is right and who is wrong about what will happen under opposing amici's proposal. Real clients have already done this work and have flatly rejected opposing amici's lodestar-multiplier analysis. As we explained above, the market has rejected lodestar-based formulas for contingent

[9] *See* Texans for Lawsuit Reform, Timeline of Reforms, https://www.tortreform.com/timeline-of-reforms/ (last visited Dec. 24, 2023) ("In 2003, TLR advocated our nation's most comprehensive tort reform bill . . . address[ing] several areas of Texas' legal system that were being abused[, including] . . . class action attorney fees.").

[10] Professor Silver studied the impact of the 2003 tort reforms on medical malpractice litigation and found that the frequency of lawsuits and payouts declined significantly. *See* Bernard S. Black et al., MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHAT IT DOES, AND WHY TORT REFORM HASN'T HELPED 11 (Cato Institute 2021).

legal representation. In particular, it has rejected capping percentages by a multiple of the lawyer's lodestar. Again, Professor Fitzpatrick canvassed the empirical evidence in *A Fiduciary Judge*; his conclusion: "I have never seen this method used in the market for contingency representation, whether among sophisticated or unsophisticated clients." *Id*. at 1167. Indeed, opposing amici have not cited a *single* example of any client anywhere that agreed to a fee contract that lowered percentages based on the lawyer's lodestar multiplier—not even one tainted by politics. Yet, that is the very method they are recommending to the Court! *See* AB.12 ("A lodestar cross-check could, and should, be used . . . .").

If there were any doubt that opposing amici's analysis has been flatly rejected by the market, the death knell can be found in their backup argument: returning to lodestar multipliers, they argue that lawyers' percentages should be reduced when cases are resolved *after* a motion to dismiss is denied versus before. *See* CB.7 ("[A]ttorneys are undercompensated before a motion to dismiss, but overcompensated afterwards . . . ."). In their companion law review article, they argue this is warranted because risk has been mitigated once the case has survived a motion to dismiss; less risk should mean lower lodestar multipliers and lower lodestar multipliers should again mean lower fee percentages. *See* Stephen J. Choi, Jessica Erickson & A. C. Pritchard, *The Business of Securities Class Action Lawyering*, 99 IND. L. J. (forthcoming), https://ssrn.com/abstract=4350971, at 62 (noting that "the riskiness of a case goes down as the litigation progresses" and arguing that, because, "the impact is largest in the cases against the largest companies," the "overcompensation (and thus incentive to overwork) is greatest for these cases"). As we noted above, real clients in the real marketplace do sometimes vary fee percentages on the procedural maturity the case achieved. But they do so in the exact opposite manner recommended by opposing amici! The market *increases* percentages as cases survive procedural stages, not decreases them.

Again, we have *never* seen a fee agreement that goes the other way, and, again, opposing amici cannot cite a *single* one. The reason is well known. As scholars have shown for many decades, the biggest drawback to the percentage-method is that lawyers will want to settle prematurely for too little. *See* Fitzpatrick, *A Fiduciary Judge,* at 1158-59 (citing over 50 years of scholarship). Clients mitigate this by *increasing* percentages as cases move along; decreasing percentages would only *exacerbate* the problem.[11] In other words, here again, opposing amici's recommendation only makes sense by assuming that case outcomes are not affected

[11] *See, e.g.*, Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259, 260 (1997) (showing that percentages should increase with procedural maturity). Another way to mitigate the problem is to increase percentages with recovery size. *See, e.g.*, John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,"* 30 CARDOZO L. REV. 407, 432 (2008); Jill E. Fisch, *Lawyers on the Chopping Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 679 (2002).

by attorney effort after filing. Here again, that assumption is not based in reality. But, here again, there is no need to try to figure out who is right or who is wrong about what will happen if fee percentages decline as a case matures. Real clients have already done this work for us and they have rejected the idea. In our view, courts should not "experiment on" the stockholders here by subjecting them to novel theories of attorney compensation unknown in the real world.

CONCLUSION

Scholars have spent many lifetimes trying to figure out the best way for clients to pay their lawyers. The answer is indeterminate because there are too many variables and too many of them are unknowable. Judges could play central planner and try to figure out the ideal fee formula in every case. But, with respect, we think that is a fool's errand. The better and safer course is just to ask what real clients do when they hire lawyers on contingency. That's what Vice Chancellor Laster did and his decision should be affirmed.

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EXHIBIT B

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

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

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Practice-Oriented Publications

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118. "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).

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Miscellaneous

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

PERSONAL

Daughter, Katherine

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

First generation of family to attend college.

EXHIBIT C

89 Fordham L. Rev. 1151

Fordham Law Review
March, 2021

Colloquium

The Judicial Role in Professional Regulation
Brian T. Fitzpatrick[a1]

A FIDUCIARY JUDGE'S GUIDE TO AWARDING FEES IN CLASS ACTIONS

*1172Appendix

Direct Purchaser Pharmaceutical Antitrust Settlements, April 2003-April 2020

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
November 9, 2018	Hartig Drug Co. v. Senju Pharmaceutical Co.[90]	$9,000,000	33.33%	N/A	None	No
October 24, 2018	*In re* Blood Reagents Antitrust Litigation[91]	$41,500,000	33.33%	N/A	None	No
September 20, 2018	*In re* Lidoderm Antitrust Litigation[92]	$166,000,000	27.11%	33.33%	None	Yes
July 18, 2018	*In re* Solodyn (Minocycline Hydrochloride) Antitrust Litigation[93]	$76,846,250	31.45%	N/A	None	No
April 18, 2018	American Sales Co. v. Pfizer, Inc.[94]	$94,000,000	32.69%	33.33%	None	Yes
December 19, 2017	*In re* Aggrenox Antitrust Litigation[95]	$146,000,000	33.33%	33.33%	None	Yes
December 7, 2017	*In re* Asacol Antitrust Litigation[96]	$15,000,000	33.33%	N/A	None	Yes

October 23, 2017	Castro v. Sanofi Pasteur, Inc.[97]	$61,500,000	33.33%	N/A	None	Yes
October 5, 2017	*In re* K-Dur Antitrust Litigation[98]	$60,200,000	33.33%	N/A	None	Yes
October 15, 2015	King Drug Co. of Florence v. Cephalon, Inc.[99]	$512,000,000	27.50%	N/A	None	Yes
May 20, 2015	*In re* Prograf Antitrust Litigation[100]	$98,000,000	33.33%	N/A	None	Yes
January 20, 2015	*In re* Prandin Direct Purchaser Antitrust Litigation[101]	$19,000,000	33.33%	N/A	None	Yes
September 15, 2014	Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co.[102]	$15,000,000	33.33%	N/A	None	No
August 6, 2014	Louisiana Wholesale Drug Co. v. Pfizer, Inc.[103]	$190,416,438	33.33%	N/A	None	Yes
June 30, 2014	*In re* Skelaxin (Metaxalone) Antitrust Litigation[104]	$73,000,000	33.33%	N/A	None	Yes
April 16, 2014	*In re* Plasma-Derivative Protein Therapies Antitrust Litigation[105]	$64,000,000	33.33%	N/A	None	No
June 14, 2013	American Sales Co. v. Smithkline Beecham Corp.[106]	$150,000,000	33.33%	N/A	None	Yes
April 10, 2013	Louisiana Wholesale Drug Co. v. Becton Dickinson & Co.[107]	$45,000,000	33.33%	N/A	None	Yes
November 7, 2012	*In re* Wellbutrin XL Antitrust Litigation[108]	$37,500,000	33.33%	N/A	None	Yes
May 31, 2012	Rochester Drug Co-Operative, Inc., v. Braintree Laboratories Inc.[109]	$17,250,000	33.33%	N/A	None	Yes
January 12, 2012	*In re* Metoprolol Succinate Antitrust Litigation[110]	$20,000,000	33.33%	N/A	None	Yes
November 28, 2011	*In re* DDAVP Direct Purchaser Antitrust Litigation[111]	$20,250,000	33.33%	N/A	None	Yes
November 21, 2011	*In re* Wellbutrin SR Antitrust Litigation[112]	$49,000,000	33.33%	N/A	None	Yes

August 11, 2011	Meijer, Inc. v. Abbott Laboratories[113]	$52,000,000	33.33%	N/A	None	Yes
January 31, 2011	*In re* Nifedipine Antitrust Litigation[114]	$35,000,000	33.33%	N/A	None	Yes
January 25, 2011	*In re* Oxycontin Antitrust Litigation[115]	$16,000,000	33.33%	N/A	None	Yes
April 23, 2009	*In re* Tricor Direct Purchaser Litigation[116]	$250,000,000	33.33%	N/A	None	Yes
April 20, 2009	Meijer, Inc. v. Barr Pharmaceuticals, Inc.[117]	$22,000,000	33.33%	N/A	None	Yes
November 9, 2005	*In re* Remeron Direct Purchaser Antitrust Litigation[118]	$75,000,000	33.33%	N/A	None	Yes
April 19, 2005	*In re* Terazosin Hydrochloride Antitrust Litigation[119]	$74,572,327	32.41%	N/A	None	Yes
November 30, 2004	North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.[120]	$50,000,000	33.33%	N/A	None	No
April 9, 2004	*In re* Relafen Antitrust Litigation[121]	$175,000,000	33.33%	N/A	None	No
April 11, 2003	Louisiana Wholesale Drug Co. v. Bristol-Myers Squibb Co.[122]	$220,000,000	32.96%	N/A	None	Yes
			N = 33 Median = 33.33% Mean = 32.85%	3/33	0/33	26/33

Footnotes

a1 Professor of Law and Milton R. Underwood Chair in Free Enterprise, Vanderbilt Law School. This Essay was prepared for the Colloquium entitled *The Judicial Role in Professional Regulation*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 9, 2020, at Fordham University School of Law. Many thanks to Lynn Baker, Sam Issacharoff, Alon Klement, Rick Marcus, Steve Shavell, Charlie Silver, Kathy Spier, and the participants at a faculty workshop at the University of California Hastings College of the Law, as well as at this Colloquium for helpful comments on earlier drafts. Thanks as well to Peter Byrne and Will Cox for excellent research assistance.

1 *See*Fed. R. Civ. P. 23(c)(1)(A).

2 *Id.* r. 23(g).

3 *Id.* r. 23(e).

4 *See id.* r. 23(h).

5 *Id.* r. 23(c)(2)(B)(v).

6 *Id.* r. 23(c)(2)(B) (requiring courts to direct only "the best notice that is practicable under the circumstances"); *see also*Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (holding that notice need only be "reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

7 *See*Brian T. Fitzpatrick, The Conservative Case for Class Actions 59-61 (2019) (noting that class actions are necessary because individuals lack the incentive to sue to remedy small harms); *id.* at 88 (noting that class members often do expend much effort to collect payments from the class fund); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1533 (2004) (finding that "opt-out ... rates increase as per capita recovery increases").

8 *See, e.g.*, Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Emps. Ret. Sys., 814 F.3d 652, 657 (2d Cir. 2016); Ehrheart v. Verizon Wireless, 609 F.3d 590, 594 (3d Cir. 2010); Rodriguez v. West Publ'g Corp., 563 F.3d 948, 968 (9th Cir. 2009); *In re* Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 932 (8th Cir. 2005); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279-80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class."); *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 225 (5th Cir. 1981); Ray v. Mechel Bluestone, Inc., No. 15-CV-03014, 2018 WL 1309731, at *4 (S.D.W. Va. Mar. 13, 2018); Jackson v. Innovative Sec. Servs., LLC, 283 F.R.D. 13, 15 (D.D.C. 2012); *In re* Lupron Mktg. & Sales Pracs. Litig., 345 F. Supp. 2d 135, 138 (D. Mass. 2004); *see also*4 William B. Rubenstein, Newberg on Class Actions § 13:40 (5th ed. 2020) (noting that in class action litigation "the law requires the judge to act as a fiduciary" of absent class members).

9 *See, e.g.*, Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. Rev. 1239, 1322 ("[C]ourts portraying themselves as fiduciaries fail to articulate what the status requires in this context, much less what they have done to satisfy their fiduciary duties for the benefit of absent class members.").

10 *See generally* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043 (2010).

11 *See*Restatement (Third) of the L. of Agency § 1.01 (Am. L. Inst. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf.").

12 *See id.* § 8.01 ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

13 *Id.* § 8.10 ("An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise."); *id.* § 2.02 cmt. f ("The agent's fiduciary duty to the principal obliges the agent to interpret the principal's manifestations so as to infer, in a reasonable manner, what the principal desires to be done in light of facts of which the agent has notice at the time of acting."); *id.* cmt. h ("[I]f it is

normally not reasonable to believe that the principal will benefit from an act, a reasonable agent should not infer that the principal wishes the agent to do the act and therefore should not commit the act unless the principal communicates specifically that the principal wishes the act to be done.”).

14 *See*Fitzpatrick, *supra* note 7, at 104 (noting that “people, it turns out, are not very rational,” briefly discussing the wealth of literature “showing how all of us make the same types of mistakes over and over again when we try to process information,” and citing sources).

15 *See id.* at 91 (“[J]udges almost always set the fee award at the end of the case.”); *id.* at 87 (“[M]any courts wait to see how many class members apply for money before awarding fees.”).

16 *See id.* at 91 (noting that the short-term rational decision for a class member paying his lawyer at the end of the case is to “give him as little as possible so I can keep as much as possible for myself!”).

17 *See* Fitzpatrick, *supra* note 10, at 2051 (“In most cases, ... fee awards come from proceeds that would otherwise go to class members.”). An interesting example to the contrary is *Hyland v. Navient Corp.*, No. 18-CV-9031, 2019 WL 2918238 (S.D.N.Y. Oct. 9, 2020), which describes a class counsel who was paid noncontingent fees by the American Federation of Teachers.

18 *See* Alon Klement & Zvika Neeman, *Incentive Structures for Class Action Lawyers*, 20 J.L. Econ. & Org. 102, 108-09 (2004) (noting that “[a]ny noncontingent fee [is] infeasible in this context” and “the attorney can never collect a fee higher than the actual amount recovered”).

19 *See* Fitzpatrick, *supra* note 10, at 2063 (“[A]ggregate litigation permits plaintiffs to reap the benefits of economies of scale in litigation, and, in a competitive marketplace, one might expect those economies to be passed on to clients in the form of lower attorneys' fees.”).

20 *See*Fitzpatrick, *supra* note 7, at 104 (noting that behavioral law and economics does not suggest that “the teams of people who run corporations are systematically irrational in the same way the rest of us are”).

21 *See, e.g.*, Lynn Baker, Comment, *Facts About Fees: Lessons for Legal Ethics*, 80 Tex. L. Rev. 1985, 1986 (2002).

22 *See, e.g.*, *id.*; Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees*, *in* 1 The New Palgrave Dictionary of Economics and the Law 415, 416 (Peter Newman ed., 2002) (“It is common to compare a contingency fee arrangement with the alternative in which an attorney is paid an hourly wage.”).

23 *See, e.g.*, Fitzpatrick, *supra* note 7, at 85-98 (explaining the pros and cons of the contingent-lodestar method and the percentage method); Klement & Neeman, *supra* note 18, at 108-110; William Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 J. Legal Stud. 185, 191-95 (1994).

24 *See, e.g.*, Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 Ind. L.J. 1021, 1048-61 (2020) (discussing different fee arrangements, including statutory fee shifting); Martha Pacold, Comment, *Attorneys' Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. Chi. L. Rev. 1007 (2001).

25 *See, e.g.*, Winand Emons & Nuno Garoupa, *US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and the Supply of Legal Services*, 27 Managerial & Decisions Econ. 379 (2006).

26 *See, e.g.*, Fitzpatrick, *supra* note 10, at 2051.

27 I am ignoring the possibility that monitoring will take place by the class representative. Outside of securities fraud class actions, most class representatives are unsophisticated figureheads. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 5 (1991) ("The named plaintiff does little--indeed, usually does nothing--to monitor the attorney in order to ensure that representation is competent and zealous, or to align the interests of the attorney with those of the class or corporation.").

28 *See, e.g.*, Alon Klement, *Who Should Guard the Guardians?: A New Approach for Monitoring Class Action Lawyers*, 21 Rev. Litig. 25, 45 (2002) ("[C]ommon law courts are institutionally incapable of obtaining information unless presented to them by the litigants.").

29 *See id.* at 45-46 ("[T]he paradigmatic common law court is passive and relies solely on the adversary process for its education about the case.").

30 *See id.* at 45 ("Constrained by the institutional requirements of neutrality and passivity set by the adversary system ... courts have been left, by and large, uninformed about the parameters necessary to effectively regulate class attorneys.").

31 *See id.* at 47 ("On top of these institutional barriers, courts are also constrained by their limited resources. Dockets are full, and support personnel are scarce. Conducting meaningful investigations without the necessary means is often unworkable. Moreover, in the specific context of attorney fee applications, courts are expected to apply restraint and limit the extent of factual investigations. They are urged not to allow protracted satellite litigation and to control and expedite fee award determinations." (footnote omitted)).

32 For models that relax that assumption, see, for example, James Dana & Kathryn Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. Econ. Org. 349 (1993); Klement & Neeman, *supra* note 18; *see also* Rubinfeld & Scotchmer, *supra* note 22, at 417-18 (summarizing these models).

33 The only thing that frees clients from monitoring is the outright sale of their claims to their lawyers. *See* Macey & Miller, *supra* note 27, at 108 (proposing an auction approach where "[t]he winning bidder becomes the owner of the claim, and therefore acts as its own agent").

34 *See* Emons & Garoupa, *supra* note 25, at 380 ("[C]ontingent fees are more efficient than conditional fees."); Fitzpatrick, *supra* note 10, at 2051-52 ("Under the lodestar method, class counsel's compensation increased the longer the litigation wore on; class members, by contrast, prefer cases to end as quickly as possible so they can receive their compensation as quickly as possible. Moreover, class counsel were compensated irrespective of how much they recovered for the class; class members, by contrast, prefer to receive as much as possible."); Klement & Neeman, *supra* note 18, at 108-10; Lynk, *supra* note 23, at 191-95.

35 *See* Emons & Garoupa, *supra* note 25, at 380; Fitzpatrick, *supra* note 10, at 2052 ("To better align the interests of class counsel and the class, judges began compensating class counsel by awarding them a percentage of the class's recovery.

This way, the more the class recovers, the more class counsel are paid, and class counsel have no incentive to drag cases on unnecessarily.").

36 *See, e.g.*, Steven Shavell, Foundations of Economic Analysis of Law 435 (2009) ("Under contingency fee arrangements ... the lawyer ... press[es] for settlement more often than when the settlement offer exceeds the expected judgment net of litigation costs because the lawyer bears all the litigation costs but obtains only a percentage of the settlement."); Lynk, *supra* note 23, at 194; Murray Schwartz & Daniel Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 Stan. L. Rev. 1125 (1970). *But see* Mitchell Polinsky & Daniel Rubinfeld, *A Note on Settlements Under the Contingent Fee Method of Compensating Lawyers*, 22 Int'l Rev. L. & Econ. 217, 217 (2002) ("[T]he lawyer could have an insufficient motive to settle, the opposite of what is usually believed.").

37 *See* Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. Legal Stud. 503, 508-11 (1996) (noting that the optimal fee minimizes the agency costs generated from a lawyer's underinvestment in the claim and rent-seeking behavior).

38 *See* John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 697 (1986) ("[T]he most logical answer to this problem of premature settlement would be to base fees on a graduated, increasing percentage of the recovery formula--one that operates, much like the Internal Revenue Code, to award the plaintiff's attorney a marginally greater percentage of each defined increment of the recovery. While this approach cannot be said to eliminate the inevitable tension between the interests of plaintiff's attorneys and their clients in class actions, it can at least partially counteract the tendency for premature settlements."); Jill E. Fisch, *Lawyers on the Chopping Block: Evaluating the Selection of Class Counsel by Auction*, 102 Colum. L. Rev. 650, 679 (2002) ("By increasing the reward to counsel, increasing percentage bids reduce the incentive for cheap settlements and motivate counsel to pursue high levels of recovery."); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. Legal Stud. 259, 260 (1997) ("[T]he bifurcated fee structure is preferable to the unitary structure .... The optimal bifurcated fee often couples a relatively high trial percentage for the lawyer (one that would be excessive if the case were actually going to trial) with a relatively low settlement percentage. The rationale of the large trial percentage is that it generates a large settlement; the rationale of the small settlement percentage is that it avoids paying the lawyer for (trial) work he does not perform.").

39 *See* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 Cornell L. Rev. 529, 530 (1978).

40 *See id.* at 581 ("The contingent hourly-percentage fee is payable only in the event of recovery and equals the sum of two components: (1) the lawyer's time charge for the hours devoted to the case; and (2) a percentage (*x*) of the amount by which the recovery (*s*) exceeds that time charge." (footnotes omitted)).

41 *See* A. Mitchell Polinsky & Daniel Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 Am. L. & Econ. Rev. 165, 182 n.30 (2003) ("This payment scheme is only fully successful, however, if the plaintiff is certain to obtain a settlement or a trial victory."). Although there are ways to perfect the formula, they are complex and involve third parties; as such I am not sure how realistic the perfections are. *See id.* at 166-69 (proposing a variation in which a third-party administrator "will contract with the lawyer and agree to pay him for the appropriate fraction of his time"); Alon Klement et al, Auctioning Class Action Representation 4 (Sept. 8, 2020) (unpublished manuscript) (on file with the *Fordham Law Review*) ("The proposed auction is divided into two stages. In the first stage, risk neutral insurers bid the highest percentage they are willing to pay the representing lawyer, over the hours she invests in the case.").

42 *See*Herbert M. Kritzer, Risks, Reputations, and Rewards 19 (2004) ("[T]he geographical focus of my research is the state of Wisconsin .... My initial data collection was a survey of Wisconsin contingency fee practitioners ...."). Eric Helland and Seth Seabury have surveyed the other studies and found that they all "are quite consistent in their findings.

Fees are typically 33 percent." Eric Helland & Seth A. Seabury, *Contingent-Fee Contracts in Litigation: A Survey and Assessment*, *in*Research Handbook on the Economics of Torts 383, 385 (Jennifer Arlen ed., 2013).

43 Kritzer, *supra* note 42, at 39.

44 *See id.* at 39-40.

45 *See id.* at 40.

46 *See id.* Although some of these methods combined lodestar and percentage components, none of the lodestar components were contingent. *See id.* The only examples of the contingent lodestar plus percentage I have seen are in cases where there could be fee shifting: the lawyer might be able to receive a lodestar-based fee-shifting award as well as a percentage of the recovery. *See* 1 Robert L. Rossi, Attorney's Fees § 10.6 (3d. ed. 2020) ("[Some] courts have held or indicated that an attorney may retain both the fee award and the contingent fee where the fee agreement provides for such a result.").

47 Kritzer, *supra* note 42, at 35 (noting that "personal injury was the dominant type of case" handled by the lawyers who responded to the survey).

48 *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 356-57 (2012).

49 *See id.* at 356-57.

50 *See id.* at 363 ("[The most elite contingent-fee patent litigators] select cases that they perceive to be strong on the merits, and importantly, to have extremely high potential damages. For example, one lawyer in this category explained: '$25 million expected value against one infringer. That's the general rule.' Others had similar high cut points, saying things like 'we'd like to be at $100 million on our cases. Those are good cases. The very least, I don't take a case unless we think we could pull in well into 8 figures."' (footnote omitted)).

51 *See id.* at 360.

52 Securities fraud class actions are another area of potential data because large sophisticated institutions serve at least as the representative class members. But efforts to systematically collect retainer agreements here have thus far failed because the agreements are rarely publicly disclosed. *See* Lynn A. Baker et al., *Is the Price Right?: An Empirical Study of Fee-Setting in Securities Class Actions*, 115 Colum. L. Rev. 1371, 1389-91 (2015) ("The study's analysis began by looking for cases in which proposed lead plaintiffs offered the court proof of the ex ante fee agreements they had negotiated. Although Congress and the drafters of the lead plaintiff mechanism seemed to anticipate that such agreements would be the norm, there is little evidence that they play a significant role in a court's selection of the lead plaintiff. There were very few cases--just 11.29%--in which the lead plaintiff candidate or the court discussed an ex ante agreement during the appointment process.").

53 *Cf.* Peter B. Rutledge & Christopher R. Drahozal, "*Sticky" Arbitration Clauses?: The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 Vand. L. Rev. 955, 959 (2014) ("[C]ontracts ... may be 'sticky' and resistant to change.").

54 *See generally* 1 John K. Villa, Corporate Counsel Guidelines § 4:7 (2020).

55 *See*Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013) ("Many costs of litigation do not depend on the outcome; it is almost as expensive to conduct discovery in a $100 million case as in a $200 million case .... There may be some marginal costs of bumping the recovery from $100 million to $200 million, but as a percentage of the incremental recovery these costs are bound to be low.").

56 *See* Appendix.

57 *See supra* note 32 and accompanying text. Another explanation comes from Eyal Zamir et al., *Who Benefits from the Uniformity of Contingent Fee Rates?*, 9 Rev. L. & Econ. 357, 359 (2013) ("The non-negotiability of the ... rate precludes lawyers from exploiting their private information about the expected value of the lawsuit and the amount of work it might entail. Clients with a good sense of the ranking of lawyers are able to hire the best lawyer among the ones who are willing to handle the case. The uniformity also enables the clients to retain the transaction's entire surplus.").

58 *See* Hay, *supra* note 37, at 519 ("[C]ases in which the ceiling is high but in which it is costly for the lawyer to move upward should involve the same fee as cases in which the ceiling is low but in which it is easy for the lawyer to move upward." (emphasis omitted)).

59 *See id.* at 511.

60 *See*Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 551 (2010) ("[T]he 'lodestar' figure has ... become the guiding light of our fee-shifting jurisprudence."); 1 Joan N. Feeney et al., Bankruptcy Law Manual § 4:38 (5th ed. 2020) ("Courts use a lodestar calculation to determine reasonableness of any fee application.").

61 *See*Fitzpatrick, *supra* note 7, at 98 (noting that an auction would in theory "drive down the winning fee percentage to the lowest possible price"); Macey & Miller, *supra* note 27, at 108-10 (noting that an auction could reduce agency costs and transaction costs).

62 For a detailed review of litigation where the presiding judge used an auction to select class counsel, see Laural L. Hooper & Marie Leary, Fed. Jud. Ctr., Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study (2001), https://www.fjc.gov/sites/default/files/2012/auctioning.pdf [https://perma.cc/7QJR-F54H].

63 Fisch, *supra* note 38, at 674-82 (discussing the difficulty of selecting the lowest bidder in auctions for class counsel); *see also*Third Cir. Task Force on the Selection of Class Couns., Final Report 49-51 (2002), https://www.ca3.uscourts.gov/sites/ca3/files/final%20report%C20***o***f%C20third%C20circuit%C20task%20force.pdf [https://perma.cc/7G8Y-Q7ZF] (same).

64 *See* Fisch, *supra* note 38, at 683-90 (noting that "a lead counsel auction cannot select among competing bids solely on the basis of price" and discussing the difficulties posed by incorporating an analysis of firm quality into the auction process).

65 48 C.F.R. § 9.201 (2020) ("Qualified bidders list (QBL) means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied

all applicable qualification requirements. Qualified manufacturers list (QML) means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product."); *id.* § 15.305 ("Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings."); 1 Steven Feldman, Government Contract Awards: Negotiation and Sealed Bidding § 10:20 (2020) (providing an example of a scoring system).

66 *See* Ralph Chapoco, *Calls for Lawyer Diversity Spread to Complex Class Litigation*, Bloomberg L. (July 30, 2020, 4:45 AM) https://news.bloomberglaw.com/social-justice/calls-for-lawyer-diversity-spread-to-complex-class-litigation [https://perma.cc/CQZ6-KSGH] ("Judge James Donato of the U.S. District Court for the Northern District of California declined to certify two firms ... as interim co-lead class counsel in a securities action .... In a July 14 order, Donato cited 'a lack of diversity in the proposed lead counsel,' noting that all four lead counsel were male, and [had] been lead counsel in other cases, what legal experts refer to as 'repeat players."' (quoting Order Re: Consolidation & Interim Class Counsel, *In re* Robinhood Outage Litig., No. 20-cv-01626, 2020 WL 6130884 (N.D. Cal. July 14, 2020))); *see also* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity*, 17 Cardozo J.L. & Gender 321, 324-27 (2011) (discussing Judge Harold Baer's orders imposing a diversity requirement on class counsel).

67 *See* 2 Feldman, *supra* note 65, § 12:2 ("[C]ontracting officials usually have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results [to award a contract]."); Third Cir. Task Force on the Selection of Class Couns., *supra* note 63, at 51 ("The courts that have conducted auctions have recognized that price cannot be the sole factor in awarding class counsel; there must be some quality control as well. Yet if the court takes into account anything other than price to choose among competing bids, it enters into the same kind of subjective determinations as occur under the traditional method of appointing class counsel.").

68 *See* Fisch, *supra* note 38; *see also*Third Cir. Task Force on the Selection of Class Couns., *supra* note 63, at 45 ("The auction method could encourage firms to submit unduly low bids in order to win the position of class counsel. Underbidding can result in lawyers cutting corners or settling too early in order to maintain a profit margin.").

69 *See* Fisch, *supra* note 38, at 674-78 (discussing the difficulty of evaluating bids with changing percentages).

70 *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. Legal Stud. 189, 201 (1987) ("It is at best a rough corrective ... because it substitutes a small number of discrete increments for what is in fact a continuous process--the reduction in the attorney's expected future costs as the case progresses.").

71 *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 832 (2010) (finding that courts use the percentage method 69 percent of the time, more often than not without the lodestar crosscheck); *see also* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) (finding the percentage method with lodestar cross-check was used approximately 38 percent of the time versus approximately 54 percent for the percent method without lodestar cross-check).

72 *See* Fitzpatrick, *supra* note 10, at 2052.

73 5 Rubenstein, *supra* note 8, § 15:85 ("[M]any courts also undertake a lodestar crosscheck as a means of ensuring that the percentage award is not a windfall.").

74 *See*Fitzpatrick, *supra* note 7, at 92 (explaining that the lodestar cross-check is "the same thing as the lodestar method, just dressed up in nicer clothing"); *see also*Williams v. Rohm & Haas Pension Plan, 658 F.3d 629, 636 (7th Cir. 2011) ("The ... argument ... that any percentage fee award exceeding a certain lodestar multiplier is excessive ... echoes the 'megafund' cap we rejected in *Synthroid*.").

75 *See* Fitzpatrick, *supra* note 71, at 833 (finding that "[t]he average award [under the percentage method] was 25.4 percent and the median was 25 percent"); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud., 241, 260 (2010) (finding that "[t]he median and mean fee to recovery ratios were 0.24 and 0.25, respectively" in percentage method cases).

76 Fitzpatrick, *supra* note 71, at 833 ("[T]he Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases."); *see also* Eisenberg & Miller, *supra* note 75, at 259 ("The Ninth Circuit has a 25 percent benchmark fee in common fund cases but allows departures based on individual case factors, and the Eleventh Circuit has indicated that its district courts view 25 percent as a benchmark.").

77 Professor Bill Rubenstein, however, has proprietary data suggesting judges do this. *See* Expert Declaration of William B. Rubenstein in Support of the Plaintiffs' Motion for Attorney's Fees & Expenses at 12, Hale v. State Farm Mut. Ins. Co., No. 12-cv-00660 (S.D. Ill. Oct. 16, 2018), ECF No. 954-3.

78 Fitzpatrick, *supra* note 10, at 2063 ("[A]ggregate litigation permits plaintiffs to reap the benefits of economies of scale in litigation, and, in a competitive marketplace, one might expect those economies to be passed on to clients in the form of lower attorneys' fees.").

79 *See* Hay, *supra* note 37, at 517-23.

80 *See*Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013).

81 Fitzpatrick, *supra* note 71, at 838 ("[I]t appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent."); *see also* Eisenberg & Miller, *supra* note 75, at 265 (reporting a mean fee of 12.0 percent and a median fee of 10.2 percent for recoveries over $175.5 million).

82 *See In re* Synthroid Mktg. Litig., 264 F.3d 712, 718 (7th Cir. 2001) (noting that "[u]nder the district court's approach" of capping attorneys' fees at 10 percent of recovery for settlements over $75 million, "no sane lawyer would negotiate a settlement of more than $74 million and less than $225 million; even the higher figure would make sense only if it were no more costly to obtain $225 million for the class than to garner $74 million"); Fitzpatrick, *supra* note 7, at 93-94 (providing an example and explaining "if you pay the lawyer a bigger percentage of smaller sums, he or she is better off sometimes resolving cases for smaller sums").

83 *See supra* note 36 and accompanying text.

84 *In re Synthroid*, 264 F.3d at 718 ("[C]ounsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their

clients (the consumer fund, recall, is $88 million). Why there should be such a notch is a mystery. Markets would not tolerate that effect; the district court's approach compels it.").

85 *Id.* ("A notch could be avoided if the 10% cap in 'megafund' cases were applied only to the *portion* of the recovery that exceeded $74 million, but that is not what the district court did; it capped fees at 10% of the whole fund.").

86 *See* Fisch, *supra* note 38, at 678 ("Because it fails to align counsel's interests with those of the plaintiff class at high levels of recovery, a declining percentage of recovery fee structure is especially likely to create a significant moral hazard problem."); *see also In re Synthroid*, 264 F.3d at 721 ("[D]eclining marginal percentages ... create declining marginal returns to legal work .... This feature exacerbates the agency costs inherent in any percentage-of-recovery system.").

87 *See*Silverman v. Motorola Sols., Inc., 739 F.3d 956, 959 (7th Cir. 2013) ("Awarding counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin (yet still preserving some incentive for lawyers to strive for these higher awards)."); *In re Synthroid*, 264 F.3d at 721 (noting that "negotiations and auctions often produce diminishing marginal fees when the recovery will not necessarily increase in proportion to the number of hours devoted to the case").

88 Daniel Rubinfeld and Suzanne Scotchmer have reported that such arrangements are "quite common," but they did not cite anything for that assertion. *See* Rubinfeld & Scotchmer, *supra* note 22, at 415.

89 *See, e.g.*, *In re* AT&T Corp., 455 F.3d 160, 163 (3d Cir. 2006). This case described the following fee agreement between class counsel and "the lead plaintiff New Hampshire Retirement Systems": "The formula provided attorneys' fees would equal 15% of any settlement amount up to $25 million, 20% of any settlement amount between $25 million and $50 million, and 25% of any settlement amount over $50 million."

90 Settlement Agreement Between Plaintiff Hartig Drug Co. Inc. & Defendants Senju Pharmaceutical Co. Ltd., Kyorin Pharmaceutical Co., Ltd. & Allergan, Inc., Hartig Drug Co. v. Senju Pharm. Co., No. 14-00719 (D. Del. Feb. 16, 2018).

91 Order Granting Plaintiffs' Motion for (1) an Award of Attorneys' Fees, (2) Reimbursement of Litigation Expenses & (3) Service Awards for the Class Representatives, *In re* Blood Reagents Antitrust Litig., MDL No. 09-2081 (E.D. Pa. Oct. 24, 2018).

92 Order Granting Final Approval of Settlement with Direct Purchaser Class & Entering Final Judgment of Dismissal with Prejudice, *In re* Lidoderm Antitrust Litig., No. 14-md-02521 (N.D. Cal. Sept. 20, 2018).

93 Settlement Agreement Between Implax Laboratories, Inc. & the Direct Purchaser Class, *In re* Solodyn (Minocycline Hydrochloride) Antitrust Litig., MDL No. 14-md-2503 (D. Mass. Mar. 10, 2018).

94 Order Granting Direct Purchaser Class Plaintiffs' Unopposed Motion for Final Approval of Settlement & Distribution Plan, Attorneys' Fees, Reimbursement of Expenses, Service Awards to the Class Representative Plaintiffs & Entry of Final Judgment & Order of Dismissal, Am. Sales Co. v. Pfizer, Inc., No. 14-cv-00361 (E.D. Va. Apr. 18, 2018).

95 Final Judgment & Order of Dismissal, *In re* Aggrenox Antitrust Litig., No. 14-md-02516 (D. Conn. Dec. 19, 2017).

96 Order & Final Judgment Finding Notice to Satisfy Due Process, Approving Settlement, Awarding Attorneys' Fees & Expenses, Approving Service Awards to Representative Plaintiffs & Ordering Dismissal with Prejudice, *In re* Asacol Antitrust Litig., No. 15-cv-12730 (D. Mass. Dec. 7, 2017).

97 Order for an Award of Attorneys' Fees, Reimbursement of Expenses & Payment of Service Awards to the Class Representatives, Castro v. Sanofi Pasteur, Inc., No. 11-cv-7178 (D.N.J. Oct. 23, 2017).

98 Order Granting Final Judgment & Order of Dismissal Approving Direct Purchaser Class Settlement & Dismissing Direct Purchaser Class Claims Against Defendants, *In re* KDur Antitrust Litig., MDL No. 1419, No. 01-cv-01652 (D.N.J. Oct. 5, 2017).

99 Order Granting Final Judgment & Order of Dismissal Approving Direct Purchaser Class Settlement & Dismissing Direct Purchaser Class Claims Against the Cephalon Defendants, King Drug Co. of Florence v. Cephalon, Inc., No. 06-cv-01797 (E.D. Pa. Oct. 15, 2015).

100 Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal with Prejudice, *In re* Prograf Antitrust Litig., MDL No. 2242 (D. Mass. May 20, 2015).

101 Order & Final Judgment Approving Class Action Settlement, *In re* Prandin Direct Purchaser Antitrust Litig., No. 10-cv-12141 (E.D. Mich. Jan. 20, 2015).

102 Order, Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co., No. Civ. 12-3824 (E.D. Pa. Sept. 15, 2015).

103 Final Judgment & Order of Dismissal Approving Proposed Class Settlement & Dismissing Actions, La. Wholesale Drug Co. v. Pfizer, Inc., Nos. 02-1830 & 02-2731 (D.N.J. Aug. 6, 2014).

104 Order Granting Class Counsel's Motion for Attorney Fees, Reimbursement of Expenses & Awards for the Named Plaintiffs, *In re* Skelaxin (Metaxalone) Antitrust Litig., MDL No. 2343, No. 12-cv-83 (E.D. Tenn. June 30, 2014).

105 Corrected Order & Judgment Approving Settlement & Dismissing with Prejudice Baxter International, Inc. & Baxter Healthcare Corporation, *In re* Plasma-Derivative Protein Therapies Antitrust Litig., MDL No. 2109, No. 09 C 7666 (N.D. Ill. Apr. 16, 2014).

106 Final Order & Judgment Approving Settlement, Am. Sales Co. v. Smithkline Beecham Corp., No. 08-cv-3149 (E.D. Pa. June 14, 2013).

107 Order & Final Judgment Approving Direct Purchaser Class Settlement, Awarding Attorneys' Fees & Expenses, Awarding Incentive Awards to Class Representatives, Approving Plan of Allocation & Dismissing Claims Against Defendant, La. Wholesale Drug Co. v. Becton Dickinson & Co., MDL No. 1730, No. 05-cv-1602 (D.N.J. Apr. 10, 2013).

108 Final Order & Judgment Approving Settlement, *In re* Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012).

109 Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to the Defendant, Rochester Drug Co-Operative, Inc., v. Braintree Lab'ys, Inc., No. 07-142 (D. Del. May 31, 2012).

110 Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiffs Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Metoprolol Succinate Antitrust Litig., No. Civ 06-52 (D. Del. Jan. 12, 2012).

111 Order & Final Judgment Approving Settlement Between Purchaser Class Plaintiffs & Defendants Ferring B.V., Ferring Pharmaceuticals, Inc. & Aventis Pharmaceuticals, Inc., *In re* DDAVP Direct Purchaser Antitrust Litig., No. 05 Civ. 2237 (S.D.N.Y. Nov. 28, 2011).

112 Order & Final Judgment Approving Direct Purchaser Class Settlement & Awarding Attorneys' Fees, Reimbursement of Costs & Class Representative Awards, *In re* Wellbutrin SR Antitrust Litig., No. Civ. 04-5525 (E.D. Pa. Nov. 21, 2011).

113 Order Granting Final Approval of Settlement & Entering Final Judgment of Dismissal with Prejudice, Meijer, Inc. v. Abbott Lab'ys, No. C. 07-5985 (N.D. Cal. Aug. 11, 2011).

114 Order Granting Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Additional Expenses & Awards to Certified Class Representatives, *In re* Nifedipine Antitrust Litig., MDL No. 1515, No. 03-MC-223 (D.D.C. Jan. 31, 2011).

115 Order & Final Judgment Approving Settlement Between Direct Purchaser Class Plaintiffs & Defendants Purdue Pharma L.P., Perdue Frederick Co., P.F. Laboratories, Inc., Purdue Pharmaceuticals L.P. & Purdue Pharma Inc., Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Oxycontin Antitrust Litig., No. 04-md-1603 (Jan. 25, 2011 S.D.N.Y.).

116 Order & Final Judgment Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, *In re* Tricor Direct Purchaser Litig., No. 05-340 (D. Del. Apr. 23, 2009).

117 Order & Final Judgment Approving Settlement Between Direct Purchaser Class Plaintiffs & Defendant Barr Pharmaceuticals, Inc., Awarding Attorneys' Fees & Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation & Ordering Dismissal as to All Defendants, Meijer, Inc. v. Barr Pharms., Inc., No. Civ. 05-2195 (D.D.C. Apr. 20, 2009).

118 Final Judgment & Order of Dismissal Approving Proposed Settlement & Dismissing Actions, *In re* Remeron Direct Purchaser Antitrust Litig., No. 03-CV-0085 (D.N.J. Nov. 9, 2005).

119 Order & Final Judgment, *In re* Terazosin Hydrochloride Antitrust Litig., MDL No. 99-1317, Nos. 98-3125 & 99-7143 (S.D. Fla. Apr. 19, 2005).

120 Final Order & Judgment Approving Settlement Between Class Plaintiff & Defendant Bristol-Myers Squibb Company, N. Shore Hematology-Oncology Assocs., P.C. v. Bristol-Myers Squibb Co., No. 04cv248 (D.D.C. Nov. 30, 2004).

121 Order & Final Judgment, *In re* Relafen Antitrust Litig., No. 01-12239 (D. Mass. Apr. 9, 2004).

122 Order & Final Judgment, La. Wholesale Drug Co. v. Bristol-Myers Squibb Co., MDL No. 1413, No. 01-CV-7951 (S.D.N.Y. Apr. 11, 2003).

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