UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Alaska Electrical Pension Fund et al. v. Bank of America N.A. et al.

Case No. 14-cv-7126

DECLARATION OF BRIAN T. FITZPATRICK

I. Background and qualifications

1. I am currently a Visiting Professor of Law at Harvard Law School. My regular appointment is Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses at Vanderbilt. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the University of Arizona Law Review, and the NYU Journal of Law & Business. My work has been cited by numerous courts, scholars, and popular media outlets, such as The New York Times, USA Today, and The Wall Street Journal. I am also frequently invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, 2016, and 2017, and the ABA Annual Meeting in

2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to membership in the American Law Institute.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period, 2006-2007. *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is several times larger than the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 109 from the Second Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. This study has been relied upon by a number of courts, scholars, and testifying experts.[1] In addition to my empirical works,

[1] *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *Hillson v. Kelly Servs. Inc.*, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017); *Good v. W. Virginia-Am. Water Co.*, 2017 WL 2884535, at *23, *27 (S.D. W. Va. July 6, 2017); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017); *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at

I have also published many papers on how the economic incentives of attorneys and others affect class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "Class Action Lawyers"). Next year, my book on this subject, The Conservative Case for Class Actions, will be published by University of Chicago Press.

4. I have been asked by class counsel to opine on whether the attorneys' fees they have requested in the settlements before the Court are reasonable in light of the fees that have been awarded in other class action cases and the research on the economics of class action litigation. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel; I have attached a list of these documents in Exhibit 2. As I explain, based on the studies of settlements across the country and in the Second Circuit in particular, I believe the requested fees are reasonable and in line with other fee awards in comparable cases.

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*17 (S.D.N.Y. Apr. 24, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016) (same); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1246 (D.N.M. 2016) (same); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Federal National Mortgage Ass'n Secs., Deriv., and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Products Liability Litig.*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

II. Case background

5. These settlements arise out of litigation against many of the largest banks in the world as well as an inter-dealer broker entity (ICAP) that helped them set a daily index known as "ISDAfix." The ISDAfix benchmark is used to price various types of interest rate derivatives such as swaptions and structured notes. The lawsuit here alleges that the Defendants violated the Sherman Act and various state laws by making false ISDAfix rate submissions and otherwise colluding with one another to move the ISDAfix in ways favorable to the Defendants and unfavorable to the Plaintiffs and others whose investments depended on ISDAfix rates. Class counsel have now reached settlements with all fourteen banks and the inter-dealer broker. The court gave final approval to ten of these settlements on June 1, 2018, and gave preliminary approval to the last settlement on June 26, 2018. The parties have now moved the Court for final approval of the last settlement.

6. Each settlement agreement sets forth the definition of its Settlement Class, and I will not repeat those here. As summarized in Table 1, below, each of the settlements requires the Defendants to pay cash of varying amounts into a common fund (to be distributed based on a separately submitted plan of allocation), each bars any leftover cash from reverting to the Defendants, and the first ten required those settling Defendants to provide substantial confirmatory discovery and other cooperation to class counsel as they continued to litigate against the other alleged conspirators. (Because the final settlement concludes the litigation, there was no need to require the Newly Settling Defendants to provide similar cooperation.) In exchange, the class agrees to release the Defendants from the claims they brought here or could have brought here related to the factual underpinnings of these lawsuits.

Table 1: Settlements in *ISDAfix Litigation*

Settlement	Cash	Reversion to Defendant	Cooperation
Bank of America	$50,000,000	NO	YES
Barclays	$30,000,000	NO	YES
Citigroup	$42,000,000	NO	YES
Credit Suisse	$50,000,000	NO	YES
Deutsche Bank	$50,000,000	NO	YES
JP Morgan Chase	$52,000,000	NO	YES
Royal Bank of Scotland	$50,000,000	NO	YES
Goldman Sachs	$56,500,000	NO	YES
UBS	$14,000,000	NO	YES
HSBC	$14,000,000	NO	YES
BNP Paribas, ICAP, Morgan Stanley, Nomura, Wells Fargo[2]	$96,000,000	NO	NO

7. Class counsel have now moved the Court for a fee award equal to 30% of each of these settlements. Based on the academic literature and empirical studies of class action settlements across the country and in the Second Circuit in particular, it is my opinion that these requests are reasonable and in line with other fee awards in comparable cases.

III. Assessment of the reasonableness of the requests for attorneys' fees

8. The settlements at issue are so-called "common fund" settlements, where the efforts by attorneys for the plaintiffs have created common funds of cash for the benefit of the plaintiffs, but, because these are class action settlements and no fee-shifting statute was triggered, the attorneys are requesting that they be compensated from the funds they have created. At one time, courts that awarded fees in common fund class action cases did so using the familiar "lodestar" approach. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2051. Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on

[2] These defendants agreed to split their contributions in the following manner: for BNP and Morgan Stanley, $33.5 million each; for Nomura and Wells Fargo, $8.75 million each; and for ICAP, $11.5 million.

the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.*

9. Over time, however, the lodestar approach fell out of favor in common fund class actions. It did so largely for two reasons. First, courts came to dislike the lodestar method because it was difficult to calculate the lodestar; courts had to review voluminous time records and evaluate the reasonableness of those hours. Second—and more importantly—courts came to dislike the lodestar method because it did not align the interests of class counsel with the interests of the class; class counsel's recovery did not depend on how much the class recovered, but, rather, on how many hours could be spent on the case. *See id.* at 2051-52. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is predominantly injunctive in nature (and the value of the injunction cannot be reliably calculated). *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of settlements). The other large-scale academic study of class action fees, authored over time by Geoff Miller and the late Ted Eisenberg, agrees with my findings. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 267 (2010) (finding lodestar method used only 13.6% of the time before 2002 and less than 10% of the time thereafter) (hereinafter "Eisenberg-Miller 2010"); Theodore Eisenberg et al., *Attorneys' Fees in Class Action Settlements: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) (finding lodestar method used less than 7% of the time since 2009) (hereinafter "Eisenberg-Miller 2017").

10. The more common method of calculating attorneys' fees today is known as the "percentage" method. Under this approach, courts select a percentage of the settlement fund that they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product. The percentage approach has become the preferred method for awarding fees to class counsel in common fund cases precisely because it corrects the deficiencies of the lodestar method: it is less cumbersome to calculate, and, more importantly, it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2052.

11. In the Second Circuit, courts have discretion to use either the lodestar method or the percentage method in awarding attorneys' fees in common fund class actions. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 45 (2d Cir. 2000) ("We hold that either the lodestar or percentage of the recovery methods may properly be used to calculate fees in common fund cases."). But "[t]he trend in this Circuit is toward the percentage method . . . ." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). In light of the well-recognized disadvantages of the lodestar method and the well-recognized advantages of the percentage method, it is my opinion that courts should generally use the percentage method in common fund cases whenever the value of the settlement can be reliably calculated. It is my opinion that courts should use the lodestar method only where the value of the settlement cannot be reliably calculated (and the percentage method is therefore not feasible) or a fee-shifting statute is applicable (and the statute requires it). This is not just my opinion. It is the consensus opinion of class action scholars. *See* American Law Institute, Principles of the Law of Aggregate Litigation § 3.13(b) (2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases."). In this case, the settlements consist largely of

cash, and, to that extent, they are obviously readily quantifiable; therefore, in my opinion, the percentage method should be used. Accordingly, I will assess the reasonableness of the fee requests here using the percentage method.

12. Under the percentage method, courts in the Second Circuit examine six factors: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50. As I explain below, the fee requests here are justified under the above factors in light of the empirical data and the economics of class action litigation.

13. Consider first factor (6): public policy considerations. The primary goals of class action litigation are to facilitate compensation for victims of wrongdoing and deterrence of that wrongdoing in the first place that might not be possible without the class action. For example, many of the class members in this litigation were injured in relatively small sums by the Defendants' alleged misconduct. Even if all of them later became aware of the Defendants' misconduct—and one of the virtues of the class action device is that not all class members have to be in order for all of them to recover—these class members would not be able to sue on their own. That is, because of lack of knowledge and wherewithal, but for this class action, most class members would receive nothing. Moreover, if Defendants know some Plaintiffs will be unable or unwilling to sue on their own, then they will not be deterred from taking money from them; thus, the class actions here can facilitate both compensation and deterrence. Although it is true the federal government has pursued some of these Defendants and recovered substantial penalties against them, the government had done so against only five of the Defendants by the

time Plaintiffs settled with the last defendants in this action.[3] Perhaps more importantly, the government has no obligation to distribute any of its penalties to class members.

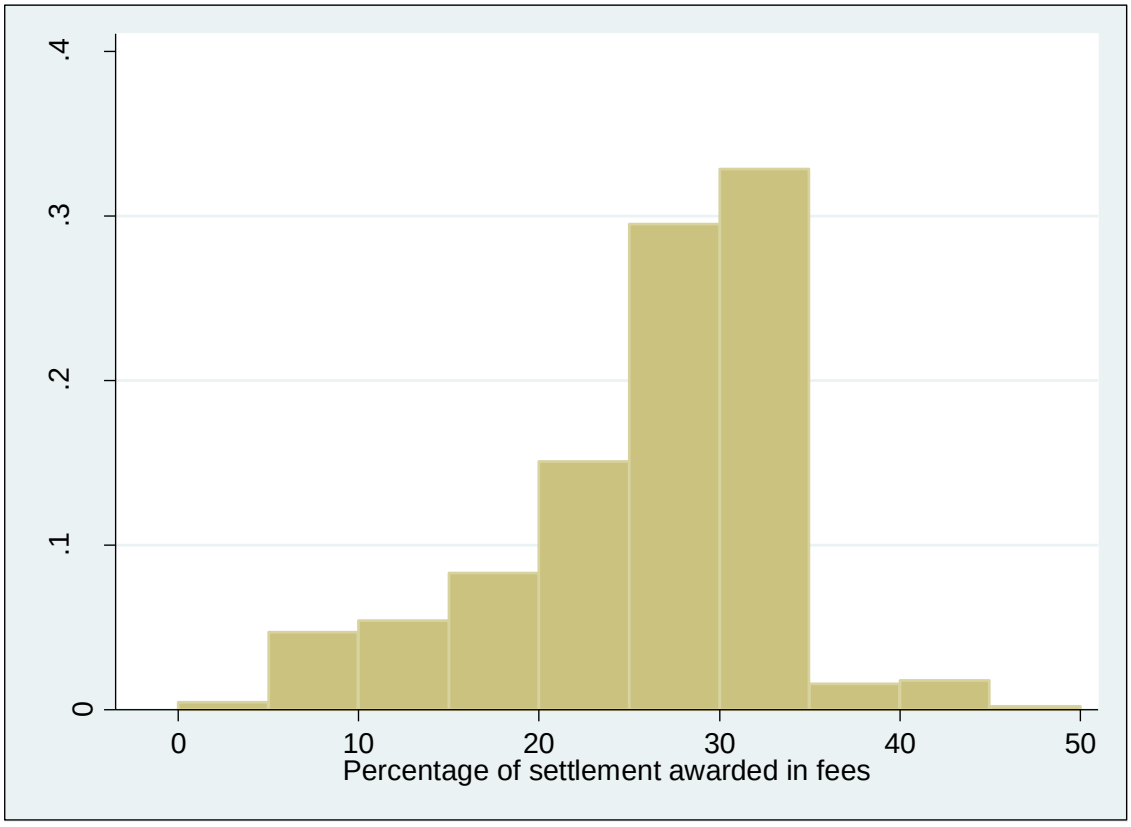
14. Thus, again, for many class members, it is the class action or nothing at all. Why are these policy considerations important to the court's fee decisions? Because attorneys' fees are the fuel that drive class action litigation. Class action lawyers are rational actors like everyone else: if they are not adequately rewarded for successfully prosecuting class action cases, then they will do something else with their time. Yet, the profit motives of class action lawyers like all rational actors must be aligned with socially responsible behavior; like all rational actors, profit motives can lead class action lawyers astray just as easily as they can lead them to good. As such, it is important in my opinion that courts set fees such that class action lawyers have the incentive to maximize the compensation they recover and the deterrence they generate. In my opinion, and as I explain more below, granting class counsel's fee requests here are consistent with these goals.

15. Consider next factor (5): the requested fee in relation to the settlement. The fees requested here are 30% of each of the cash portions of the settlements. These requests are only slightly higher than the average percentages awarded in class actions, whether one looks nationwide or in the Second Circuit alone. For example, according to my empirical study, the most common percentages awarded by federal courts nationwide using the percentage method were 25%, 30%, and 33%, with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study*, *supra*, at 833-34, 838. This can be seen graphically in Figure 1, which shows the distribution of all of the percentage-method fee awards in my study. In particular, the figure shows what fraction of settlements (y-axis) had fee awards within each five-

[3] The government did not pursue antitrust claims against any of the Defendants.

point range of fee percentages (x-axis). As the figure shows, the fee requests here fall within *the most common fee range*: between 30% (inclusive) and 35%. Indeed, one-third of all awards fell into that range and almost 40% of all fee awards were equal to or above 30%. Thus, although the requests here are slightly above average, they would still be in very good company. The findings of the other large-scale academic study are in agreement. *See Eisenberg-Miller 2010, supra*, at 260 (finding mean and median of 24% and 25%, respectively); *Eisenberg-Miller 2017, supra*, at 951 (finding mean and median of 27% and 29%, respectively).

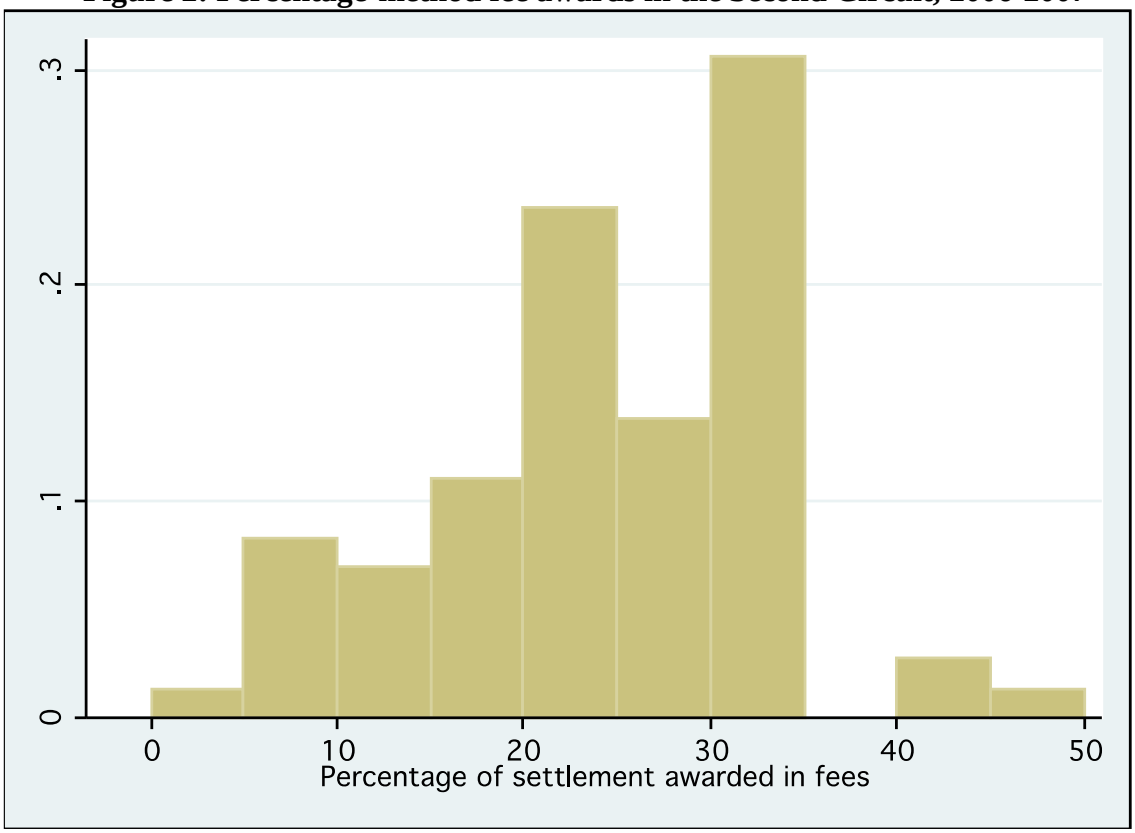
Figure 1: Percentage-method fee awards among all federal courts, 2006-2007



16. The same is true when looking at fee awards in the Second Circuit alone. In the 72 settlements in my study from the Second Circuit where the percentage method was used, the mean and median were 23.8% and 24.5%, respectively, with, again, the fees requested here falling within the most popular range: from 30% (inclusive) to 35%. *See* Fitzpatrick, *Empirical*

Study, *supra*, at 836. This is depicted graphically in Figure 2. Again, the findings of the other large-scale academic study are in agreement. *See Eisenberg-Miller 2010*, *supra*, at 260 (finding mean and median in the Second Circuit of 23% and 24%, respectively); *Eisenberg-Miller 2010*, *supra*, at 951 (finding mean and median in the Second Circuit of 28% and 30%, respectively).

Figure 2: Percentage-method fee awards in the Second Circuit, 2006-2007



17. In the preceding paragraphs, I have analyzed class counsel's fee requests as reflecting separate (but related) settlements entered into at different times during the pendency of the case. That is because that is what they are: these separately negotiated settlements based on the strength of the evidence against each individual Defendant or group of Defendants were arrived at over several years. Nonetheless, class counsel have asked me to additionally assess the reasonableness of their fee request if we assume this was one $504.5 million settlement rather

than several smaller ones. In other words, would 30% of $504.5 million be unreasonable? As I explain below, I think it would not.

18. It is true that a $504.5 million settlement would be a very large one; there are only a handful of settlements this size in federal court every year. It is also true that some courts award smaller fee percentages when the settlement amount is very large. *See* Fitzpatrick, *Empirical Study*, *supra*, at 838, 842-44. That is, in my empirical study, settlement size had a statistically significant but inverse relationship with the fee percentages awarded by federal courts. This relationship was found in the other large-scale academic study as well. *See Eisenberg-Miller 2010*, *supra*, at 263-65; *Eisenberg-Miller 2017*, *supra*, at 947-48. Thus, for example, the mean and median fee percentages awarded in the percentage-method settlements in my dataset between $250 million and $500 million were 17.8% and 19.5%. *See* Fitzpatrick, *Empirical Study*, *supra*, at 839. (The mean and median fee percentages for settlements between $500 million and $1 billion were 12.9%, but there were only two settlements in that range during the years of my study. *See id.* The Eisenberg-Miller study does not report separate fee-percentage averages and medians for very large settlements.)

19. In my opinion, it undermines rather than furthers the public policy considerations discussed above to cut fee percentages simply because settlements are large. Indeed, doing so can incentivize class action lawyers to settle for *less* rather than *more*. Consider the following example: if courts award 20% in fees of $125 million settlements, but 30% in fees of $90 million settlements, then class action lawyers are better off settling for $90 million ($27 million fee) than $125 million ($25 million fee)! Needless to say, such incentives are not good for compensation or deterrence. Courts attuned to these perverse incentives sometimes slash fee percentages on a marginal basis rather than an absolute basis—e.g., award 30% of the first $100 million, but 20%

thereafter. Although this has the virtue of not incentivizing class counsel to settle for less in a given case, it does give them an incentive to redirect their efforts from bigger cases to smaller ones. For example, if a class action lawyer believed that the court would award them only 20% once they hit $100 million but 30% before then, then class counsel might redirect their time once they hit $100 million to smaller cases where they can still return 30% on their time. Again, such incentives are not good for compensation or deterrence, at least in the biggest cases (i.e., the cases where defendants have caused people the most harm). Although these settlements obviously will not be affected by the court's fee decisions here, the court's decisions will send a signal to lawyers in the future about how courts might compensate them and they could have an effect on future cases. In my opinion, courts should not send signals that encourage lawyers to do anything other than recover the most they can from defendants.

20. Nonetheless, as I noted, courts sometimes do not follow this advice and slash fee percentages in bigger cases despite the negative incentives it may cause. It is important to realize however, that, although the fee request here would be higher than the mean and median in my study for large cases, the standard deviation around the mean was quite large in my study: e.g., 7.9% in the $250-$500 million range. *See id.* This means that the fee range for large settlements in my study was very broad. As such, there are many examples of courts awarding class action lawyers 30% or more in cases of this size (or even bigger), including cases both inside and outside my study's time period. *See, e.g.*, *Allapattah Servs. Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) (31.33% of $1.075 billion); *In re Urethane Antitrust Litig.*, No. 04 Civ. 1616, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (33.33% of $835 million); *Dahl v. Bain Capital Partners, LLC*, No. 07-cv-12388, Dkt. 1095 (D. Mass. Feb. 2, 2015) ("*Dahl"*) (33% of $590.5 million); *In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d

467, 516 (S.D.N.Y. 2009) (33% of $510 million); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011) (30% of $410 million); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), 2001 WL 34312839, at *10, 14 (D.D.C. July 16, 2001) (34% of $359 million); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, ECF No. 543 (D. Del. 2009) (33% of $250 million).

21. Of all these cases, the one that may be the most similar to this litigation is *Dahl*. I served as an expert in that case so I am very familiar with it. Like the settlements here, *Dahl* was the culmination of an antitrust lawsuit against several well-heeled financial industry defendants. Like here, *Dahl* counsel spent over a year investigating the defendants' activities with experts before they were confident they had uncovered a conspiracy. Like here, all of the pre-filing activity in *Dahl* took place at great expense and without assistance from the government. Even the total dollar magnitude of the settlements presented to the court in *Dahl* ($590.5 million) was not unlike the magnitude presented here. Indeed, if anything, these settlements may be the more impressive ones. I describe these matters in more detail below, but the recoveries in this litigation (approximately 35% to 73% of the anticipated total damages demand) is greater than the estimated percent of recovery in *Dahl* (5%). Yet the court in *Dahl* awarded even higher fee percentages (33%) than those class counsel seek here.

22. Consider next factors: (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; and (4) the quality of representation. These factors ask the court to assess how impressive the recoveries are here in light of the risks the class faced. With respect to the recoveries, class counsel has calculated that the settlements here comprise some 35% to 73% of what they anticipated to demand at trial. This is much more successful than the typical antitrust case. *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) (finding the weighted average of recoveries—the authors' preferred measure—to be 19% of single damages for cartel cases between 1990 to 2014).

23. It is even more impressive when measured against the considerable risks the class faced in this litigation. As the court is well aware, the class faced a litany of legal and factual barriers, including: whether or not the statute of limitations had run on some of the class's injuries; whether or not the class could show antitrust standing; whether or not there was actually a conspiracy among the Defendants; whether Plaintiffs had identified market manipulation; and how much of the class's injuries could actually be traced to the conspiracy. Although the Court sided with the class on some of these issues at the motion to dismiss stage, it might have changed its mind at summary judgment or trial. Even if it did not, the jury might have gone the other way. Of course, even if the class prevailed at all those stages, the Defendants inevitably would have taken appeals, introducing more risk (not to mention delay). If one goes through each step in this litigation decision tree and assigns probabilities of success to the class at each step and then multiplies all of those probabilities together, it becomes quite clear that the recoveries here are much better than the class was likely to obtain had litigation continued. In other words, the above-average results here support above-average fee requests.

24. Indeed, I am not sure simply tallying the case's risks and comparing them to the class's recovery does full justice to class counsel's work here. My review of the record indicates that class counsel faced (and successfully navigated) unusually challenging and novel issues—navigation that often necessitated creative lawyering and extensive consultation with experts. For example, class counsel thoroughly and thoughtfully briefed extremely complex issues of antitrust law over the course of numerous motions to dismiss. They also found ways to pioneer

innovative theories of injury and damages while nonetheless always grounding them in existing law. I am very impressed with the work class counsel did in this litigation.

25. Consider finally factor (1), the time and labor expended by counsel. As the Court is well aware, class counsel have expended tens of thousands of hours and years of their lives litigating against the Defendants. This litigation has already transpired much longer than the typical class action case. *See* Fitzpatrick, *Empirical Study*, *supra*, at 820 (finding mean and median time to final approval of three years or less in all class actions and antitrust class actions in particular). In my opinion, these facts alone are sufficient to weigh this factor in favor of the fee requests.

26. But some courts go further and perform a so-called "lodestar crosscheck" to ensure that the percentage method will not result in a "windfall" to class counsel in light of the time they have invested in the litigation. *See* Fitzpatrick, *Empirical Study*, *supra*, at 833 (finding that only 49% of courts consider lodestar when awarding fees with the percentage method); *Eisenberg-Miller 2017*, *supra*, at 945 (finding percentage method with lodestar crosscheck used 38% of the time versus 54% for percentage method without lodestar crosscheck). In my opinion, the lodestar crosscheck undermines the public policy considerations I discussed above and courts should not perform it at all. In particular, the lodestar crosscheck reintroduces the very same undesirable consequences of the lodestar method that the percentage method was designed to correct in the first place. For example, if class counsel believe that courts will cap the percentage awarded at some multiple of their lodestar, then they will have precisely the same incentives they would if courts used the lodestar method alone: to be inefficient, perform unnecessary projects, delay results, and overbill and overstaff work in order to run up their lodestar. Moreover, because the lodestar crosscheck inevitably caps the amount of compensation class counsel can

receive under the percentage method, it blunts their incentive to achieve the largest recoveries. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2065-66.[4]

27. Nonetheless, because class counsel have asked me to assess their fee requests in light of the lodestar crosscheck, I will do it. Class counsel have reported a total lodestar of over $89 million in this litigation. Class counsel's fee requests would therefore result in a multiplier over class counsel's lodestar of approximately 1.68. This would be right at the average and slightly above the median lodestar-crosscheck multiplier in both my study and the other large-scale academic study of class action fee awards. *See* Fitzpatrick, *Empirical Study*, *supra*, at 834 (finding mean and median lodestar multipliers in cases using the percentage method with the lodestar crosscheck were 1.65 and 1.34, respectively); *Eisenberg-Miller 2010*, *supra*, at 273 (finding mean multiplier of 1.81 for cases between 1993 and 2008); *Eisenberg-Miller 2017*, *supra*, at 965 (finding mean multiplier of 1.48 for cases between 2009 and 2013).

28. But what does the data say if we factor in the size of the settlement and assume that this is one $504.5 million settlement rather than eleven smaller ones? The data looks even better. On seven occasions in my empirical study courts awarded fees in settlements between $250 million (inclusive) and $1 billion and used the percentage method with the lodestar crosscheck. The lodestar multipliers in these cases were: 1, 2.40, 2.89, 3.33, 3.50, 5.85, and 6. All but one of these multipliers would be larger than the one that results here. *See also*

[4] Consider the following example. Suppose a class action lawyer had incurred a lodestar of $1 million in a class action case. If that lawyer believed that a court would not award him a 25% fee if it exceeded twice his lodestar, then he or she would be rationally indifferent between settling the case for $8 million and $80 million (or any number higher than $8 million). Either way he or she will get the same $2 million fee. Or suppose the lawyer believed that the most he or she could wring from the defendant in this example was $16 million. In order to reap the maximum 25% fee with the lodestar crosscheck, he or she would have to generate an additional $1 million in lodestar before agreeing to the settlement; this would create the incentive to drag the case out before sealing the deal. Neither indifference as to settlement amount nor incentive to delay settlement is in the interests of class members or of a society interested in optimal compensation of injuries and optimal deterrence of wrongdoing.

Eisenberg-Miller 2010, *supra*, at 274 (finding mean and median multipliers of 3.18 and 2.60, respectively, in settlements above $175.5 million). In other words, no matter how you look at it, the multiplier that would result here would be modest.

29. Truth be told, the lodestar data suggests that, if anything, class counsel will probably be undercompensated for the risks they faced in this litigation. In light of all of the complexities and uncertainties, class counsel faced the very real risk of recovering nothing at all. Yet, the lodestar multiplier shows that their fee requests will end up paying them only a small premium over their normal, risk-free hourly rates—a smaller premium than is probably warranted in the light of the risk that they would have recovered nothing. I do not mention this to encourage the court to use class counsel's lodestar as a reason to pay them more than they have requested; as I said above, it creates bad incentives to focus on class counsel's lodestar at all. I mention it simply to reiterate that there is nothing about class counsel's lodestar that suggests they would be overpaid if their fee requests are granted. If courts always award class action lawyers only their lodestar or something close to it, no lawyer would ever take a risky class action case like this one on contingency; they would do something else with their time. Again, although this litigation is over and it is too late to affect class counsel's incentives here, the fee decisions courts make signal to future lawyers whether and when they should take on risky cases. In my opinion, it would send the right signal to granted these fee requests.

30. For all these reasons, it is my opinion that class counsel's fee requests here are reasonable and well within the range awarded in other, comparable cases.

31. My compensation in this matter has been $895 per hour.

Cambridge, MA

September 27, 2018

Brian T. Fitzpatrick

EXHIBIT 1

BRIAN T. FITZPATRICK

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Nashville, TN 37203
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ACADEMIC APPOINTMENTS

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018
- Classes: Civil Procedure, Litigation Finance

VANDERBILT UNIVERSITY LAW SCHOOL, *Professor*, 2012 to present
- *FedEx Research Professor*, 2014-2015; *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts, Comparative Class Actions
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010
- Classes: Civil Procedure

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

BOOKS

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press, forthcoming 2019)

ACADEMIC ARTICLES

Can and Should the New Third-Party Litigation Financing Come to Class Actions?, 19 THEORETICAL INQUIRIES IN LAW 109 (2018)

Scalia in the Casebooks, 84 U. CHI. L. REV. 2231 (2017)

The Ideological Consequences of Judicial Selection, 70 VAND. L. REV. 1729 (2017)

Judicial Selection and Ideology, 42 OKLAHOMA CITY UNIV. L. REV. 53 (2017)

Justice Scalia and Class Actions: A Loving Critique, 92 NOTRE DAME L. REV. 1977 (2017)

A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology, 69 VAND. L. REV. 991 (2016)

The Hidden Question in Fisher, 10 NYU J. L. & LIBERTY 168 (2016)

An Empirical Look at Compensation in Consumer Class Actions, 11 NYU J. L. & BUS. 767 (2015) (with Robert Gilbert)

The End of Class Actions?, 57 ARIZ. L. REV. 161 (2015)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 VA. L. REV. 839 (2012)

Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012)

An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

Do Class Action Lawyers Make Too Little?, 158 U. PA. L. REV. 2043 (2010)

Originalism and Summary Judgment, 71 OHIO ST. L.J. 919 (2010)

The End of Objector Blackmail?, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

The Politics of Merit Selection, 74 MISSOURI L. REV. 675 (2009)

Errors, Omissions, and the Tennessee Plan, 39 U. MEMPHIS L. REV. 85 (2008)

Election by Appointment: The Tennessee Plan Reconsidered, 75 TENN. L. REV. 473 (2008)

Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 MICH. J. RACE & LAW 277 (2007)

BOOK CHAPTERS

Do Class Actions Deter Wrongdoing? in THE CLASS ACTION EFFECT (Catherine Piché, ed., Éditions Yvon Blais, Montreal, 2018)

Judicial Selection in Illinois in AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY (Joseph E. Tabor, ed., Illinois Policy Institute, 2017)

Civil Procedure in the Roberts Court in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, 2016)

Is the Future of Affirmative Action Race Neutral? in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, 2016)

ACADEMIC PRESENTATIONS

Empirical Research on Class Actions, Civil Justice Research Initiative, University of California at Berkeley, Berkeley, California (Apr. 9, 2018)

A Political Future for Class Actions in the United States?, The Future of Class Actions Symposium, University of Auckland Law School, Auckland, New Zealand (Mar. 15, 2018)

The Indian Class Actions: How Effective Will They Be?, Eighth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 19, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 8, 2017) (panelist)

Critical Issues in Complex Litigation, Contemporary Issues in Complex Litigation, Northwestern Law School (Nov. 29, 2017) (panelist)

The Conservative Case for Class Actions, Consumer Class Action Symposium, National Consumer Law Center, Washington, DC (Nov. 19, 2017)

The Conservative Case for Class Actions—A Monumental Debate, ABA National Institute on Class Actions, Washington, DC (Oct. 26, 2017) (panelist)

One-Way Fee Shifting after Summary Judgment, 2017 Meeting of the Midwestern Law and Economics Association, Marquette Law School, Milwaukee, WI (Oct. 20, 2017)

The Conservative Case for Class Actions, Pepperdine Law School Malibu, CA (Oct. 17, 2017)

One-Way Fee Shifting after Summary Judgment, Vanderbilt Law Review Symposium on The Future of Discovery, Vanderbilt Law School, Nashville, TN (Oct. 13, 2017)

The Constitution Revision Commission and Florida's Judiciary, 2017 Annual Florida Bar Convention, Boca Raton, FL (June 22, 2017)

Class Actions After Spokeo v. Robins*: Supreme Court Jurisprudence, Article III Standing, and Practical Implications for the Bench and Practitioners*, Northern District of California Judicial Conference, Napa, CA (Apr. 29, 2017) (panelist)

The Ironic History of Rule 23, Conference on Secrecy, Institute for Law & Economic Policy, Naples, FL (Apr. 21, 2017)

Justice Scalia and Class Actions: A Loving Critique, University of Notre Dame Law School, South Bend, Indiana (Feb. 3, 2017)

Should Third-Party Litigation Financing Be Permitted in Class Actions?, Fifty Years of Class Actions—A Global Perspective, Tel Aviv University, Tel Aviv, Israel (Jan. 4, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 2, 2016) (panelist)

The Ideological Consequences of Judicial Selection, William J. Brennan Lecture, Oklahoma City University School of Law, Oklahoma, City, Oklahoma (Nov. 10, 2016)

After Fifty Years, What's Class Action's Future, ABA National Institute on Class Actions, Las Vegas, Nevada (Oct. 20, 2016) (panelist)

Where Will Justice Scalia Rank Among the Most Influential Justices, State University of New York at Stony Brook, Long Island, New York (Sep. 17, 2016)

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

A Respected Judiciary—Balancing Independence and Accountability, 2016 Annual Florida Bar Convention, Orlando, FL (June 16, 2016) (panelist)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, FL (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, NY (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, CA (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, FL (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law, Columbia, MO (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School, Arlington, VA (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School, Ann Arbor, MI (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School, Nashville, TN (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, FL (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School, Ann Arbor, MI (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School, New York, NY (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School, New York, NY (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability, Fordham Law School Corporate Law Center, New York, NY (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School, St. Louis, MO (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, Chicago, IL (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School, Palo Alto, CA (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School, Chicago, IL (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School, Iowa City, IA (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School, St. Louis, MO (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered*, Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School, Washington, DC (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School, South Bend, IN (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, CA (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law, Minneapolis, MN (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School, Columbia, MO (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law, Chicago, IL (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law, Ann Arbor, MI (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

9th Circuit Split: What's the math say?, DAILY JOURNAL (Mar. 21, 2017)

Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

Lessons from Tennessee Supreme Court Retention Election, THE TENNESSEAN (Aug. 20, 2014)

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

Kagan is an Intellect Capable of Serving Court, THE TENNESSEAN (Jun. 13, 2010)

Confirmation "Kabuki" Does No Justice, POLITICO (July 20, 2009)

Selection by Governor may be Best Judicial Option, THE TENNESSEAN (Apr. 27, 2009)

Verdict on Tennessee Plan May Require a Jury, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

Tennessee's Plan to Appoint Judges Takes Power Away from the Public, THE TENNESSEAN (Mar. 14, 2008)

Process of Picking Judges Broken, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

Disorder in the Court, LOS ANGELES TIMES (Jul. 11, 2007)

Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

Where Will Justice Scalia Rank Among the Most Influential Justices, The Leo Bearman, Sr. American Inn of Court, Memphis, TN (Mar. 21, 2017)

Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Washington, D.C. (Mar. 16, 2017)

Supreme Court Review 2016: Current Issues and Cases Update, Nashville Bar Association, Nashville, TN (Sep. 15, 2016) (panelist)

A Respected Judiciary—Balancing Independence and Accountability, Florida Bar Annual Convention, Orlando, FL (June 16, 2016) (panelist)

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club, Nashville, TN (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Member, American Law Institute
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies
Reviewer, Oxford University Press
Reviewer, Supreme Court Economic Review
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights
Board of Directors, Tennessee Stonewall Bar Association
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia

COMMUNITY ACTIVITIES

Board of Directors, Nashville Ballet, 2011-2017; Nashville Talking Library for the Blind, 2008-2009

EXHIBIT 2

Documents reviewed:

- Plaintiffs' Motion for Preliminary Approval of Settlement Agreements with Bank of America, N.A.; Barclays Bank plc; Citigroup Inc.; Credit Suisse AG, New York Branch; Deutsche Bank AG; JPMorgan Chase & Co. LLC; and Royal Bank of Scotland, plc, ECF No. 220 (May 3, 2016).
- Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreements with Bank of America, N.A.; Barclays Bank plc; Citigroup Inc.; Credit Suisse AG, New York Branch; Deutsche Bank AG; JPMorgan Chase & Co. LLC; and Royal Bank of Scotland, plc, ECF No. 221 (May 3, 2016).
- Declaration of Christopher M. Burke in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreements with Bank of America, N.A.; Barclays Bank plc; Citigroup Inc.; Credit Suisse AG, New York Branch; Deutsche Bank AG; JPMorgan Chase & Co. LLC; and Royal Bank of Scotland, plc, ECF No. 222 (May 3, 2016).
- Stipulation and Agreement of Settlement with Bank of America, N.A., ECF No. 222-1 (filed May 3, 2016).
- Stipulation and Agreement of Settlement with Barclays Bank and Barclays Capital Inc., ECF No. 222-2 (filed May 3, 2016).
- Stipulation and Agreement of Settlement with Citigroup Inc., ECF No. 222-3 (filed May 3, 2016).
- Stipulation and Agreement of Settlement with Credit Suisse AG, New York Branch, ECF No. 222-4 (filed May 3, 2016).
- Stipulation and Agreement of Settlement with Deutsche Bank AG, ECF No. 222-5 (filed May 3, 2016).
- Stipulation and Agreement of Settlement with JPMorgan Chase & Co., ECF No. 222-6 (filed May 3, 2016).
- Stipulation and Agreement of Settlement with The Royal Bank of Scotland, ECF No. 222-7 (filed May 3, 2016).
- Order Preliminarily Approving Settlement Agreements, Certifying the Settlement Class, and Appointing Class Counsel and Class Representatives for the Settlement Class, ECF No. 228 (May 11, 2016).

- Plaintiffs' Motion for Preliminary Approval of Settlement Agreement with The Goldman Sachs Group, Inc., ECF No. 329 (Dec. 16, 2016).
- Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreement with The Goldman Sachs Group, Inc., ECF No. 330 (Dec. 16, 2016).
- Declaration of Christopher M. Burke in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreement with The Goldman Sachs Group, Inc., ECF No. 331 (Dec. 16, 2016).
- Stipulation and Agreement of Settlement with The Goldman Sachs Group, Inc., ECF No. 331-1 (filed Dec. 16, 2016).
- Order Preliminarily Approving the Goldman Sachs Settlement Agreement, Certifying the Settlement Class, and Appointing Class Counsel and Class Representatives for the Settlement Class, ECF No. 337 (Dec. 19, 2016).
- Plaintiffs' Motion for Preliminary Approval of Settlement Agreements with UBS AG and HSBC Bank USA, N.A., ECF No. 488 (July 11, 2017).
- Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreements with UBS AG and HSBC Bank USA, N.A., ECF No. 489 (July 11, 2017).
- Declaration of Daniel L. Brockett in Support of Plaintiffs' Motion for Preliminary Approval of Settlement Agreements with UBS AG and HSBC Bank USA, N.A., ECF No. 490 (July 11, 2017).
- Stipulation and Agreement of Settlement with UBS AG, ECF No. 490-1 (filed July 11, 2017).
- Stipulation and Agreement of Settlement with HSBC USA Bank, N.A., ECF No. 490-2 (filed July 11, 2017).
- Order Preliminarily Approving Settlement Agreements with UBS AG and HSBC Bank USA, N.A., Certifying the Settlement Class, and Appointing Class Counsel and Class Representatives for the Settlement Class, ECF No. 492 (July 12, 2017).
- Plaintiffs' Notice of Motion for an Order Providing for Notice to the Settlement Class and Preliminarily Approving the Plan of Distribution, ECF No. 512 (Sept. 29, 2017).

- Memorandum in Support of Plaintiffs' Notice of Motion for an Order Providing for Notice to the Settlement Class and Preliminarily Approving the Plan of Distribution, ECF No. 513 (Sept. 29, 2017).
- Declaration of Dr. Christopher Fiore in Support of Preliminary Approval of Class Action Settlement, ECF No. 514 (Sept. 29, 2017).
- Declaration of Cameron R. Azari, Esq., on Proposed Settlement Class Notice Program, ECF No. 515 (Sept. 29, 2017).
- Order Providing for Notice to the Settlement Class and Preliminarily Approving the Plan of Distribution, ECF No. 521 (Oct. 24, 2017).
- Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, In the Matter of Barclays PLC, Barclays Bank PLC and Barclays Capital Inc., CFTC Docket No. 15-25 (May 20, 2015).
- Commodity Futures Trading Commission, Examples of Barclays' USD ISDAFIX Misconduct (May 20, 2015).
- Press Release, CFTC Orders Barclays to Pay $115 Million Penalty for Attempted Manipulation of and False Reporting of U.S. Dollar ISDAFIX Benchmark Swap Rates (May 20, 2015).
- Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, In the Matter of Citibank, N.A., CFTC Docket No. 16-16 (May 25, 2016).
- Commodity Futures Trading Commission, Examples of Citibank's USD ISDAFIX Misconduct (May 25, 2016).
- Press Release, CFTC Orders Citibank to Pay $250 Million for Attempted Manipulation and False Reporting of U.S. Dollar ISDAFIX Benchmark Swap Rates (May 25, 2016).
- Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, In the Matter of The Goldman Sachs Group, Inc., and Goldman, Sachs & Co., CFTC Docket No. 17-03 (Dec. 21, 2016).
- Commodity Futures Trading Commission, Examples of Goldman's USD ISDAFIX Misconduct (Dec. 21, 2016).

- Press Release, CFTC Orders Goldman Sachs to Pay $120 Million Penalty for Attempted Manipulation of and False Reporting of U.S. Dollar ISDAFIX Benchmark Swap Rates (Dec. 21, 2016).
- Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, In the Matter of The Royal Bank of Scotland plc, CFTC Docket No. 17-08 (Feb. 3, 2017).
- Commodity Futures Trading Commission, Examples of RBS's USD ISDAFIX Misconduct (Feb. 3, 2017).
- Press Release, CFTC Orders The Royal Bank of Scotland to Pay $85 Million Penalty for Attempted Manipulation of U.S. Dollar ISDAFIX Benchmark Swap Rates (Feb. 3, 2017).
- Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, ECF No. 501 (Aug. 2, 2017).
- Non-Settling Defendants' Joint Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, ECF No. 538 (Nov. 8, 2017).
- Non-Settling Defendants' Joint Memorandum of Law in Support of their Motion to Exclude the Report and Testimony of Craig Pirrong, ECF No. 530 (Nov. 8, 2017).
- Non-Settling Defendants' Joint Memorandum of Law in Support of their Motion to Exclude the Report and Testimony of Michael Williams, ECF No. 533 (Nov. 8, 2017).
- Non-Settling Defendants' Joint Memorandum of Law in Support of their Motion to Exclude the Report and Testimony of Robert Farrell, ECF No. 536 (Nov. 8, 2017).
- Reply Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, ECF No. 555 (Jan. 26, 2018).
- Plaintiffs' Omnibus Memorandum of Law in Opposition to Non-Settling Defendants' Motions to Exclude the Reports and Testimony of Craig Pirrong, Robert Farrell, and Michael Williams, ECF No. 558 (Jan. 26, 2018).
- Non-Settling Defendants' Reply Memorandum of Law in Further Support of their Motion to Exclude the Reports and Testimony of Craig Pirrong, Robert Farrell, and Michael Williams, ECF No. 581 (Feb. 28, 2018).
- Second Consolidated Amended Class Action Complaint, ECF No. 387 (Feb. 7, 2017).
- Non-Settling Defendants' Joint Memorandum of Law in Support of their Motion to Partially Dismiss Plaintiffs' Antitrust Claims, ECF No. 396 (March 6, 2017).

- Plaintiffs' Memorandum of Law in Opposition to Non-Settling Defendants' Joint Motion to Partially Dismiss Plaintiffs' Antitrust Claims, ECF No. 408 (March 28, 2017).
- Non-Settling Defendants' Joint Reply Memorandum of Law in Further Support of their Motion to Partially Dismiss Plaintiffs' Antitrust Claims, ECF No. 425 (April 7, 2017).
- Opinion and Order Denying Defendants' Joint Motion to Dismiss, Granting Nomura's Motion to Dismiss, Denying Plaintiffs' Motion to Amend, and Granting in Part and Denying in Part Wells Fargo's Motion to Dismiss, ECF 568 (Feb. 2, 2018).
- Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, In the Matter of Deutsche Bank Securities Inc., CFTC Docket No. 18-09 (Feb. 1, 2018).
- Press Release, CFTC Orders Deutsche Bank Securities Inc. to Pay $70 Million Penalty for Attempted Manipulation of U.S. Dollar ISDAFIX Benchmark Swap Rates (Feb. 1, 2018).
- Defendants' Memorandum of Law in Support of their Joint Motion to Dismiss the Consolidated Amended Class Action Complaint, ECF. No. 173 (Apr. 13, 2015).
- Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss the Consolidated Amended Class Action Complaint, ECF No. 194 (June 2, 2015).
- Defendants' Reply Memorandum of Law in Further Support of their Joint Motion to Dismiss the Consolidated Amended Class Action Complaint, ECF No. 204 (July 10, 2015).
- Opinion and Order, ECF No. 209 (March 28, 2016).
- Memorandum of Law in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Payment of Litigation Expenses, ECF No. 614 (March 30, 2018).
- Order, ECF No. 646 (May 29, 2018).
- Transcript of Final Approval Hearing (May 30, 2018).
- Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of an Additional Settlement and the Related Plan of Distribution, and for Approval of the Manner and Forms for Notice, ECF No. 666 (June 22, 2018).
- Declaration of Daniel L. Brockett in Support of Plaintiffs' Motion for Preliminary Approval of an Additional Settlement, ECF No. 667 (June 22, 2018) (including Exhibit 1 thereto, the Stipulation and Agreement of Settlement with the Newly Setting Defendants).

- Order Preliminarily Approving an Additional Settlement and the Related Plan of Distribution, and Approving the Manner and Forms for Notice, ECF No. 669 (June 26, 2018).
- Press Release, CFTC Orders JPMorgan Chase Bank, N.A. to Pay $65 Million Penalty for Attempted Manipulation of U.S. Dollar ISDAFIX Benchmark Swap Rates (June 18, 2018).
- Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, In the Matter of JPMorgan Chase Bank, N.A., CFTC Docket No. 18-15 (June 18, 2018).