EXHIBIT L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: End-Payor Plaintiff Actions	MDL No. 2472 Master File No. 1:13-md-2472-WES-PAS

DECLARATION OF PROFESSOR CHARLES SILVER IN SUPPORT OF END-PAYOR CLASS PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES

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I, Charles Silver, declare as follows:

I. SUMMARY OF OPINIONS

1. This is an antitrust class action brought to challenge allegedly anticompetitive practices that delayed the entry into the pharmaceutical market of generic versions of Loestrin 24 Fe ("Loestrin 24") and, suppressed generic Loestrin 24, after it entered the market, through an alleged product switch or hop. Because the Court certified a litigation class , the issues had been fully briefed and argued on opposing motions for summary judgment, the parties were ready for trial, and the team of lawyers was highly experienced, Class Counsel[1] were in an excellent position to negotiate the best possible settlement for the Third-Party Payor (TTP) Class.

2. The proposed settlement, which was negotiated with the assistance of the office of retired Judge Layn Phillips, one of the country's leading mediators, requires the Warner Chilcott Defendants (Defendants) to pay $62.5 million to the TPP Class. This is an excellent recovery that justifies a fully compensatory fee for Class Counsel.

3. Class Counsel's request for one-third of the recovery (33⅓ percent) as fees is reasonable. It falls squarely within both the range of fees that clients pay lawyers who handle complex commercial lawsuits on contingency and the range of fees that judges tend to award in cases of this nature and of this size.

4. A lodestar cross-check also shows that the fee request is reasonable. Because the litigation was greatly advanced when the settlement was reached, Class Counsel have expended a large number of hours. Consequently, the requested lodestar multiplier barely exceeds 1, meaning

[1] Class Counsel are Motley Rice LLC, Hilliard & Shadowen LLP, Miller Law LLC, and Cohen Milstein Sellers & Toll, PLLC.

that Class Counsel will receive no or only a minimal premium above their hourly rates. In short, Class Counsel have fully earned the fee they request.

II. CREDENTIALS

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

6. I have taught, researched, written, consulted with lawyers, and testified about class actions, other large lawsuits, attorneys' fees, professional responsibility, and related subjects for 30 years. I have published over 100 major writings, many of which appeared in peer-reviewed publications and many of which focus on subjects relevant to this Declaration. My writings are cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996), the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, and the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT.

7. My first publication after joining the Texas Law faculty, an analysis of the restitutionary basis for fee awards in class actions, appeared in 1991. Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991). My most recent publication in the field, an empirical study of fee awards in securities fraud class actions, appeared in the Columbia Law Review nearly twenty-five years later. Lynn A. Baker, Michael A. Perino, and Charles Silver*, Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015) (*Is the Price Right?*). The CORPORATE PRACTICE COMMENTATOR chose this article as one of the ten best in the field of corporate and

securities law in 2016. The study of attorneys' fees has been a principal focus of my academic career.

8. 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.

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

10. 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.

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

III. DOCUMENTS REVIEWED

12. In preparing this Report, I reviewed the items listed below. I also reviewed other items including, without limitation, cases, studies, and published scholarly works.

- End-Payor Class Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Class Representatives, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472 (D.R.I.)

- Memorandum of Law in Support of Third-Party Payor Plaintiffs' Unopposed Amended Motion for Preliminary Approval of Proposed Warner Chilcott Settlement, Approval of the Form and Manner of Notice to the Class, and Schedule for a Fairness Hearing, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1421 (D.R.I. March 6, 2020)
- Declaration of Michael M. Buchman in Support of End-Payor Plaintiffs' Unopposed Amended Motion for Modification of the Form and Manner of Notice to the Lupin Settlement Class and the Third-Party Payor Plaintiffs' Unopposed Amended Motion for Preliminary Approval of Proposed Warner Chilcott Settlement, Approval of the Form and Manner of Notice to the Class, and to Set a Schedule for a Fairness Hearing, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1424 (D.R.I. March 6, 2020)
- Order Granting End-Payor Plaintiffs' Unopposed Motion for Modification of the Form and Manner of Notice to the Lupin Settlement Class and the Third-Party Payor Unopposed Motion for Preliminary Approval of Proposed Warner Chilcott Settlement, Approval of the Form and Manner of Notice to the Classes, and to Set a Schedule for a Fairness Hearing, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1427 (D.R.I. March 23, 2020)
- Memorandum of Decision on Class Certification and Order Regarding Motions to Exclude Certain Expert Opinions and Defendants' Renewed Motion to Dismiss, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1274 (D.R.I. Oct. 17, 2019)
- Opinion and Order on Summary Judgment and Order Regarding Motions to Exclude Certain Expert Opinions, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1380 (D.R.I. Dec. 17, 2019)
- Memorandum of Law in Support of Direct Purchaser Class Plaintiffs' Unopposed Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award for the Class Representative, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1429 (D.R.I. April 20, 2020)
- Declaration of Co-Lead Counsel Peter R. Kohn In Support of Direct Purchaser Class Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and a Service Award to the Class Representative, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1430 (D.R.I. April 20, 2020)
- Declaration of Brian T. Fitzpatrick, *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1431 (D.R.I. April 20, 2020)
- *In re Cabletron Systems Inc. Securities Litig.*, 239 F.R.D. 30 (2006)
- Memorandum and Order Granting Final Approval of Settlement and Plan of Allocation, *Rosen v. Textron, Inc.*, No. 1:02-cv-00190, ECF No. 166 (D.R.I. Oct. 20, 2006)
- Order and Final Judgment, *Scritchfield v. Paolo*, No. 1:01-cv-00550, ECF No. 53, (D.R.I. Aug. 12, 2004)

- Final Approval Order and Final Judgment, *Short v. Brown University*, No. 1:17-cv-00318, ECF No. 55 (D.R.I. Aug. 2, 2019)
- Order Granting Final Judgment and Order of Dismissal Approving IPP Class Settlement and Dismissing IPP Class Claims Against Boehringer and Teva, *In re Aggrenox Antitrust Litig.*, No. 3:14-md-02516, ECF No. 821 (D. Conn. July 19, 2018)
- Order and Final Judgment Approving Settlement Between IPP Class and Defendants, *In re DDAVP Indirect Purchaser Antitrust Litig.*, No. 7:05-cv-02398, ECF No. 27 (S.D.N.Y. Dec. 18, 2013)
- Memorandum, *In re Flonase Antitrust Litig.*, No. 2:12-cv-04212, ECF No. 33 (E.D. Pa. June 19, 2013)
- Order Re: Distribution of the Settlement Fund, *In re Flonase Antitrust Litig.*, No. 2:08-cv-03301, ECF No. 660 (E.D. Pa. Nov. 10, 2014)
- Order and Final Judgment Approving Settlement, Awarding Attorneys' Fees and Expenses, Awarding Representative Plaintiffs' Incentive Awards, Approving Plan of Allocation, and Ordering Dismissal as to All Defendants, *In re Metroprolol Antitrust Litig.*, No. 1:06-cv-00071, ECF No. 342 (D. Del. March 7, 2013)
- Final Order and Judgment Granting Final Approval to Proposed Class Action Settlement, *In re Relafen Antitrust Litig.*, No. 1:01-cv-12239, ECF No. 459 (D. Mass. Oct. 13, 2005)
- Final Judgment and Order Certifying Settlement Class, Approving Proposed Settlement and Dismissing Actions, *In re Remeron Antitrust Litig.*, No. 2:02-cv-02007, ECF No. 197 (D.N.J. Aug. 31, 2005)
- *In re Remeron End-Payor Antitrust Litig.*, No. 02-cv-2007, 2005 WL 2230314 (D.N.J. Sept. 13, 2005)
- Order Granting (1) IPP Classes' Motion for Award of Attorneys' Fees, Expenses and Incentive Fees and (2) the Plaintiff States' Motion for Approval of Allocation of Fees and Costs, *In re Terazosin Hydrochloride Antitrust Litig.*, No. 1:99-md-01317, ECF No. 1611 (S.D. Fla. July 13, 2005)
- Order and Final Judgment Approving Settlement, Awarding Attorneys' Fees and Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation, and Ordering Dismissal as to All Defendants, *In re Tricor Indirect Purchaser Antitrust Litig.*, No. 1:05-cv-00360, ECF No. 545 (D. Del. Oct. 28, 2009)
- Final Order and Judgment Approving Settlement and Awarding Incentive Payments, Fees, and Reimbursement of Expenses, *In re Wellbutrin XL Antitrust Litig.*, No. 2:08-cv-02433, ECF No. 473 (E.D. Pa. July 22, 2013)
- Order Granting EPP Class Counsel's Motion for an Award of Attorneys' Fees, Expenses, and Service Awards, *In re Lidoderm Antitrust Litig.*, No. 3:14-md-02521, ECF No. 1055 (N.D. Cal. Sept. 20, 2018)

- Order and Final Judgment, *Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd.*, No. 1:05-cv-02327, ECF No. 105 (D.D.C. Nov. 15, 2007)
- Memorandum Opinion, *Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd.*, No. 1:05-cv-02327, ECF No. 104 (D.D.C. Nov. 16, 2007)
- Memorandum Opinion, *Cohen vs. Warner Chilcott Pub. Ltd. Co.*, No. 06-cv-401, ECF No. 101 (Nov. 16, 2007).
- Order and Final Judgment Approving Settlement, Awarding Attorneys' Fees and Expenses, Awarding Representative Plaintiffs Incentive Awards, Approving Plan of Allocation, and Ordering Dismissal with Prejudice, *In re Prograf Antitrust Litig.*, No. 1:11-md-02242, ECF No. 712 (D. Mass. Nov. 2, 2016)
- Order Granting Plaintiffs' Unopposed Motion for Preliminary Approval of TPP Class Settlement, *In re Wellbutrin Sr. Antitrust Litig.*, No. 04-cv-5898, ECF No. 367 (E.D. Pa. Jan. 14, 2013)
- Final Order and Judgment Approving Settlement, *In re Wellbutrin Sr. Antitrust Litig.*, No. 04-cv-5898, ECF No. 378 (E.D. Pa. Sept. 27, 2013)
- Memorandum *In re Paxil Antitrust Litig.*, No. 2:00-cv-06222, ECF No. 212 (E.D. Pa. April 22, 2005)
- Memorandum *In re Provigil Antitrust Litig.*, No. 2:06-cv-01833, ECF No. 614 (E.D. Pa. April 21, 2020)
- Final Approval Order and Final Judgment of Dismissal with Prejudice as to Defendant Mutual Pharmaceutical Company, Inc., *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-cv-00163, ECF No. 125 (E.D. Tenn. Dec. 22, 2015)
- Order Awarding Attorneys' Fees, Expenses and Approving Service Awards to the Class Representatives, *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 1:16-cv-10238, ECF No. 24 (D. Mass. July 18, 2018)

IV. FACTS

13. The litigation-related facts upon which my conclusions rest are set out in the documents listed above.

14. In brief, Class Counsel have negotiated a proposed settlement that will make $62.5 million (less attorneys' fees and other deductions) available for the benefit of the TPP Class, which is led by a number of union-related health and welfare funds, and the City of Providence. Because these are sophisticated entities, they have sufficient experience with the pharmaceutical drug industry to evaluate the proposed settlement competently.

15. Class Counsel have applied to the Court for a common fund fee award of 33⅓ percent of the gross recovery, approximately $20.8 million, plus cost reimbursements.

V. BACKGROUND ANALYSIS

16. Throughout my academic career, I have urged courts to base fee awards from common funds on rates prevailing in the private market for legal services. Although the view was not widely shared when I first expressed it, it is now. It is not unusual for courts to want to know what those rates are and to give them weight when deciding how much to award lawyers whose efforts create common funds, even when they are not legally bound to do so. In this Report, I will show that Class Counsel's request for a fee equal to 33⅓ percent of the recovery falls squarely within the range of percentages that prevails in the private market, which typically runs from 25 percent to 40 percent.

A. Fee-Setting Is A Positive-Sum Interaction

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

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

19. When regulating fees, then, the object should not be to set them as close to zero as possible. It should be to maximize class members' net expected recoveries—the amounts they expect to take home after paying their attorneys. Because a claimant who nets $1 million after

paying a 40 percent fee is better off than one who nets $500,000 after paying a 20 percent fee, it is rational for clients to offer higher percentages when doing so is expected to leave them with more money after fees are paid.

20. Courts have known this for years. In 2002, a task force on fees commissioned by the Third Circuit stated that "The goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, *not to obtain the lowest attorney fee.* The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee." *Third Circuit Task Force Report,* 208 F.R.D. 340, 373 (January 15, 2002) (emphasis added). The Seventh Circuit made a similar point in *In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001). It rejected the so-called "mega-fund rule," according to which fees must be capped at low percentages when recoveries are very large, noting that "[p]rivate parties would never contract for such an arrangement" because it would encourage cheap settlements. *Id*. at 718. Private clients want lawyers to maximize the value of their claims, not to settle them cheaply.

B. Courts Should Mimic The Market When Awarding Fees

21. In the market for legal services, claimants negotiate fees when litigation starts, not when it ends. Upfront, they see the risks that lie ahead and the virtue of paying fees that encourage lawyers to bear them. As the Seventh Circuit observed,

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

In re Synthroid Marketing Litigation, 264 F.3d at 724.

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

23. The best evidence on which to base an answer is the market rate. A general insight from the economics of contracts is that parties tend to agree on terms that maximize the amount of wealth available for them to share. When markets are competitive, as the market for legal services plainly is, clients and lawyers should settle on the lowest percentages that maximize their joint expected return. This is the percentage that maximizes clients' net expected recoveries.

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

25. Because the Court wrote the opinion in *In re Cabletron Sys. Inc. Sec. Litig*., I am, perhaps, preaching to the choir, the Court having already "concludes[d] that the best way to determine the reasonableness of a fee award [in a class action] is to assess what the fee arrangement would have been had it been determined by an open, competitive process at the outset of the case." *Cabletron*, 239 F.R.D. 30 at 40-41. Like me, the Court is also impressed by the reasons set out in the opinions of Judge D. Brock Hornby, who has taken the lead in advocating for the use of the market-based approach in the First Circuit. See *In re TRS Recovery Servs., Inc. & Telecheck Servs., Inc., Fair Debt Collection Practices Act (FDCPA) Litig*., No. 2:13-MD-2426-DBH, 2016 WL 543137, at *9 (D. Me. Feb. 10, 2016); *Scovil v. FedEx Ground Package Sys., Inc.*, No. 1:10-CV-515-DBH, 2014 WL 1057079, at *5 (D. Me. Mar. 14, 2014); *In re New Motor Vehicles Canadian Exp. Antitrust Litig*., 842 F. Supp. 2d 346 (D. Me. 2012); and *Nilsen v. York County*, 400 F.Supp.2d 266, 277-278 (D. Maine 2005).

26. In *Cabletron*, though, when the Court sought to determine "what a market rate fee arrangement would have been at the outset of a class action case," the Court had limited information to go on: data concerning fee awards in other class actions; and data from class action in which fees were set by auctions. *Id*., 239 F.R.D. at 41. Because both data sources are poor substitutes for actual market rates, I devote Part IV of this Declaration to a discussion of the fees that real clients, including sophisticated clients, pay lawyers when hiring them on a contingency basis.

C. Quality of Plaintiffs' Counsel

27. When considering how the market compensates attorneys, it is important to remember that the quality of counsel matters greatly. Studies of lawyers' charges show that they vary with experience, rank, accomplishment, firm size, and geographical location. For example, it is well known that a select group of attorneys with outstanding reputations command

exceedingly high rates, often more than $1,500 per hour, and that lawyers who practice in major metropolitan areas charge more than others.

28. In this case, the TPP Class is represented by outstanding law firms. Motley Rice LLC is a veteran of many MDLs involving antirust claims, pharmaceuticals, and medical devices. In 2020, ALM and The National Trial Lawyers chose firm co-founder Joe Rice for the Elite Trial Lawyers Lifetime Achievement Award and chose the firm itself as Law Firm of the Year in the pharmaceutical and insurance categories. I also know from personal experience that Motley Rice LLC was deeply involved in the states' lawsuits against the tobacco industry and provided services that were indispensable.

29. Cohen Milstein Sellers & Toll, PLLC is one of the nation's most distinguished firms that represents plaintiffs in antitrust cases. Over the period extending from 2013 through 2018, Cohen Milstein ranked 6th among all law firms in number of antitrust complaints filed, 13th in number of settlements, and 7th in aggregate settlement amount, with $2.1 billion recovered. University of San Francisco Law School and The Huntington National Bank, *2018 Antitrust Annual Report* (2019). In 2018 alone, the firm had two of the ten largest antitrust settlements: the Domestic Drywall Antitrust Litigation at $125 million and the Lidoderm Antitrust Litigation at $104.75 million. Cohen Milstein also handled the Urethanes Antitrust Litigation which, at $835 million, was the 5th largest antitrust settlement approved during the period. In the Urethanes case, Cohen Milstein obtained a favorable jury verdict for the class that exceeded $1 billion after trebling—one of the largest known antitrust jury verdicts to date.

30. Hilliard & Shadowen LLP is another MDL veteran. Steve Shadowen, who leads the firm's antitrust practice, has been a leader in the decade-long efforts against "pay for delay" settlements. He and his firm have also pioneered, in both academic studies and litigation, the

product-hop theory of antitrust liability in the pharmaceutical industry. The American Antitrust Institute recognized him with its award for Outstanding Antitrust Litigation Achievement in Private Law Practice.

31. Miller Law LLC has been recognized by courts and its peers for appointment to lead complex antitrust and pharmaceutical practices cases, and has an extensive history of involvement in antitrust cases, including large cases involving sales of pharmaceuticals. The pharmaceutical team at Miller Law LLC has a 20-year history of holding leadership positions in 18 similar cases of generic pharmaceuticals exclusion. It has also served as sole lead counsel for the indirect purchaser class in the Polyurethane Foam Antitrust Litigation, in which $151,250,000 was achieved for the class.

VI. FEES PREVAILING IN THE PRIVATE MARKET FOR LEGAL SERVICES

32. As mentioned, over the course of my career I have consistently urged courts to take guidance from the market for legal services when sizing fee awards, and the number of courts that do so has grown. For example, in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), the Second Circuit wrote that "market rates, where available, are the ideal proxy for [class action lawyers'] compensation." *Id.*, p. 52. It is hard to do better than "ideal."

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

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

34. I start by noting that when clients hire lawyers to handle lawsuits on straight contingency, the market sets lawyers' compensation as percentages of claimants' recoveries. Even sophisticated business clients with complex, high-dollar legal matters use the percentage approach.

> [T]he contingency fee model covers all sorts of plaintiffs' litigation, including cases where sophisticated individual clients have high-stakes, complex claims worth hundreds of millions of dollars. . . . [I]t is essentially unheard of for sophisticated lawyers to take on a case of this magnitude and type on any basis other than a contingency fee, expressed as a percentage of the relief obtained.

In re Payment Card Interchange Fee & Merchant Discount Litig., 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014).[2] *See also Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (Easterbrook, J.) (noting the predominance of the percentage method in plaintiff representations and observing that "[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate'" (emphasis in the original)).

35. Abundant evidence supports this contention. When two coauthors 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 basis.

36. The finding just described was expected. Over the course of my academic career, I have studied or participated in hundreds of class actions, many of which were led by sophisticated business clients. To the best of my recollection, I have encountered only one in which a lead plaintiff paid class counsel out of pocket, and that case is more than 100 years old. Even wealthy clients that, in theory, might have paid lawyers by the hour used contingent, percentage-based compensation arrangements instead. Because percentage-based compensation arrangements dominate the market, courts should also use them when awarding fees from common funds.

37. The market also appears to favor fee percentages that are flat or that rise as recoveries increase. Scales with percentages that decline at the margin are rarely employed.

[2] This opinion became a nullity when the decision approving the settlement was reversed on appeal, but the observation quoted is correct.

Professor John C. Coffee, Jr., the country's leading authority on class actions, made this point in a report filed in the antitrust litigation relating to high fructose corn syrup.

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

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

38. In view of the rarity with which declining scales are used, the 'mimic the market' approach suggests that flat percentages and scales with percentages that rise at the margin create better incentives. This is so because flat percentages and rising scales better incentivize plaintiffs' attorneys to extract higher dollars that are harder to obtain. Flat percentages or percentages that increase with the recovery encourage plaintiffs' attorneys to turn down inadequate settlements.

B. Clients Normally Pay Contingent Fees In The Range Of 25 Percent To 40 Percent

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

40. Before doing so, I wish to note that there is broad agreement that fees ranging from 25 percent to 40 percent prevail in most types of plaintiff representations. For example, courts have often noted that fees in personal injury cases normally equal or exceed 33⅓ percent of plaintiffs' recoveries. *See, e.g.*, *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1382 (N.D. Ga. 2019) ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range

of the private marketplace, where contingency-fee arrangements are often between 30 and 40 percent of any recovery"); *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"); *Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 U.S. Dist. LEXIS 153786, 2012 WL 5290155, at *4 (S.D. Fla. Sept. 26, 2012) ("One-third of the recovery is considered standard in a contingency fee agreement."); *Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (observing that "a counsel fee of 33.3% of the common fund 'is comfortably within the range typically charged as a contingency fee by plaintiffs' lawyers' in an FLSA action").

41. Many courts have also observed that attorneys regularly contract for contingent fees between 30 percent and 40 percent in non-class, commercial cases. *See, e.g., Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-CV-01007-NR, 2019 WL 5394751, at *10 (W.D. Pa. Oct. 22, 2019); *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); *Cook v. Rockwell Int'l Corp.*, No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017); and *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *32 (D.N.J. Oct. 1, 2013).

42. The point of surveying the evidence, then, is not to establish something new. It is to show that what everyone already knows is correct. In cases of diverse types, the market rate for contingent fee lawyers ranges from 25 percent to 40 percent of clients' recoveries.

1. Personal Injury Cases

43. If courts chose to base fee awards in class actions on fees charged in personal injury cases, this Report could be quite short. The evidence clearly shows that contingent fees normally

range from 25 percent to 40 percent in these cases,[3] are often higher in mass tort contexts,[4] and are higher still in medical malpractice cases, which are exceptionally risky and costly.[5] Lower rates prevail in commercial airplane crash cases, where liability is usually conceded.[6] Fees vary across contexts because cases of different types require lawyers to bear different risks.

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

[4] On fees in mass tort cases, *see* James S. Kakalik, *et al*., COSTS OF ASBESTOS LITIGATION Table S.2 (RAND 1983) (finding that asbestos claimants whose cases closed before August, 1982, paid legal fees and other litigation expenses equal to about 42 percent of their recoveries); James S. Kakalik *et al*., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii Figure S.1 (RAND 1984) (finding that asbestos claimants paid legal fees and expenses equal to 39 percent of their recoveries). For anecdotal reports of fees in mass tort cases, *see In re A.H. Robins Co., Inc*., 182 B.R. 128, 131 (E.D. Va. 1995) (reporting that thousands of women injured by the Dalkon Shield signed contingent fee arrangements providing for fees between one-quarter and one-half of the recovery, with most charging one-third); Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, NEW YORK TIMES, November 19, 2010, available at http://www.nytimes.com/2010/11/20/nyregion/20zero.html (reporting that thousands of rescue and clean-up workers who were harmed as a result of the terrorist attacks on September 11, 2001, hired lawyers on terms requiring them to pay one-third of their recoveries); Martha Neil, *Frustration Over Uncontained Gulf Oil Spill – and Tort Claim Contingency Fees of Up to 50 Percent*, ABA JOURNAL (May 24, 2010), available at http://www.abajournal.com/news/article/frustration_over_uncontained_gulf_oil_spill--and_tort_ legal_fees_of_up_to_5/ (reporting that thousands of clients with claims against BP arising out of the Deepwater Horizon catastrophe promised to pay contingent fees in the range of 40 percent to 50 percent).

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

[6] *See id*., at 27. *See also* ABA Formal Opinion 94-389, n. 13 (1994) (reporting that "[i]n cases where airline insurers voluntarily . . . [made] an early settlement offer and concede[d] all legal liability, average contingent fee rates dropped to 17% and were often only charged on a portion of

2. Large Commercial Lawsuits

44. We do not know as much about fees paid in large commercial lawsuits as we might.[7] No publicly available database collects information about this sector of the market, and businesses that sue as plaintiffs rarely reveal their fee agreements. Consequently, most of what is known is drawn from anecdotal reports.[8] That said, the evidence available on the use of contingent fees by sophisticated clients shows that marginal percentages tend to be high.

a) Patent Cases

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

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the recovery") (citing L. Kriendler, *The Letter: It Shouldn't be Sent*, 12 THE BRIEF 4, 38 (November 1982)).

[7] 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.

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

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

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

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation,* 64 ALA. L. REV. 335, 360 (2012). In a case like this one that required the lawyers to bear significant litigation expenses with no guarantee of reimbursement a high fixed percentage would apply.[9]

47. Clearly, in the segment of the market where sophisticated business clients hire lawyers to litigate patent cases on contingency, successful lawyers earn enormous premiums over their normal hourly rates. The reason is obvious. When waging patent cases on contingency, lawyers must incur large risks and high costs, so clients must promise them hefty returns. Clients still prefer this arrangement to bearing the risks and costs of litigation themselves, so they willingly do.

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[9] 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 – a strictly results-based system.

Matt Cutler, *Contingent Fee Patent Litigation, and Other Options*, PATENT LITIGATION, http://intellectualproperty-rights.com/?page_id=30 (reviewed March 13, 2012).

b) Other Large Commercial Cases

48. Turning from patent lawsuits to business representations more generally, many examples show that compensation tends to be a significant percentage of the recovery. A famous case from the 1980's involved the Texas law firm of Vinson & Elkins ("V&E"). ETSI Pipeline Project ("EPP") hired V&E to sue Burlington Northern Railroad and other defendants, alleging a conspiracy on their part to prevent EPP from constructing a $3 billion coal slurry pipeline. Harry Reasoner, then V&E's managing partner, described the financial relationship between EPP and V&E as follows:

> The terms of our retention were that our client would pay all out-of-pocket expenses as they were incurred, but all legal fees were contingent upon a successful outcome. We were paid 1/3 of all amounts received by way of settlement or judgment. We litigated the matter for 5 years. At the conclusion, we had settled with all defendants for a total of $634,900,000.00. As a result, a total of $211,633,333.00 was paid as contingent legal fees.

Declaration of Harry Reasoner, filed in *In re Washington Public Power Supply System Securities Litigation,* MDL No. 551 (D. Ariz., Nov. 30, 1990).

49. Several things about this example are noteworthy. First, the contingency fraction was one-third of the recovery in a massive case. Second, V&E bore no liability for out-of-pocket expenses. Third, the ETSI Pipeline case was enormous, ultimately generating a recovery greater than $600 million and a fee north of $200 million. Fourth, the client was a sophisticated business with access to the best lawyers in the country. No claim of pressure or undue influence by V&E could possibly be made.

50. The National Credit Union Administration's (NCUA) experience in litigation against securities underwriters provides a more recent example of contingent-fee terms that were used successfully in large, related litigations. After placing 5 corporate credit unions into liquidation in 2010, the NCUA filed 26 complaints in federal courts in New York, Kansas, and

California against 32 Wall Street securities firms and banks. To prosecute the complaints, which centered on sales of investments in faulty residential mortgage-backed securities, the 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 the NCUA had paid $1,214,634,208 in fees.[10]

51. When it retained outside counsel on contingency, NCUA knew that billions of dollars were at stake. The failed corporate credit unions had sustained $16 billion in losses, and the 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, the 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.

52. 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,

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

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.

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

c) Sophisticated Named Plaintiffs in Class Actions

54. It is my understanding that the union funds acting as named plaintiffs support Class Counsel's fee request. By doing so, they join many other sophisticated businesses that have supported percentages of the same size. Here are a few examples of cases with sizeable settlements in which sophisticated business clients did the same.

- In *Payment Card,* 2019 WL 6888488, a multi-billion-dollar litigation, twelve business clients signed retainer agreements when litigation commenced which generally provided that class counsel would receive one-third of the class-wide recovery.[11]

- In *In re International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-3346 (Court of Common Pleas, Greenville County, South Carolina), which settled in 2013 for relief valued at about $81 million, five sophisticated investors serving as named plaintiffs agreed to pay 35 percent of the gross class-wide recovery as fees, with expenses to be separately reimbursed. (The 35 percent fee was bargained down after initially being set at over 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 U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT) (D. Ct.), a RICO class action that produced a $297 million settlement, both of the businesses that served as named plaintiffs were represented by counsel in their fee negotiations and both agreed that the fee award might be as high as 40 percent.

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[11] Typical language read as follows:

(a) Fees As Class Counsel

(1) Fees for the Firm's professional services in the Action as Class Counsel will be on a contingent basis and dependent upon the results obtained. In the event of a settlement or a favorable outcome at or after a trial, the Firm shall seek to recover legal fees equal to one-third of the Value of the Recovery attributable to our representation of the Class from one or more of the defendants. Any amount which is not recovered from the defendant(s) shall be payable on a contingent fee basis as described in paragraph (2) below. The Company agrees to support any request for attorney's fees, costs and disbursements to the court that is in an amount of one-third of the Value of the Recovery or less.

(2) In the event that the court does not approve the fee requested by the Firm, the Company and the other named plaintiffs agree to pay the difference between the fee awarded by the court and an amount equal to one-third of the Value of the Recovery made on behalf of the named plaintiffs.

(b) Fees Owed If Recovery Is Made Outside Of Class Action.

In the event that The Company makes a recovery outside of the class action (as, for example, if a class is not certified or the Company withdraws as a class representative) the Company agrees to pay a contingent fee equal to one-third of the Value of the Recovery to the Company.

C. Sophisticated Clients' Support For A One-Third Fee In Prior Generic Delay Antitrust Class Actions

55. In prior reports, I have documented the tendency of sophisticated clients to support fee awards in the normal range by discussing a series of pay-for-delay pharmaceutical antitrust cases involving enormous companies that were direct purchasers. Three of the companies, Cardinal Health, and McKesson, submitted letters supporting fees equal to one-third of the recovery in 13 cases whose recoveries totaled $836.5 million. A third company, AmerisourceBergen, submitted letters of support in 12 of these cases. All three companies have annual revenues greatly in excess of $100 billion, meaning that they are highly sophisticated and could easily have objected to class counsel's fee requests had they found them excessive. Their support speaks volumes about the reasonableness of fee awards in class actions in general and in pharmaceutical antitrust class actions in particular.[12]

56. As stated, the cases discussed in the preceding paragraph involved direct purchasers of pharmaceuticals as plaintiffs. Because this case involves end-payors, Class Counsel provided me information about fee awards in prior pharmaceutical antitrust cases in which end-payers were plaintiffs. The difference should not bear on the point at hand, which is that sophisticated businesses serving as lead plaintiffs have endorsed fee awards in the normal range, but it seems best to examine end-payor class actions in case there are differences. The table below summarizes the settlements and fee awards in the cases Class Counsel identified.[13]

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[12] The cases supporting the statements in this paragraph are listed in Exhibit 2.

[13] Regarding the entry for *Remeron* in Table 1: the end-payor class and state attorneys' general negotiated a combined $36 million settlement fund consisting of $33 million payment to class members and government purchasers, $2 million earmarked for class notice and settlement administration costs, and $1 million to the attorney generals' offices for their fees and expenses. *See Remeron*, 2005 WL 2230314, at *5-6 (D.N.J. Sept. 13, 2005). Under the terms of the settlement, class members were to receive 83.5% of the $33 million fund ($27,555,000). *Id.*

Table 1. Attorneys' Fee Awards in End-Payor Generic Suppression Class Actions (2005-2020)				
Settlement Year	**Case**	**Settlement (millions)**	**Fee Award (millions)**	**Fee %**
2020	*Vista Healthplan, Inc v. Cephalon, Inc. ("Provigil")*, No. 2:06-cv-1833 (D. Pa.)	$65.9	$22.0	33.3%
2018	*In re Aggrenox Antitrust Litig.*, No. 3:14-md-2516 (D. Conn.)	$50,2	$16.7	33.3%
2018	*In re Lidoderm Antitrust Litig.*, No. 14-md-02521 (N.D. Cal.)	$104.8	$34.9	33.3%
2018	*In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 1:14-md-02503 (D. Mass.)	$43.0	$14.3	33.3%
2016	*In re Prograf Antitrust Litig.*, No. 1:11-md-02242 (D. Mass.)	$13.3	$4.4	33.3%
2015	*In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-md-2343 (E.D. Tenn.)	$9.0	$3.0	33.3%
2013	*In re Wellbutrin SR Antitrust Litig.*, No. 2:04-cv-05898 (E.D. Pa.)	$21.5	$7.1	33.0%
2013	*In re DDAVP Indirect Purchaser Antitrust Litig.*, No. 05-cv-2237 (S.D.N.Y.)	$4.8	$1.6	33.0%
2013	*In re Flonase Antitrust Litig.*, No. 08-3301 (E.D. Pa.)	$35.0	$11.7	33.3%
2012	*In re Metoprolol Succinate ("Tropol XL") End-Payor Antitrust Litig.*, No. 06-cv-71 (D. Del.)	$11.0	$3.5	31.8%
2011	*In re Wellbutrin XL Antitrust Litig.*, 2:08-cv-2433 (E.D. Pa.)	$11.8	$3.4	33.3%
2009	*In re Tricor Indirect Purchaser Antitrust Litig.*, No. 01-cv-12239 (D. Del.)	$65.7	$21.9	33.3%
2005	*In re Terazosin Hydrochloride Antitrust Litig.*, 99-mdl-1317 (S.D. Fla.)	$28.7	$8.6	30%
2005	*In re Relafen Antitrust Litig.*, No. 01-cv-12239 (D. Mass.)	$67.0	$22.3	33.3%
2005	*In re Remeron End-Payor Antirust Litig.*, No. 02-cv-2007 (D.N.J.)	$27.6	$7.8	28.3%
2005	*Nichols v. Smithline Beecham Corp. ("Paxil")*, No. 00-cv-6222 (E.D. Pa.)	$65.0	$19.0	29.2%
2005	*Ryan-House v. GlaxoSmithKline PLC ("Augmentin")*, No. 02-cv-442 (E.D. Va.)	$29.0	$7.3	25%

Accordingly, class counsel's $7.8 million fee award represents 28.3% of the portion of the settlement that was allocated to the class.

57. Judging from these cases, the named plaintiffs in end-payer class actions tend to be benefit plans maintained by unions representing public and private employees, medical centers, health insurers, purchasing agents/suppliers, self-insured employers, other businesses, and individuals or their estates. By way of example, the following end-payers served as named plaintiffs in *In re Metoprolol Succinate ("Tropol XL") End-Payor Antitrust Litig*.

> This group of plaintiffs [the end-payers] include the following parties: Meijer, Inc., Meijer Distribution, Inc., Mark S. Merado, District 1119P Health and Welfare Plan, Neil Lefton, Mary Anne Gross, International Association of Fire Fighters Local 22 Health & Welfare Fund, American Federation of State County and Municipal Employees District Council 47 Health and Welfare Fund, United Food and Commercial Workers Union Local 1776 and Participating Employers Health and Welfare Fund, AF of L AGC Building Trades Welfare Plan and Sheet Metal Workers Local 441 Health & Welfare Plan, United Union of Roofers Waterproofers and Allied Workers Local 74 Health and Pension Fund, United Union of Roofers Waterproofers and Allied Workers Local 203 Health and Pension Fund, Plumbers and Pipefitlers Local 572 Pension Fund, National Joint Powers Alliance, Dorothy Ferguson, and Thelma Clement.

Memorandum Opinion Approving Settlement, *In re Metoprolol Succinate ("Tropol XL") End-Payor Antitrust Litig*., No. 06-cv-71 (D. Del. Apr. 13, 2010).

58. Although the business and union entities that represent end-payer classes are smaller than the three companies discussed above, all of which are direct purchasers, they clearly are sophisticated clients.

- The Meijer entities are two of the 373 companies in the Meijer Companies, Ltd. corporate family, which collectively have 65,000 employees and generate over $10 billion in sales. Company Profile, Meijer Companies, LTD, Dun & Bradstreet, https://www.dnb.com/business-directory/company-profiles.meijer_companies_ltd.0c36043c4e7080896dc30dd32ffb4343.html (visited June 5, 2020).

- The National Joint Powers Alliance "is a public agency that creates national cooperative contract purchasing solutions on behalf of over 50,000 member entities including all government, education, and non-profit agencies nationwide and in Canada." National Joint Powers Alliance, https://www.gfoa.org/exhibitors/national-joint-powers-alliance (visited June 5, 2020).
- The union health and welfare funds collectively represent thousands of workers and, presumably, process millions of benefits claims involving (at least) hundreds of millions of dollars.

The support of entities like these for the fee awards shown in Table 1, most of which were for one-third of the recovery, is strong evidence that the awards were reasonable. They therefore support the reasonableness of Class Counsel's request for one-third of the recovery in this end-payer class action too.

VII. THE DIFFICULTY OF WINNING ANTITRUST CLASS ACTIONS

59. Antitrust class actions are notoriously hard to win. Many hurdles must be overcome, including the demonstration of antitrust damages, which require expert testimony based on complicated economic models to provide.

60. Many of the risks the Class faced are described in the *End-Payor Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Class Representatives*. Because Class Counsel know this terrain far better than I do, I can add little to the account this filing contains. However, I can say, first, that the Defendants' actions demonstrate clearly that this was a high-risk case. Had it been a "slam dunk" for the Class, the Defendants would have found it financially advantageous to have settled far sooner than they did. Why waste tens of millions of dollars defending a lawsuit until the eve of trial when it is obvious

that one will lose? Why spend millions of dollars on expert witnesses too? Why file multiple motions for summary judgment or resist class certification when it is obvious that both maneuvers will fail? The Defendants' willingness to mount an aggressive defense makes sense only if they thought they had a decent chance of winning the case.

61. And at one point, it seemed that the Defendants' would win. In 2014, the Court granted their motion to dismiss, entered a partial final judgment in their favor, and stayed the remaining claims. Two years later, the First Circuit revived the case and remanded it to the Court for further consideration of the sufficiency of the Class' pleading.

62. The lack of a prior governmental investigation of this generic delay settlement is also worth mentioning because it a sign of high risk. A government agency's involvement in a lawsuit may reduce the burden on class action lawyers, lend credence to the plaintiffs' allegations, and be a source of valuable information or other assistance. Many antitrust cases have been assisted substantially by criminal prosecutions and guilty pleas. *See, e.g., In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001) ($365 million class recovery and 34.6% fee award in case supported by criminal prosecutions and guilty pleas); *In re TFT-LCD (Flat Panel) [Indirect Purchaser] Antitrust Litig.*, MDL No. 1827, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013) ($1.08 billion class recovery and approximately 30% fee to class counsel and state attorneys general in case supported by sweeping criminal prosecutions and guilty pleas).

63. If prior or parallel government proceedings make class actions less risky, then (other things being equal) fee awards should be higher in cases like this one, where Class Counsel undertook the litigation challenging a patent litigation settlement without help from a regulator.

64. The Class lawyers here not only litigated the case without help from a regulator; they investigated and developed the case without any such help. Without that investigation and the

enormous resources and risk that the End-Payor Class lawyers incurred (including the risk that the investigation would come up empty), the lawsuit may never have existed to begin with.

65. Finally, it bears emphasis that Class Counsel secured class certification for trial before negotiating the proposed settlement. Although settlement classes are common in antitrust cases and cases of other types, litigation classes are not, as other commentators have noted. The following paragraph appears in an empirical study published in 2017.

> Many class actions are resolved as settlement classes—meaning that the parties settle the class certification issue at the same time as they settle the merits, and present both agreements to the judge for approval at the fairness hearing. Settlement classes were common in our data, constituting approximately three-quarters of the cases: Of the 422 cases for which data were available, 318 were settlement classes and 104 were litigation classes.

Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 961 (2017). Eleven of the 16 antitrust cases in the authors' dataset were settlement classes. *Id*., Table 10.

66. Both the risk and the value of certifying a class for litigation are important. Winning a contested certification motion in an antitrust case is hard. During the era of the Roberts Court, federal courts have been increasingly hard on antitrust plaintiffs. *See, e.g.,* Mark S. Popofsky and Douglas H. Hallward-Driemeier, *Antitrust and the Roberts Court*, 28-SUM ANTITRUST 26, 26 (2014) (observing that "the Roberts Court has consistently raised the threshold for plaintiffs seeking to pursue class actions"). Plaintiffs who win in the trial courts also face a serious prospect of losing on appeal, as I pointed out almost two decades ago.

> Rule 23(f) is a one-way ratchet for defendants. Although early evidence was ambiguous, … a clear pattern of antiplaintiff decisions has emerged. See Jennifer K. Fardy, Disciplining the Class: Interlocutory Review of Class Action Certification Decisions Under Rule 23(f), 13 Class Actions & Derivative Suits 3, 9 (2003) (reporting that federal circuit courts have granted thirty-two petitions for interlocutory review, that "the vast majority of the decisions ... have resulted in elimination of class status," and that no federal circuit has used [a] 23(f) appeal to

reverse [a] denial of class certification), available at http://www.seyfarth.com/db30/cgi-bin/pubs/fardy.PDF.

Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1430 (2003).

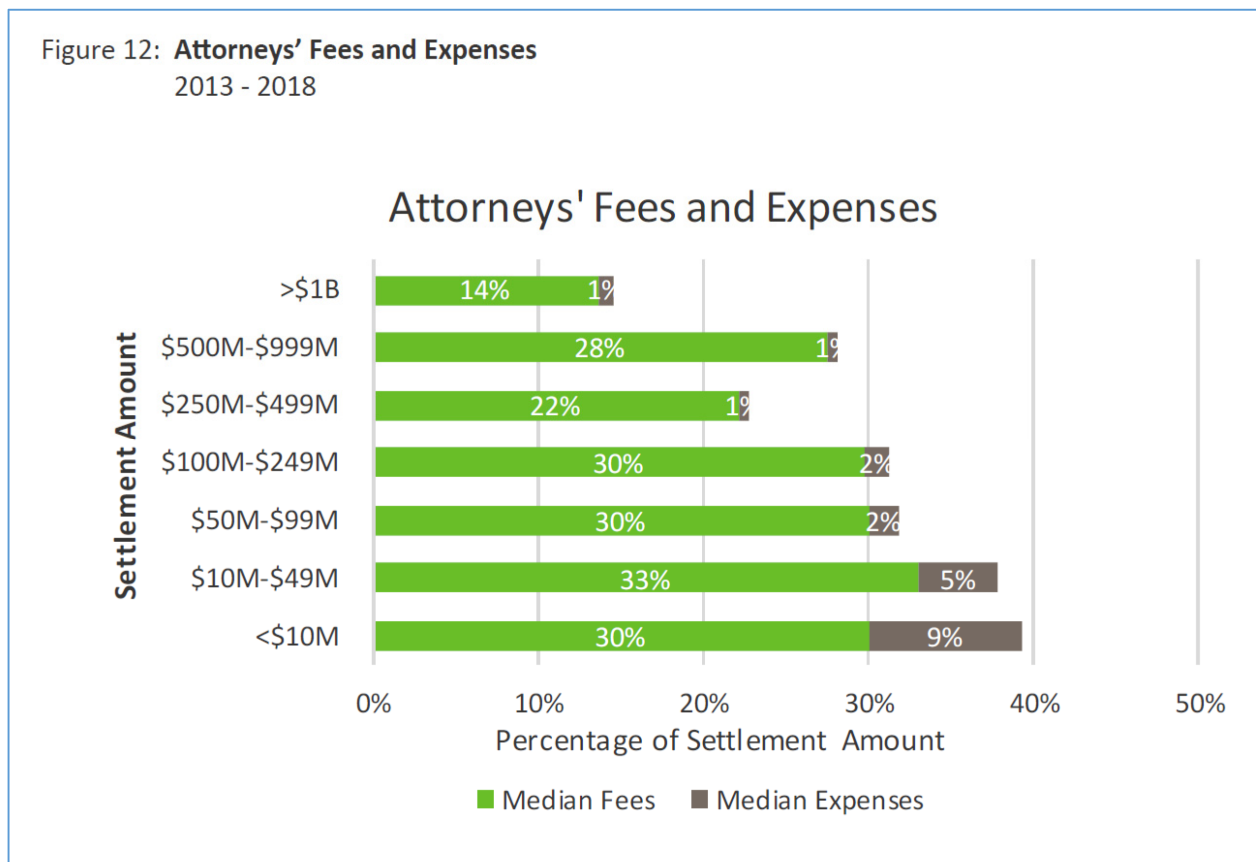
67. Here, the First Circuit's decision in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), saddled the Class with a sizeable risk of having certification denied. *Asacol*, which was decided after the plaintiffs submitted their initial certification briefs, required the Class to show that third-party payors who were not harmed could be excluded from the class. Class Counsel met the challenge in extraordinary fashion. They revamped the class definition, retained new experts to analyze data, had both the new experts and their original expert file new reports, defended the experts at depositions, took the depositions of three defense experts, filed extensive briefing, moved to exclude the defense experts and rebutted the Defendants' motions to exclude, and prepared for a two-day hearing on class certification—all in the space of four months. Having worked on class actions, I find the intensity of Class Counsel's effort—and the result they achieved under the circumstances—remarkable.

68. Although the odds of losing are great, the value of having a class certified for litigation is enormous. Certification cements counsel's control of the lawsuit and forces the defendant to confront the possibility of suffering a class-wide judgment at trial. The combination greatly enhances plaintiffs' leverage in settlement negotiations.

VIII. FEE AWARDS IN COMPARABLE CASES

69. In my experience, courts want to know how other courts have handled fees in similar cases. Being familiar with empirical studies of fee awards and having co-authored one such study myself, I can confidently report that Class Counsel's request for a fee of 33⅓ percent of the recovery falls in the range that courts typically award.

70. The *2018 Antitrust Annual Report, supra*, at p. 23, contains the most comprehensive information I have been able to find on fee awards in antitrust class actions. It reports that fees and expenses are most often calculated as a percentage of the overall settlement fund, and that lodestar cross checks are common too. The report then breaks out median fee awards and expenses in antitrust class action by size of recovery. As is visually apparent, at most recovery levels, the median award falls between 28 percent and 33 percent. Only when recoveries exceed $1 billion does the median fee award percentage substantially decline.



Source: University of San Francisco Law School and The Huntington Bank, 2018 Antitrust Annual Report, Fig. 12 (2019).

71. In this case, Class Counsel request a fee award equal to 33⅓ percent of the $62.5 million recovery. The request falls just above the median award—30 percent—for cases in the

relevant size band. But, of course, half of the cases in the size range are above the median, so at 33⅓ the fee request has plenty of company.

72. In fact, there are many far larger settlements in which judges approved comparable fee percentages. Table 2 lists a number of mega-fund cases—cases with settlements exceeding $100 million—with fee awards of 30 percent or more. The table is not comprehensive, and the entries have not been adjusted for inflation. An inflation adjustment would increase the number of qualifying cases and make the older cases in the table seem larger. For example, the $359 million paid in the *Vitamins* antitrust case in 2001 equals $523 million in 2020.

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Table 2: Mega-Fund Settlements With Fee Awards Of 30 Percent Or More				
	Case	**Settlement Amount (in Millions)**	**Fee**	**Type**
1	In re Vitamins Antitrust Litig., No. MDL 1285, 2001 WL 34312839 (D.D.C. July 16, 2001)	359.00	34%	Antitrust
2	In re Urethane Antitrust Litig., 2016 WL 4060156, at *8 (D. Kan. July 29, 2016)	835.00	33%	Antitrust
3	In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467 (S.D.N.Y. 2009)	586.00	33%	Securities
4	In re Tricor Direct Purchaser Antitrust Litig., No. 05-340-SLR, ECF No. 543 (D. Del. 2009)	250.00	33%	Antitrust
5	In re Buspirone Antitrust Litig., MDL No. 1413 (JGK), 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003)	220.00	33%	Antitrust
6	*In re Neurontin Antitrust Litig.,* No. 02-1830 (D.N.J. Aug. 6, 2014)	$191.00	33⅓%	Antitrust
7	In re Titanium Dioxide Antitrust Litig., No. 10-CV-00318 RDB, 2013 WL 6577029 (D. Md. Dec. 13, 2013)	163.50	33%	Antitrust
8	In re Se. Milk Antitrust Litig., No. 2:07-CV 208, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013)	158.60	33%	Antitrust
9	In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013)	150.00	33%	Antitrust
10	In re Apollo Grp. Inc. Sec. Litig., No. CV 04-2147-PHX-JAT, 2012 WL 1378677 (D. Ariz. Apr. 20, 2012)	145.00	33%	Securities
11	In re Plasma-Derivative Protein Therapies Antitrust Litig., No. 09-cv-07666, ECF Nos. 693, 697, 697-1 and 701 (N.D. Ill. 2014)	128.00	33%	Antitrust
12	Erica P. John Fund, Inc. v. Halliburton Co., No. 02-xc-01152, ECF No. 844 (N.D. Tex. Apr. 25, 2018)	100.00	33%	Securities
13	Dahl v. Bain Capital Partners, LLC, No. 07-CV-12388, ECF No. 1095 (D. Mass. Feb 2, 2015).	590.50	33%	Antitrust

Table 2: Mega-Fund Settlements With Fee Awards Of 30 Percent Or More				
	Case	**Settlement Amount (in Millions)**	**Fee**	**Type**
14	In re Relafen Antitrust Litig., No. 01-12239, ECF No. 297 (D. Mass. Apr. 9, 2004)	175.00	33%	Antitrust
15	Standard Iron Works v. Arcelormittal, et al., No. 08-cv-5214, ECF. No. 539 (N.D. Ill. 2014)	163.90	33%	Antitrust
16	In re Auto. Refinishing Paint Antitrust Litig., No. MDL NO 1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008)	105.75	33%	Antitrust
17	Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006)	1075.00	31%	Securities
18	In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011)	410.00	30%	Antitrust
19	Schuh v. HCA Holdings Inc., No. 3:11-cv-01033, ECF No. 563 at 1 (M.D. Tenn. Apr. 14, 2016)	215.00	30%	Securities
20	In re Linerboard Antitrust Litig., No. CIV.A. 98-5055, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004), amended, No. CIV.A.98-5055, 2004 WL 1240775 (E.D. Pa. June 4, 2004)	203.00	30%	Antitrust
21	City of Pontiac General Employees' Retirement System v. Wal-Mart Stores, Inc. et al., No. 12-cv-05162, ECF No. 458 (W.D. Ark. 2019)	160.00	30%	Securities
22	In re Polyurethane Foam Antitrust Litig., No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015), appeal dismissed (Dec. 4, 2015)	147.80	30%	Antitrust
23	In re: Informix Corp. Sec. Litig. No 97-CV-1289-CRB, ECF No. 471 (N.D. Cal., Nov 23, 1999)	142.00	30%	Securities
24	Anwar et al v. Fairfield Greenwich Limited et al, No. 09-cv-0118, ECF No. 1457 (S.D.N.Y. Nov. 20, 2015)	125.00	30%	Securities
25	Kurzweil v. Philip Morris Cos., 1999 U.S. Dist. LEXIS 18378, (S.D.N.Y. Nov 24, 1999)	123.80	30%	Securities
26	In re Ikon Office Sols., Inc., Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	111.00	30%	Securities and Derivative

Table 2: Mega-Fund Settlements With Fee Awards Of 30 Percent Or More				
	Case	Settlement Amount (in Millions)	Fee	Type
27	In re Morgan Keegan Open-End Mutual Fund Litigation, No. 07-cv-02784, ECF No. 435 (W.D. Tenn. Aug 2, 2016)	110.00	30%	Securities
28	In re Prison Realty Sec. Litig., No. 3:99–0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001).	104.00	30%	Securities

73. Table 2 shows what everyone knows: Judges award fees that they believe are appropriate in the circumstances. This typically means applying percentages in the normal range, and it often means doing so even when settlements are unusually large.

IX. LODESTAR CROSS-CHECK

74. When awarding fees, courts often gauge their reasonableness by performing lodestar cross-checks. These cross-checks employ two components: the lodestar basis, which combines hourly rates and time expended; and a multiplier, which is a factor that brings the basis into line with the fee request. I discuss both quantities here.

75. Before doing so, I wish to note that I oppose the use of cross-checks and have argued against them in print. By assigning weight to cross-checks, courts encourage lawyers to expend time rather than to conserve it. In other words, courts unintentionally penalize efficiency and reward inefficiency. To the best of my knowledge, claimants never use the lodestar method when hiring lawyers directly. I therefore see no reason for courts to rely on it when assessing the reasonableness of class counsel's fees.

76. Turning to the comparison itself, Class Counsel's compensation request reflects a lodestar basis of approximately $19.9 million in fees and a multiplier of 1.05. Class Counsel reports all but one lawyer at the partner level billing between $550 and $995 per hour, other counsel billing $475 to $845 per hour, and associates billing $300 to $700 per hour.

77. There are many sources of information that may help assess the reasonableness of the requested rates. For example, one can study the fee applications that lawyers submit in bankruptcy proceedings. Using this approach, one learns that many lawyers are compensated at rates far higher than those requested here. For example, in the Sears bankruptcy proceeding, the fee application submitted in 2019 by Weil, Gotshal & Manges LLP, the debtors' attorneys, includes dozens of lawyers whose hourly charges exceed $1,000, with nine lawyers charging $1,500 per hour or more. Unlike Class Counsel, these lawyers did not work on contingency. Even so, the bankruptcy judge approved the fee request in full.

78. Even higher hourly rates were sought in the Toys R' Us bankruptcy, where Kirkland & Ellis LLP serves as debtors' counsel. There, the highest hourly rate was $1,795, the blended rate for all partners, of which there were dozens, was $1,227, and the blended rate for all timekeepers, including paralegals and support staff, was $901. The blended rate for all timekeepers compared to the top rates being requested by partners here.

79. Because White & Case LLP is serving as defense counsel in this litigation, I reproduce below a chart showing the hourly rates its lawyers recently requested in the Joerns Woundco Holdings, Inc. bankruptcy proceeding. First and Final Fee Application of White & Case LLP for Compensation for Services Rendered and Reimbursement of Expenses as Counsel to the Debtors for the Period of June 24, 2019 through and including July 25, 2019, *In re Joerns Woundco Holdings, Inc.*, U.S Bankruptcy Court for the District of Delaware, Case No. 19-11401 (JTD), (filed Oct. 4, 2019). As can be seen, the requested rates are similar to those mentioned above and are more than on par with those sought by Class Counsel. When one recalls that Class Counsel worked on contingency, its requested hourly rates can only seem fair.

COMPENSATION BY PROFESSIONAL PERSON
WHITE & CASE LLP
JUNE 24, 2019 TO JULY 25, 2019

Timekeeper	Year of Admission	Hourly Rate ($)	Total Hours	Total Compensation ($)
Partner				
David Turetsky*	2003	1,245	195.60	243,522.00
Elizabeth Feld*	2001	1,095	29.30	32,083.50
Gregory M. Owens	1983	1,245	20.00	24,900.00
John M. Reiss	1986	1,545	2.70	4,171.50
Kim Haviv*	2009	1,095	14.30	15,658.50
Luke Laumann	2010	1,095	32.10	35,149.50
Philip Abelson*	2000	1,245	141.80	176,541.00
Rupa Briggs	2006	1,095	3.10	3,394.50
Sang I. Ji	1996	1,245	3.30	4,108.50
	Total Partner		**442.20**	**526,216.50**[1]
Counsel				
Fan B. He	2007	995	11.40	11,343.00
Richard Graham	2000	995	24.80	24,676.00
Tal Marnin	1997	995	35.70	35,521.50
	Total Counsel		**71.70**	**71,341.50**
Associates				
Adriana Foreman*	2017	650	86.70	56,355.00
Amanda Parra Criste*	2015	840	177.80	149,352.00
Brett Bakemeyer*	2017	770	23.50	18,095.00
Brooks Barker	2018	650	5.40	3,510.00
Jennifer McWhaw	N/A	770	78.50	60,445.00
John Ramirez*	2009	950	171.20	162,640.00
Kathryn Sutherland-Smith	2019	770	54.00	41,580.00
Mitchell Li	2014	550	2.10	1,155.00
Morgan Somerset	2019	550	29.10	16,005.00
Rashida Adams	2015	870	4.70	4,089.00
Scott Schilson	2019	550	5.20	2,860.00
	Total Associates		**636.80**	**505,691.00**[2]
Paraprofessionals				
Aileen Venes	N/A	290	4.50	1,305.00
Carter Ballentine	N/A	290	4.60	1,334.00
Deanna Hirshorn	N/A	290	7.90	2,291.00
Hannah Kim	N/A	340	23.50	7,990.00
Katelynn Pan	N/A	290	25.40	7,366.00
	Total Paraprofessionals		**65.90**	**20,286.00**

* Nonworking travel time is billed at 50% of the applicable regular billing rate.

[1] This amount reflects a 50% reduction in fees for non-working travel time.
[2] This amount reflects a 50% reduction in fees for non-working travel time.

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

81. Finally, one can consult surveys of law firms' billing rates, such as those taken by the NATIONAL LAW JOURNAL (NLJ). The number of firms participating in the NLJ surveys varies from year to year, but always exceeds 100. The NLJ surveys are often cited to courts as evidence supporting hourly rates in fee applications. *See, e.g.*, *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172-73 (C.D. Cal. 2010) (admitting into evidence and relying upon expert report by Professor William Rubenstein which was based in part on NLJ surveys).

82. The NLJ surveys report that senior partners at large law firms often charge $1000 per hour or more. *See* Karen Sloan, *NLJ Billing Survey: $1,000 Per Hour Isn't Rare Anymore,* The National Law Journal (January 13, 2014). Reading the text of the article, one learns that "[n]early 20 percent of the firms included in The National Law Journal's annual survey of large law firm billing rates [in 2014] had at least one partner charging more than $1,000 an hour." Lawyers who practice in the Supreme Court routinely charge more than $1,000 per hour too. *Billing Rates*, The National Law Journal Supreme Court Brief (Online), Sept. 6, 2019.

83. The 2014 NLJ survey, which contained information for 159 of the largest law firms in the U.S., found a median rate (half above/half below) for the highest partner billing rate category of $775 and a median high hourly rate for associates of $510. Since then, rates at major law firms have risen, but even so the blended rate that Class Counsel requests falls with the identified range.

84. As explained, Class Counsel are excellent lawyers who should be paid at rates comparable to those charged by other lawyers in the top tier. Having considered a variety of sources, it is my opinion that the requested hourly rates are reasonable.

85. I turn now to the multiplier portion of the lodestar, which will equal 1.05 if the Court awards 33⅓ percent of the recovery as fees. This multiplier is far below average. A study published in 2017 reported a mean multiplier of 1.82 for all federal class actions. Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 966 (2017). There is no doubt that the requested multiplier is reasonable and falls within the range the Court has discretion to award.

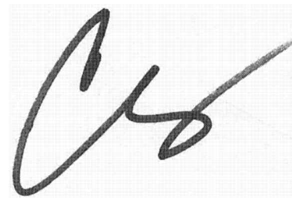
X. COMPENSATION

86. I received a flat fee of $30,000 for preparing this Report. I have no personal stake in the outcome of this matter or the attorneys' fees awarded.

XI. CONCLUSION

87. For the reasons set out above, I believe that Class Counsel's request for a fee award equal to 33⅓ percent of the gross recovery is reasonable and should be approved.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 5th day of June, 2020, at Empire, Michigan.



CHARLES SILVER

EXHIBIT 1: RESUME OF PROFESSOR CHARLES SILVER

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

University of Michigan Law School, Fall 2018
Visiting Professor

Harvard Law School, Fall 2011
Visiting Professor

Vanderbilt University Law School, Fall 2003
Visiting Professor

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

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

EDUCATION

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

PUBLICATIONS

Special Projects

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Miscellaneous

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

PERSONAL

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

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

First generation of family to attend college.

EXHIBIT 2: TABLE OF FEE AWARDS IN DIRECT PURCHASER CLASS ACTIONS

Pay-For-Delay Pharmaceutical Antitrust Settlements Where Three Large Direct Purchasers Supported Fee Requests In The Customary Market Range					
Litigation	**Settlement (Millions)**	**Fee**	**AmerisourceBergen**	**Cardinal Health**	**McKesson**
In re Asacol Antitrust Litig., No. 15-12730 (D. Mass. Dec. 7, 2017)	$15.00	33⅓%	Y	Y	Y
In re K-Dur Antitrust Litig., No. 01-1652 (D.N.J. Oct. 5, 2017)	$60.00	33⅓%	Y	Y	Y
In re Prograf Antitrust Litig., No. 11-md-2242 (D. Mass. May 20, 2015)	$98.00	33⅓%	Y	Y	Y
In re Prandin Direct Purchaser Antitrust Litig., No. 10-12141 (E.D. Mich. Jan. 20, 2015)	$19.00	33⅓%	Y	Y	Y
In re Neurontin Antitrust Litig., No. 02-1830 (D.N.J. Aug. 6, 2014)	$191.00	33⅓%	Y	Y	Y
In re Flonase Antitrust Litig., No. 08-cv-3149 (E.D. Pa. June 14, 2013)	$150.00	33⅓%	N	Y	Y
In re Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012)	$37.50	33⅓%	Y	Y	Y
In re Metoprolol Succinate Antitrust Litig., No. 06-52 (D. Del. Jan. 11, 2012)	$20.00	33⅓%	Y	Y	Y
In re Wellbutrin SR Antitrust Litig., No. 04-5525 (E.D. Pa. Nov. 21, 2011)	$49.00	33⅓%	Y	Y	Y
In re Nifedipine Antitrust Litig., No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011)	$35.00	33⅓%	Y	Y	Y
In re Oxycontin Antitrust Litig., No. 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011)	$16.00	33⅓%	Y	Y	Y
In re Celebrex (Celecoxib) Antitrust Litig., No. 2:14-CV-00361, 2018 WL 2382091 (E.D. Va. Apr. 18, 2018)	$94.00	33⅓%	Y	Y	Y
Meijer, Inc. v. Abbot Labs., No. 07-5985 (N.D. Cal.) (August 11, 2011)	$52.00	33⅓%	Y	Y	Y
King Drug Company of Florence, Inc. v. Cephalon, Inc., No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015)	$512.00	27.5%	Y	Y	Y