EXHIBIT 18

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KING DRUG COMPANY OF FLORENCE, Inc., *et al.*, On behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **CEPHALON, INC., *et al.*,** **Defendants.**	**Civil Action No.** **2:06-cv-01797-MSG** **Judge Mitchell S. Goldberg**

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

I, Charles Silver, declare as follows:

I. SUMMARY OF OPINIONS

- When sophisticated businesses, some with large financial stakes in pharmaceutical antitrust class actions, consistently endorse fees awards of one-third (33.3%) of the recovery plus expenses in closely analogous cases, their voices establish that such fees are reasonable and proper under prevailing ethical rules.
- To date, in this case, no class member has objected to the requested fee of 27.5%, objected to reimbursing counsel for expenses, or opted out of the class. Instead, class members that are entitled to a substantial portion of the $512 million settlement fund have affirmatively endorsed Class Counsel's fee request, as they did in prior cases that generated large recoveries. It is therefore my opinion that an award of 27.5% of the $512 million settlement fund plus expenses is ethically proper.

- My opinion that an award of 27.5% of the recovery plus expenses is ethically proper is bolstered by the fact that judges granted higher percentage awards in the many pharmaceutical antitrust cases that preceded this one. The factors that govern the reasonableness of fee awards are similar to those that appear in state bar associations' fee rules.

II. INTRODUCTION

The best evidence of an ethically acceptable reasonable price for a legal service is the amount that a client agrees to pay and a lawyer agrees to accept when both are sophisticated, well informed, and interact in a deep market. When set this way, lawyers' fees are ethically proper.

In class actions, clients and lawyers do not bargain over fees and expenses directly. Lawyers' compensation is fixed by courts. Even so, one can sometimes be confident that class members and court-appointed class counsel would have settled on particular fee terms had face-to-face negotiations occurred, because the available evidence is conclusive upon the point. That is so here.

The Direct Purchaser Class Plaintiffs (DPCP) include businesses that are sophisticated and that have large financial stakes. Class Counsel for the DPCP ("Class Counsel")—including Garwin Gerstein & Fisher LLP, Odom & Des Roches, LLP, Smith Segura & Raphael, LLP, Berger & Montague, P.C., Heim, Payne & Chroush, LLP and Faruqi & Faruqi, LLP—have an extensive collective history of acting for these companies in Hatch-Waxman antitrust lawsuits that target pay-for-delay settlements between pharmaceutical manufacturers, as well as other anticompetitive behavior. The past cases show that members of the DPCP class have uniformly supported fees equal to 33% of the recovery plus expenses (or 30% in the one case where Class Counsel requested that amount) by submitting letters of support and by declining to object or opt out when given

opportunities to do so. Here, no Class Member has objected to Class Counsel's fee request, while many expressly support a fee award of 27.5% or more.

Businesses often agree to pay one-third of the recovery or more when hiring lawyers on contingency to handle complex cases with the potential to generate large recoveries.[1] Thus, evidence drawn from other cases also supports the reasonableness of Class Counsel's fee request.

III. CREDENTIALS

I have testified as an expert on attorneys' fees many times, and judges have cited or relied upon my opinions in the following major cases, as well as many smaller ones: *Silverman v. Motorola, Inc*., No. 07 C 4507, 2012 WL 1597388 (N.D. Ill. May 7, 2012) (fee award of 27.5% on recovery of $200 million); *In re Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330 (S.D. Fla. 2011) (fee award of 30% on recovery of $410 million); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F.Supp.2d 437 (E.D.N.Y. 2014) (awarding $544.8 million fee on recovery of $5.7 billion); *In re Enron Corp. Securities, Derivative & "ERISA" Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008) ($688 million fee award on a $7.2 billion recovery); *Allapattah Services, Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (31.33% fee award on recovery exceeding $1 billion).

Professionally, I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, where I also serve as Co-Director of the Center on Lawyers, Civil Justice, and the Media. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I

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[1] See David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation,* 64 ALABAMA LAW REVIEW 335, 360 (2012) (reviewing fee agreements used in patent cases and finding that contingent percentages commonly approach 40% when plaintiffs' lawyers are responsible for expenses).

received tenure in 1991. Since then I have been a Visiting Professor at the University of Michigan School of Law, the Vanderbilt University Law School, and the Harvard Law School.

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.

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

I have an extensive background, publication record, and experience as an expert witness testifying on matters of legal ethics. I am a coauthor of William T. Barker and Charles Silver, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (LexisNexis Mathew Bender, Updated 2014). 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. At the University of Texas, I regularly teach a specialized class called Professional Responsibility for Civil Litigators.

A complete list of my publications appears in Exhibit 1.

IV. DOCUMENTS REVIEWED

- Letter from Robert J. Tucker on behalf of Class Member Cardinal Health, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated September 14, 2015);

- Letter from David A. Shumacher on behalf of Class Member AmerisourceBergen Corporation to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated September 11, 2015);

- Letter from Steven H. Winick on behalf of Class Member McKesson Corporation to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated September 11, 2015);

- Letter from Juan Carlos Hernandez, VP Finance Manager of Class Member Drogueria Betances, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated September 9, 2015);

- Declaration of Ken Couch, President of Class Member J M Smith Corporation d/b/a Smith Drug Company in *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015);

- Letter from Greg Drew, President of Class Member Value Drug Co. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015);

- Declaration of Margaret M. Glazier, the Compliance/Regulatory Officer of Class Member Burlington Drug Company, Inc. in *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015);

- Letter from Jacqueline J. Harbauer, Corporate Secretary/Treasurer of Class Member Prescription Supply, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015);

- Letter from Matthew Kipp, General Counsel of Class Member Dakota Drug, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015);

- Letter from Anthony V. Rattini, President and CEO of Class Member Miami-Luken, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015);

- Declaration of Keith Elmore, President of Class Member King Drug Company of Florence, Inc. in *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 18, 2015);

- Letter from G.K. Richards, President of Class Member Capital Wholesale Drug Company to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 14, 2015);

- Memorandum of Law in Support of Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards to Class Representatives, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.);

- Order on Certification of a Settlement Class, Appointment of Class Counsel, Preliminary Approval of Proposed Settlement, Approval of the Form and Manner of Notice to the Class, and Proposed Schedulee for a Fairness Hearing, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (entered on July 27, 2015, ECF No. 831);

- Memorandum Opinion on Class Certification, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (entered on July 27, 2015, ECF No. 829);

- Direct Purchaser Class Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Certification of a Settlement Class, Appointment of Class Counsel, Preliminary Approval of Proposed Settlement, Approval of the Form and Manner of Notice to the Class and Proposed Schedule for a Fairness Hearing, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (filed on April 15, 2015, ECF No. 795-1);

- Settlement Agreement between the *King Drug* Direct Purchaser Class Plaintiffs and the Cephalon Defendants in *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.), dated April 17, 2015 (filed on April 17, 2015, ECF No. 795-3);

- Memorandum Opinion on Summary Judgment, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (entered on January 28, 2015, ECF No. 736);

- Memorandum Opinion on Collateral Estoppel Effect of Prior Patent Invalidity Ruling, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (entered on March 13, 2014, ECF No. 600);

- Memorandum Opinion on Defendants' Motion to Dismiss, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (entered on March 29, 2010, ECF No. 260);

- Second Consolidated Amended Class Action Complaint, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (filed on November 27, 2009, ECF No. 233-2);

- Amended Memorandum and Order, *In re: Nexium (Esomeprazole) Antitrust Litig*., No. 12-md-02409-WGY (D. Mass.) (entered on August 7, 2015, ECF No. 1545);

- *In re Effexor XR Antitrust Litig.*, Civil Action No. 11-5479 (PGS) (LHG), 2014 U.S. Dist. LEXIS 142206 (D.N.J. Oct. 6, 2014);

- *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523 (D.N.J. 2014);

- *In re Loestrin 24 FE Antitrust Litig.*, 45 F. Supp. 3d 180 (D.R.I. 2014);

- Final Judgment and Order of Dismissal Approving Proposed Class Settlement and Dismissing Action, *In re Neurontin Antitrust Litig.*, No. 2:02-cv-01830-FSH-MAH (D.N.J.) (entered August 6, 2014, ECF No. 114);

- *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. 2013);

- Declaration of Bruce E. Gerstein in Support of the Cross Motion of Plaintiffs Louisiana Wholesale Drug Co., Inc. and King Drug Company of Florence, Inc. for Entry of Case Management Order No. 1 Including the Consolidation of Cases and the Appointment of Interim Class Counsel and Liasion Counsel, *Louisiana Wholesale Drug Co., Inc. v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline et al.*, No. 2:12-cv-995 (D.N.J.) (filed on April 9, 2012, ECF No. 18-3);

- *Arkansas Carpenters Health & Welfare Fund v. Bayer AG,* 604 F.3d 98 (2d Cir. 2010), *cert denied,* 562 U.S. 1280 (2011).

- *Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938 (S.D. Ohio 2010);

- Judgment, *Louisiana Wholesale Drug Co. Inc. v. Sanofi-Aventis U.S., LLC et al.*, No. 07-cv-7343 (HB) (S.D.N.Y.) (entered December 9, 2008, ECF No. 280);

- *Walgreen Co. v. AstraZeneca Pharm. LP*, 534 F. Supp. 2d 146 (D.D.C. 2008);

- Order, *Louisiana Wholesale Drug Company, Inc. v. Biovail Corporation*, Civil Action No. 04-2235 (JR) (D.D.C.) (entered on June 22, 2006, ECF No. 47);

- Transcript of Civil Cause for Settlement and Attorney's Fees Before the Honorable John G. Koeltl on April 11, 2003, *In re: Buspirone Patent*, No. 01-MD-1410 (S.D.N.Y.);

- Order No. 49, Memorandum Opinion Granting Sherman Act Class Plaintiffs' Motions for Final Approval of Settlement and Plan of Allocation, and Sherman Act Class Counsel's Joint Petition for Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for Named Plaintiffs, *In re: Cardizem CD Antitrust Litig.*, No. 99-md-1278 (E.D. Mich.) (entered on November 26, 2002);

- Letter from Laurence F. Doud, III, Chief Executive Officer of Rochester Drug Co-Operative, Inc. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 25, 2014);

- Letter from Donald W. Myers, Esq. on behalf of AmerisourceBergen Corporation to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479 (FSH) (PS) (dated June 19, 2014);

- Letter from Robert J. Tucker, Esq. on behalf of Cardinal Health, Inc. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479 (FSH) (PS) (dated June 18, 2014);

- Letter from Anthony V. Rattini, President and CEO of Miami-Luken, Inc. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 16, 2014);

- Letter from Steven Winick, Esq. on behalf of McKesson Corporation to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479 (FSH) (PS) (dated June 16, 2014);

- Letter from Ken Couch, President of J M Smith Corporation d/b/a Smith Drug Co. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 11, 2014);

- Letter from Gegory Drew, President of Value Drug Co. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 11, 2014);

- Letter from Raul Rodriguez Font, President of Drogueria Betances, Inc. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 11, 2014);

- Letter from Margaret M. Glazier, Complaince/Regulatory Officer of Burlington Drug Company, Inc. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 11, 2014);

- Letter from Matthew Kipp, General Counsel for Dakota Drug, Inc. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 11, 2014);

- Letter from Thomas G. Schoen, President of Prescription Supply, Inc. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 11, 2014);

- Letter from W. Keith Elmore, President of King Drug Company of Florence, Inc. to the Honorable Faith S. Hochberg, U.S.D.J., *In re Neurontin Antitrust Litig*., MDL No. 1479, Master File No. 02-1390 (FSH) (dated June 10, 2014);

- Letter from Donald W. Myers, Esq. on behalf of AmerisourceBergen Corporation to the Honorable Thomas W. Thrash, Jr., U.S.D.J., *In re AndroGel Antitrust Litig*., No. 09-2084 (N.D. Ga.) (dated October 21, 2011);

- Letter from Thomas L. Long, Esq. on behalf of Cardinal Health, Inc. to the Honorable Thomas W. Thrash, Jr., U.S.D.J., *In re AndroGel Antitrust Litig*., No. 09-2084 (N.D. Ga.) (dated October 20, 2011);

- Letter from Rick Meehan, President and Chief Operating Officer of OptiSource LLC to the Honorable Sue L. Robinson, U.S.D.J., *In re Tricor Direct Purchaser Antitrust Litig*., C.A. No. 05-340-SLR (Consolidated) (D. Del.) (dated February 23, 2009).

- Letter from Steven E. Bizar, Esq. on behalf of AmerisourceBergen Corporation to the Honorable Sue L. Robinson, U.S.D.J., *In re Tricor Direct Purchaser Antitrust Litig*., C.A. No. 05-340-SLR (D. Del.) (dated February 2, 2009); and

- Letter from Thomas L. Long, Esq. on behalf of Cardinal Health, Inc. to the Honorable Sue L. Robinson, U.S.D.J., *In re Tricor Direct Purchaser Antitrust Litig*., C.A. No. 05-340-SLR (Consolidated) (D. Del.) (dated January 30, 2009).

III. ACTUAL AGREEMENTS PROVIDE STRONG EVIDENCE OF THE VALUE LEGAL SERVICES HAVE FOR CLIENTS AND CLASS MEMBERS

Most of the time, lawyers' fees are determined by agreements with clients that are reached after bargaining at arms' length. When clients are sophisticated, experienced, and can freely choose the lawyers they want, these agreements provide the best evidence of the value clients place on the services that lawyers supply. An economist would say that the consented-to price measures the value a client places on the loss of the opportunity to use the same dollars to obtain other things. A buyer's willingness to pay a lawyer a particular amount thus indicates that the client expects legal services to make him better off than he would be if he were to use the same dollars to purchase other things.

A voluntary exchange is thus a source of information about the amount that a buyer can be charged for a service and still be better off. This is one reason why the law of restitution, which informs fee awards in class actions, uses prevailing prices as guides. A fundamental principle of this body of law is that a forced transaction should not leave a buyer worse off than he would have

been had no transaction occurred at all. The prices that prevail in competitive markets are those at which buyers normally derive greater values from services than the services cost.

I first made the point just stated almost 25 years ago, in an article where I identified a set of conditions that were sufficient under the law of restitution to justify the practice of awarding fees in class actions. The fifth condition was that "[a]bsent plaintiffs are better off receiving benefits and paying attorneys' fees than doing without the benefits entirely." Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656, 665 (1991). This condition has two implications. First, judges should not hold class members individually responsible for fees. They should award fees from common funds in which assets remain after lawyers are paid. For example, a judge might award a law firm $33 million in fees from a $100 million settlement fund, leaving $67 million for the class. This ensures that class members are net gainers. Second, judges should base fee awards on prevailing market rates or arrangements, for the reason already stated. Market arrangements, including percentage-based fees as are routinely used in contingency cases, provide the best evidence one can have of the terms that class members and their lawyers would have found welfare-enhancing and agreed to, had they bargained face-to-face. As Douglas Laycock, one of the greatest living writers on restitution, explained: "Quasi-contract proceeds on the fiction of an implied promise to pay.... If there were a real promise, it would probably be to pay the market value, and the implied promise is analogized to that." Douglas Laycock, MODERN AMERICAN REMEDIES 488 (1985).

IV. FEES FREELY AGREED TO BY SOPHISTICATED CLIENTS ARE ETHICAL

All states' bar rules prohibit lawyers from charging excessive fees. In class actions, it is all but impossible for lawyers to violate this rule. Judges decide how much class action lawyers are paid, and in the course of doing so they must find that the fees they award are reasonable. In most federal circuits, the factors that judges consider when setting fee awards closely resemble

those that appear in state bar associations' disciplinary rules. For example, Rule 1.5 of the Pennsylvania Rules Of Professional Conduct provides that the reasonableness of a lawyer's fee is to be determined in light of several factors, three of which are "the time and labor required," "the fee customarily charged in the locality for similar legal services," and "the amount involved and the results obtained." Three similar factors—"the amount of time devoted to the case by plaintiffs' counsel," "awards in similar cases," and "the size of the fund created"—have been held by the Third Circuit to govern the reasonableness of fee awards in class actions. See *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 195 (3d Cir. 2000). The overlap being so substantial, there is essentially no risk that a lawyer would violate the ethical prohibition on excessive fees by accepting a class action fee award that was approved by a judge.

In my experience, judges often want to know whether prevailing standards of legal ethics permit them to award particular amounts. The answer is 'yes' when fee awards are based on the amounts that sophisticated clients with good access to the market for legal services freely agree to pay. As the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS observes, "[f]ees agreed to by clients sophisticated in entering into such arrangements (such as a fee contract made by inside legal counsel in behalf of a corporation) should almost invariably be found reasonable." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 34, Comment *c* (2000).[2] John Leubsdorf, one of the Reporters, was even more emphatic. In an article on the ethics of retaining liens, he

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[2] See also Ankur Parekh & Jay R. Pelkofer, *Lawyers, Ethics, and Fees: Getting Paid Under Model Rule 1.5*, 16 GEO. J. LEGAL ETHICS 767, 782 (2003) ("[M]ore sophisticated clients will have a better understanding of what constitutes a reasonable fee, particularly [] corporate clients that have been involved in similar litigation in the past. In fact, the Committee on Lawyer Business Ethics of the ABA's Business Law Section urged that written fee agreements between fully informed clients and lawyers should be presumptively reasonable.") (citing ABA Comm. On Lawyer Bus. Ethics, Report, *Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements*, 54 BUS. LAW. 175, 200 (1998));

wrote that "when a client is sophisticated, as in the case of a corporation with house counsel, it should be free to consent to almost any fee or financing arrangement." John Leubsdorf, *Against Lawyer Retaining Liens*, 72 FORDHAM L. REV. 849, 872 (2004)

The twenty-two national and regional pharmaceutical wholesalers that comprise the DPCP include some entitites that are large and sophisticated, such as the three biggest class members, McKesson Corporation, AmerisourceBergen Corporation, and Cardinal Health, Inc.. Many of the class members also participated in some or all of the other Hatch-Waxman antitrust cases that Class Counsel have pursued (and that are discussed further below). Consequently, they are familiar with the history of pay-for-delay antitrust litigation, with other antitrust cases involving pharma companies, with Class Counsel's efforts, with how the earlier lawsuits ended (some with recoveries, others without), and with the fees and expenses that Class Counsel requested and were awarded. Their decisions to affirmatively support Class Counsel's fee and expense request or, at least, to refrain from objecting or opting out certainly appear to be consensual and fully informed.

V. CLASS MEMBERS HAVE EXPRESSED SUPPORT FOR FEE AWARDS ABOVE 27.5% OF THE RECOVERY PLUS EXPENSES MANY TIMES

This lawsuit is one of a number of pioneering cases brought by Class Counsel in which businesses that are direct purchasers of pharmaceuticals sought to obtain recoveries from drug manufacturers that were accused of violating the antitrust laws. The relationship between the class members represented in this case and the law firms that are serving as Class Counsel extends back to 1998, when the first two pay-for-delay antitrust cases were filed.[3] The number of lawsuits kept

[3] *In re Cardizem CD Antitrust Litig*., MDL No. 1278 (E.D. Mich.); *In re Terazosin Hydrochloride Antitrust Litig*., MDL No. 1317 (S.D. Fla.).

growing for about a decade. In all, Class Counsel have pursued challenges to pay-for-delay settlements and other anticompetitive conduct involving over a dozen different prescription drugs.

Some of these lawsuits were unsuccessful. No recoveries were made in the lawsuits relating to the branded drugs Cipro,[4] Arava,[5] Prilosec,[6] Tiazac,[7] and Plavix;[8] while suits relating to Nexium,[9] Lipitor,[10] Loestrin,[11] and Effexor[12] are still under review and could conceivably yield verdicts or settlements in the future. In these cases, some of which were tried, Class Counsel went home empty-handed after expending tens of thousands of work-hours and bearing millions of dollars in litigation expenses. But many other cases ended more favorably. Six—the litigations

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[4] *See* Petition for Rehearing *En Banc* of Appellants Louisiana Wholesale Drug Co., Inc. *et al.*, *Arkansas Carpenters Health and Welfare Fund et al. v. Bayer AG et al.*, No. 05-2851-cv(L) (Court of Appeals for the Second Circuit, filed on May 13, 2010); *Arkansas Carpenters Health & Welfare Fund v. Bayer AG,* 604 F.3d 98 (2d Cir. 2010), *cert denied,* 562 U.S. 1280 (2011).

[5] Judgment, *Louisiana Wholesale Drug Co. Inc. v. Sanofi-Aventis U.S., LLC et al.*, No. 07-cv-7343 (HB) (S.D.N.Y.) (entered December 9, 2008, ECF No. 280).

[6] *Walgreen Co. v. AstraZeneca Pharm. LP*, 534 F. Supp. 2d 146 (D.D.C. 2008).

[7] Order, *Louisiana Wholesale Drug Company, Inc. v. Biovail Corporation*, Civil Action No. 04-2235 (JR) (D.D.C.) (entered on June 22, 2006, ECF No. 47).

[8] *Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938 (S.D. Ohio 2010).

[9] Amended Memorandum and Order, *In re: Nexium (Esomeprazole) Antitrust Litig*., No. 12-md-02409-WGY (D. Mass.) (entered on August 7, 2015, ECF No. 1545) (jury issued verdict in non-settling defendants' favor on causation; plaintiffs settled with two of four defendants prior to the verdict for cooperation and $24 million, respectively; further proceedings against non-settling defendants pending).

[10] *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523 (D.N.J. 2014) (further proceedings pending).

[11] *In re Loestrin 24 FE Antitrust Litig.*, 45 F. Supp. 3d 180 (D.R.I. 2014) (further proceedings pending).

[12] *In re Effexor XR Antitrust Litig.*, Civil Action No. 11-5479 (PGS) (LHG), 2014 U.S. Dist. LEXIS 142206 (D.N.J. Oct. 6, 2014) (further proceedings pending).

that concerned Cardizem, Buspirone, Relafen, Tricor,[13] Neurontin[14] and Flonase[15]—settled for amounts that exceeded $100 million each.

Here, the history of the financial relationship between the lawyers and the class can be deduced from these successful cases. Table 1 shows the fees that were awarded in the cases involving allegations of unlawfully impaired generic competition that generated recoveries. As the table makes clear, fees equal to one-third of the recovery plus expenses were awarded in all of the cases except the earliest one, *Cardizem*, in which both the request and the award equaled 30 percent.

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[13] Declaration of Bruce E. Gerstein in Support of the Cross Motion of Plaintiffs Louisiana Wholesale Drug Co., Inc. and King Drug Company of Florence, Inc. for Entry of Case Management Order No. 1 Including the Consolidation of Cases and the Appointment of Interim Class Counsel and Liasion Counsel, *Louisiana Wholesale Drug Co., Inc. v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline et al.*, No. 2:12-cv-995 (D.N.J.) (filed on April 9, 2012, ECF No. 18-3) at 2-3.

[14] Final Judgment and Order of Dismissal Approving Proposed Class Settlement and Dismissing Action, *In re Neurontin Antitrust Litig.*, No. 2:02-cv-01830-FSH-MAH (D.N.J.) (entered August 6, 2014, ECF No. 114) at ¶19.

[15] *See In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 746 (E.D. Pa. 2013).

Table 1. Recoveries and Fee Awards in Prior Pharmaceutical Antitrust Cases[16]		
Case	**Recovery (millions)**	**Fee Award**
In re Doryx Antitrust Litig., No. 12-3824 (E.D. Pa. Sept. 15, 2014)	$15	33⅓% plus expenses
In re Neurontin Antitrust Litig., No. 02-1830 (D.N.J. Aug. 6, 2014)	$191	33⅓% plus expenses
In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-cv-83 (E.D. Tenn. June 30, 2014)	$73	33⅓% plus expenses
In re Flonase Antitrust Litig., No. 08-cv-3149 (E.D. Pa. June 14, 2013)	$150	33⅓% plus expenses
In re Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012)	$37.50	33⅓% plus expenses
Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc., No. 07-142 (D. Del. May 31, 2012)	$17.25	33⅓% plus expenses
In re DDAVP Antitrust Litig., No. 05-2237 (S.D.N.Y. Nov. 28, 2011)	$20.25	33⅓% plus expenses
In re Wellbutrin SR Antitrust Litig., No. 04-5525 (E.D. Pa. Nov. 21, 2011)	$49	33⅓% plus expenses
Meijer, Inc. v. Abbott Labs., No. C07-5985 CW (N.D. Cal. Aug. 11, 2011)	$52	33⅓% plus expenses
In re Nifedipine Antitrust Litig., No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011)	$35	33⅓% plus expenses
In re Oxycontin Antitrust Litig., No. 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011)	$16	33⅓% plus expenses
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. April 23, 2009)	$250	33⅓% plus expenses
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	$75	33⅓% plus expenses
In re Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 43082 (S.D. Fla. Apr. 19, 2005)	$74	33⅓% plus expenses
In re Relafen Antitrust Litig., No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004)	$175	33⅓% plus expenses
In re Buspirone Antitrust Litig., No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003)	$220	33⅓% plus expenses
In re Cardizem CD Antitrust Litig., MDL No. 1278 (E.D. Mich. Nov. 26, 2002)	$110	30% plus expenses

[16] Memorandum of Law in Support of Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards to Class Representatives, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (filed on September 17, 2015).

The awards listed in Table 1 are important for two reasons. First, they show that in cases similar to this one, many judges concluded that fees equal to one-third of the recovery plus expenses—a percentage larger than being requested here—provided reasonable compensation for the risks and costs the lawyers incurred. Second, they provide an occasion for asking how the class members in those cases, many of whom are also absent class members here, reacted to the fee and expense requests. This section focuses on the second subject. Judicial fee award practices are discussed further below.

Under Rule 23, class members can easily express their dissatisfaction with the progress of litigation, including the terms of proposed settlements and fee requests by intervening, opting out, objecting to proposed settlements, objecting to fee requests, and appealing when their objections are denied. Yet, in the lawsuits listed in Table 1, class members did none of these things. To the contrary, several class members submitted letters *supporting* the proposed settlements and Class Counsel's fee requests. The same is true here. No class member has objected or chosen to opt out, and several have written to the Court in support.[17]

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[17] Letter from Robert J. Tucker on behalf of Class Member Cardinal Health, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated September 14, 2015); Letter from David A. Shumacher on behalf of Class Member AmerisourceBergen Corporation to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated September 11, 2015); Letter from Steven H. Winick on behalf of Class Member McKesson Corporation to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated September 11, 2015); Letter from Juan Carlos Hernandez, VP Finance Manager of Class Member Drogueria Betances, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated September 9, 2015); Declaration of Ken Couch, President of Class Member J M Smith Corporation d/b/a Smith Drug Company in *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015); Letter from Greg Drew, President of Class Member Value Drug Co. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August

The letters from informed businesses, some with large financial stakes, provide strong evidence that the compensation requested by Class Counsel is reasonable, which is the cornerstone of ethical compliance. They show clearly that these companies appreciate the risks and costs these cases entail and regard fees of 27.5% or more of the recovery plus expenses as an appropriate amount to pay a group of lawyers for bearing them. For example, in *Tricor*, which produced a $250 million common fund, Thomas L. Long, outside counsel for Cardinal Health, Inc.—a large company, stated that "Cardinal Health fully supports approval of the settlement, and has no objection to class counsel's requested fee of one third of the settlement fund (similar to the fee awarded in the prior cases in which we took part), or to reimbursement of class counsel's expenses." Letter from Thomas L. Long, Esq. on behalf of Cardinal Health, Inc. to the Honorable Sue L. Robinson, U.S.D.J., *In re Tricor Direct Purchaser Antitrust Litig*., C.A. No. 05-340-SLR (Consolidated) (D. Del.) (dated January 30, 2009). Plainly, the fee requested there was reasonable, insofar as Cardinal Health was concerned. Mr. Long's letter is especially impressive because Cardinal Health had millions of dollars at stake in *Tricor* and the cases that came before it. As he

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25, 2015); Declaration of Margaret M. Glazier, the Compliance/Regulatory Officer of Class Member Burlington Drug Company, Inc. in *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015); Letter from Jacqueline J. Harbauer, Corporate Secretary/Treasurer of Class Member Prescription Supply, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015); Letter from Matthew Kipp, General Counsel of Class Member Dakota Drug, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015); Letter from Anthony V. Rattini, President and CEO of Class Member Miami-Luken, Inc. to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 25, 2015); Declaration of Keith Elmore, President of Class Member King Drug Company of Florence, Inc. in *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 18, 2015); Letter from G.K. Richards, President of Class Member Capital Wholesale Drug Company to the Honorable Mitchell S. Goldberg, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.) (dated August 14, 2015).

stated, "[i]n each of those past settled cases, as here, Cardinal Health has had one of the three largest percentages of the total claims in the case." *Id.*

According to a report by the Federal Trade Commission, pay-for-delay settlements have generated billions of dollars for name brand drug manufacturers by inhibiting competition from manufacturers of generics. Federal Trade Commission, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS (2010), available at https://www.ftc.gov/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff. In a report released in 2013, two consumer advocacy groups contend that the actual amount is an order of magnitude higher. Community Catalyst and US PIRG, TOP TWENTY PAY-FOR-DELAY DRUGS: HOW DRUG INDUSTRY PAYOFFS DELAY GENERICS, INFLATE PRICES AND HURT CONSUMERS (July 2013), http://www.uspirg.org/sites/pirg/files/reports/Top_Twenty_Pay_For_Delay_Drugs_-USPIRG.pdf. If direct purchaser class members believe that these settlements inflict significant overcharges on them, then they are incentivized to ensure that a group of lawyers are themselves incentivized to seek to recover of those overcharges on their behalf.

In consistently endorsing Class Counsel's requests for 27.5% or more of the recovery plus expenses as fees, Cardinal Health has lots of company. Other direct purchasers have expressed the same view. In *Tricor*, others—including AmerisourceBergen Corp. and OptiSource LLC (a trade association representing 14 regional drug wholesalers, all of whom are class members)—also voiced their support for Class Counsel's fee request of 33%. In the litigation relating to Neurontin, which produced a $190 million recovery, twelve class members spoke up—AmerisourceBergen Corp, Burlington Drug Co., Cardinal Health, Dakota Drug, Inc., Drogueria Betances, Inc., King Drug Company of Florence, Inc., McKesson Corp., Miami-Luken Inc., Prescription Supply, Inc., Rochester Drug Co-operative, JM Smith Corp. d/b/a Smith Drug Co.,

and Value Drug Co. Direct purchasers have also expressed strong support for Class Counsel's efforts in other ways. In *AndroGel*, for example, three direct purchasers submitted letters in which they endorsed class-based litigation, denied the existence of intra-class conflicts, and professed their willingness to be represented by the named plaintiff and their attorneys. *See* Letter from Donald W. Myers, Esq. on behalf of AmerisourceBergen Corporation to the Honorable Thomas W. Thrash, Jr., U.S.D.J., *In re AndroGel Antitrust Litig*., No. 09-2084 (N.D. Ga.) (dated October 21, 2011); Letter from Thomas L. Long, Esq. on behalf of Cardinal Health, Inc. to the Honorable Thomas W. Thrash, Jr., U.S.D.J., *In re AndroGel Antitrust Litig*., No. 09-2084 (N.D. Ga.) (dated October 20, 2011).

These observations also explain why the need to maintain a strong incentive to litigate should loom large in any assessment of the reasonableness of Class Counsel's fee request. Drug manufacturers want to maximize their profits. Some will enter into pay-for-delay settlements or engage in other allegedly unlawful behavior to delay or impede generic competition if they think that doing so will be profitable. Private antitrust suits can help to deter such conduct but only if drug companies know that plaintiffs' lawyers representing direct purchasers will be incentivized to handle these cases, which are risky, require enormous commitments of resources, and can last for years. By awarding a fee below the amount requested, a judge might seem to "help" the class in the short run, but would actually hurt them by weakening Class Counsel's incentives.

I have often heard fellow Texans say, "If it ain't broke, don't fix it." The relationship between Class Counsel and the members of the direct purchaser class has worked to their mutual advantage for over a decade and shows every sign of continuing to do so. There is no good reason to tinker with success.

VI. JUDICIAL FEE AWARD PRACTICES

As mentioned above, this lawsuit is one of a number of similar cases, six of which created settlement funds above $100 million. In all of the successful cases but one, the judicially approved fee award equaled one-third of the recovery plus expenses. The lone exception was *Cardizem*, the first case filed, in which Class Counsel asked for and received 30% of the $110 milllion common fund.

It would be hard to obtain better evidence of judicial fee award practices than a string of nearly identical awards in a series of closely related litigations that produced recoveries of widely varying sizes. Each judge who handled a prior case learned about the litigation risks Class Counsel bore, the effort the lawyers expended, the costs that were incurred, and the results that were obtained. Because the prior recoveries covered a range from $250 million to $15 million, the judges obviously rejected the notion that fee percentages should decline as recoveries rise. In these cases, the risks and costs were so great that the same percentage was consistently applied.

By awarding one-third of the recovery plus expenses, the judges who presided over these cases did nothing unusual. Awards in this range are common. When Professor Brian Fitzpatrick studied federal class actions that settled in 2006 or 2007, he found that more fee awards (exclusive of costs) fell into the 30%-35% range than any other. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 811, 834 (2010).

Many judges have also awarded fees in the one-third range in cases with recoveries of $100 million or more when they were convinced that the risks, costs, and results warranted this level of compensation. Table 2 lists 21 cases with settlements above $100 million with fee awards of 30% or more. If the fee threshold was 27.5%, over 30 cases would appear.

Table 2. Class Actions With Settlements Above $100M and Fee Awards Of 30% Or More			
	Case	**Recovery (millions))**	**Fee Award**
1	*Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006)	$1,060	31.33%
2	*In re Initial Pub. Offering Sec. Litig*., 671 F.Supp.2d 467 (S.D.N.Y. 2009)	$510	33.30%
3	*In Re (Bank of America) Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330 (S.D. Fla. 2011)	$410	30.00%
4	*In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001)	$365	34.60%
5	*In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995)	$220	30.00%
6	*In re Linerboard Antitrust Litig.*, 2004 WL 1221350 (E.D. Pa. 2004)	$203	30.00%
7	*Weatherford Roofing Co., et al. v. Employers National Ins. Co.*, No. 91-05637 (116th Dist. Ct, Dallas, TX) (Dec. 1, 1995)	$190	31.60%
8	*In re Home-Stake Prod. Co. Sec. Litig.,* MDL No. 153 (N.D.Okla. Jan. 2, 1990)	$185	30.00%
9	*In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000)[1]	$185	40.00%
10	*Standard Iron Works v. Arcelormittal et al.*, No. 08-C-5214 (N.D. Ill., Oct. 22, 2014)	$164	33.33%
11	*In re: (Chase Bank) Checking Account Overdraft Litig.,* No. 1:09-MD-02036 (S.D. Fla. Dec., 19, 2012)	$162	30.00%
12	*In re: (Citizens Bank) Checking Account Overdraft Litig*., No. 1:09-MD-02036 (S.D. Fla. Mar. 12, 2013)	$138	30.00%
13	*In re Informix Corp. Sec. Litig.,* Master File No. C-97-1289-CRB (N.D.Cal. Nov. 2, 1999)	$132	30.00%
14	*In re Combustion, Inc.,* 968 F.Supp. 1116 (W.D.La.1997)	$127	36.00%
15	*Kurzweil v. Philip Morris Co., Inc.,* Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123	30.00%
16	*In re Ikon Office Solutions, Inc. Sec. Litig.,* 194 F.R.D. 166 (E.D.Pa.2000)	$111	30.00%
17	*In re OSB Antitrust Litig.,* Master File No. 06-826 (March 4, 2009)	$111	33.30%
18	*Klein v. O'Neal, Inc*., 705 F.Supp.2d 632 (N.D.Tex. Apr. 9, 2010)	$110	30.00%
19	*In re Automotive Refinishing Paint Antitrust* Litigation, MDL No. 1426 (E.D. Pa. Jan. 3, 2008)	$106	32.70%
20	*City of Greenville v. Syngenta Crop Protection,* No. 3:10-cv-00188 (S.D. Ill. Oct. 23, 2012)	$105	33.33%
21	*In re Prison Realty Sec. Litig.,* Civil Action No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D.Tenn. Feb. 9, 2001)	$104	30.00%

[1] While technically not a class action, this case is equivalent to a class-action in which the fee was negotiated *ex ante*.

Several things must be kept in mind when considering Table 2. First, the list is *not* comprehensive. For example, I excluded the six settlements that appear in Table 1. More generally, I cannot say with certainty how many $100 million-plus cases with fee awards of 30% or more there may be. I can provide only an illustrative list because no comprehensive database of class action settlements exists.

Second, whatever their absolute number, settlements of $100 million or more are rare. Focusing on securities class actions, which account for about 70% of the dollars recovered in class actions each year, Cornerstone Research observed that "[d]espite the publicity that often accompanies mega-settlements, … only 7 percent of cases have settled for $100 million or higher." Ellen M. Ryan and Laura E. Simmons, SECURITIES CLASS ACTION SETTLEMENTS—2011 REVIEW AND ANALYSIS (Cornerstone Research 2012), https://www.cornerstone.com/GetAttachment/22345269-75a0-4fc2-a459-62345cf23488/Securities-Settlements-2011-Review-and-Analysis.pdf. By contrast, more than half the cases settled for less than $10 million.

Because such large settlements are rare, the 21 cases listed in Table 2 and the six cases shown in Table 1 actually document a significant tendency on the part of judges to award 30% or more in percentage fees even when recoveries exceed $100 million. The prevailing judicial practice is not to reduce fee percentages automatically as recoveries grow; it is to award fees that are warranted in light of the circumstances. Judges tend to award low percentages when high percentages would confer "windfalls," which might happen when cases settle early, so that the time and labor expended by class counsel is relatively low. But they award 30% or more in cases that last for years, or that are tried, or that require lawyers to absorb high risks and costs while overcoming significant legal or factual hurdles that stood in the way of success. In this case, Class Counsel incurred the enormous risks that were associated with waging an unusually long-lived antitrust class action against several well-heeled defendants with strong interests in establishing the legality of pay-for-delay settlements. Class Counsel also achieved an amazingly good result by recovering $512 million for the direct purchaser class while still continuing to litigate the case against the two remaining defendants.

VII. CONCLUSION

A fee award equal to 27.5% of the recovery plus expenses would be both ethically proper and consistent with prevailing judicial practices in long-lived cases that involve settlements of $100 million or more and entail significant costs and risks. This conclusion rests on my study of fee awards in other cases, my study of the history of this species of litigation and this lawsuit in particular, fees prevailing in the private market for legal services, and Class Members' consistently and strongly positive reactions to Class Counsels' fee requests.

DATED: 9/16/2015

CHARLES SILVER

EXHIBIT 1

RESUME OF CHARLES SILVER

ROY W. AND EUGENIA C. MCDONALD ENDOWED CHAIR IN CIVIL PROCEDURE

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PUBLICATIONS

SPECIAL PROJECTS

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

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), available at http://www.jstor.org/stable/25763828

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, REPORT ON CONTINGENT FEES IN MEDICAL MALPRACTICE LITIGATION (2004) available at http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf; published at 25 Rev. Litig. 459 (2006).

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

BOOKS

HEALTH CARE GAMES (with David A. Hyman) (in progress)

TO SUE IS HUMAN: MEDICAL MALPRACTICE LITIGATION IN TEXAS 1988-2010 (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage) (in progress).

HEALTH LAW AND ECONOMICS, Edward Elgar (coedited with Ronen Avraham and David A. Hyman) (in progress).

LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, 2nd Edition (2012) (with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley) (updated 2013 & 2014).

PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (2012) (with William T. Barker) (updated annually 2013-2015).

ARTICLES BY SUBJECT AREA (* INDICATES PEER REVIEWED)

Health Care Law & Policy

1. "It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and Healthcare Spending," in Glenn I. Cohen, Allison Hoffman, and William M. Sage, eds., OXFORD HANDBOOK OF AMERICAN HEALTH LAW (forthcoming 2015) (with David A. Hyman).*

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

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

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

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

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

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

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

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

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

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

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

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

Empirical Studies of Medical Malpractice

14. "Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010," (with Bernard S. Black, David A. Hyman, and Mohammad H. Rahmati) (in progress), available at http://ssrn.com/abstract=2462942.

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

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

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

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

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

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

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

22. "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).

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

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

25. "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).*

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

Empirical Studies of the Law Firms and Legal Services

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

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

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

Attorneys' Fees—Empirical Studies and Policy Analyses

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

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

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

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

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

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

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

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

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

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

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

Liability Insurance and Insurance Defense Ethics

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

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

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

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

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

46. "The Impact of the Duty to Settle on Settlement: Evidence From Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard S. Black and David A. Hyman).*

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

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

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

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

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

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

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

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

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

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

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

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

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

Class Actions, Mass Actions, and Multi-District Litigations

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

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

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

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

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

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

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

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

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

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

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

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

General Legal Ethics and Civil Litigation

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

73. "Philosophers and Fiduciaries" (in progress) (presented at several law schools and conferences).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Legal and Moral Philosophy

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

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

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

Practice-Oriented Publications

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

92. "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).

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

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

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

Miscellaneous

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

PERSONAL

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