In the United States Court of Federal Claims

THE ELECTRICAL WELFARE TRUST FUND, THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., and THE STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND on behalf of themselves and all others similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 19-353 C Judge Roumel

APPENDIX IN SUPPORT OF (I) MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN FOR ALLOCATING NET SETTLEMENT FUND TO EXACTION CLASS MEMBERS; AND (II) MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARD TO CLASS REPRESENTATIVE

INDEX TO APPENDIX

EXHIBIT A

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DECLARATION OF JOSEPH H. MELTZER IN SUPPORT OF (I) MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN FOR ALLOCATING NET SETTLEMENT FUND TO EXACTION CLASS MEMBERS; AND (II) MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARD TO CLASS REPRESENTATIVE

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I, JOSEPH H. MELTZER, declare and state as follows:

1. I am a partner in the law firm of Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"), and am duly admitted to practice before this Court. My law firm represents the Court-appointed Class Representative Electrical Welfare Trust Fund ("EWTF" or "Class Representative") and was appointed to serve as Class Counsel for the Exaction Class (defined below) in the above-captioned litigation ("Action"), along with McChesney & Dale, P.C. ("McChesney & Dale").[1] I have personal knowledge of the matters set forth herein based on my active supervision of and participation in the prosecution and resolution of the Action.

2. I respectfully submit this Declaration in support of Class Representative's motion pursuant to Rule 23(e) of the Rules of the United States Court of Federal Claims ("Rules") for final approval of the proposed settlement with the United States of America ("Government" or "Defendant") for $169,022,397.28 ("Settlement"). The Settlement equates to 91.25% of available damages for Exaction Class members. If approved, the Settlement will resolve all claims asserted in the Action against the Government on behalf of the Exaction Class, consisting of 357 self-administered, self-insured employee health and welfare benefit plans that were subject to the assessment and collection of the Transitional Reinsurance Program ("TRP") contribution under Section 1341 of the Affordable Care Act ("ACA") for benefit year 2014, and are listed on the Court's May 12, 2023 Rule 54(b) Judgment (ECF No. 124) ("Judgment") and Exhibit A to the Settlement Agreement. The Court preliminarily approved the Settlement and directed notice

[1] Capitalized terms that are not defined in this Declaration have the same meanings as set forth in the Settlement Agreement dated February 16, 2024 ("Settlement Agreement"). ECF No. 142-1. Additionally, unless otherwise specified, all ECF citations herein refer to docket entries in the above-captioned matter.

thereof to the Exaction Class by Order dated February 21, 2024 ("Preliminary Approval Order"). ECF No. 143.

3. I also submit this Declaration in support of: (i) the proposed plan for allocating the net proceeds of the Settlement to Exaction Class members ("Plan of Allocation") as set forth in the Notice of Class Action Settlement ("Notice"); and (ii) Class Counsel's motion for an award of attorneys' fees in the amount of 25% of the Settlement Amount (net of expenses), payment of out-of-pocket costs and expenses incurred by Class Counsel in the total amount of $513,631.77, and a case contribution award to Class Representative in the amount of $25,000 ("Fee and Expense Application").

4. For the reasons discussed below and in the accompanying memoranda,[2] I respectfully submit that: (i) the terms of the Settlement are fair, reasonable, and adequate in all respects and should be approved by the Court; (ii) the proposed Plan of Allocation is fair, reasonable, and adequate and should be approved by the Court; and (iii) the Fee and Expense Application is fair, reasonable, supported by the facts and the law, and should be granted in all respects. The Settlement, Plan of Allocation, and Fee and Expense Application have the full support of EWTF, Class Representative for the Exaction Class. *See* Appx. Ex. D, Declaration of Michael McCarron ("McCarron Declaration"), ¶¶ 12-18.

I. INTRODUCTION

5. Following many years of hard-fought litigation, Class Representative and Class Counsel have succeeded in obtaining a recovery of $169,022,397.28 in cash for the benefit of the

[2] Contemporaneous with this Declaration, Class Representative and Class Counsel are submitting the Memorandum of Law in Support of Motion for Final Approval of Settlement and Plan for Allocating Net Settlement Fund to Exaction Class Members ("Settlement Memorandum") and the Memorandum of Law in Support of Motion for an Award of Attorneys' Fees, Expenses, and Case Contribution Award to Class Representative ("Fee Memorandum").

Exaction Class. This is an exceptional result, which equates to 91.25% of available damages for Exaction Class members. As provided in the Settlement Agreement, in exchange for this consideration, the Settlement resolves all claims asserted in the Action by Class Representative and the Exaction Class against the Government, along with its political subdivisions, and/or any of its agencies, departments, officers, agents, and employees.

6. The Settlement was achieved as a direct result of Class Counsel's efforts to diligently investigate, prosecute, and negotiate a settlement of the illegal exaction claim. Prior to reaching the Settlement, Class Counsel had, among other things, successfully defeated Defendant's motion to dismiss, completed a comprehensive discovery process, obtained certification of a class, conducted a vigorous opt-in campaign, defeated Defendant's objection to Exaction Class membership, moved for and obtained summary judgment, secured a roughly $185 million Judgment on behalf of the Exaction Class, and engaged in arm's-length settlement negotiations. As a result of these efforts (and others), Class Representative and Class Counsel had a well-developed understanding of the Exaction Class's claims and Defendant's challenges (on appeal) when they agreed to resolve the Action.

7. The Settlement is an outstanding result for the Exaction Class. Not only does the Settlement avoid the risks of litigating Defendant's appeal, as well as additional litigation costs and delay, it represents ***over 91%*** of the Exaction Class's recoverable damages (i.e., a mere 8.75% reduction on the amount awarded in the Judgment, which was 100% of recoverable damages). It is hard to envision a better result.

8. Class Counsel have worked with the Court-approved Settlement Administrator, JND Legal Administration ("JND"), to disseminate notice of the Settlement to Exaction Class members as directed in the Preliminary Approval Order. In this regard, JND has provided all 357

Exaction Class members with a copy of the Notice (via email or regular mail).[3] Additionally, JND has posted the Notice, along with other relevant documents, on the case website, www.TRPLitigation.com. Segura Decl., ¶¶ 3-15. As ordered by the Court and stated in the Notice, the deadline for objecting to any aspect of the Settlement is April 10, 2024. The Exaction Class's reaction to the Settlement thus far has been positive—to date, there have been no objections.[4]

II. PROCEDURAL HISTORY OF THE ACTION AND CLASS COUNSEL'S LITIGATION EFFORTS

A. Pre-Litigation Investigation & Analysis

9. Class Counsel began researching this matter in early 2015. The claims here have always been highly novel, in large part because the facts are incredibly unique. The Government required group health plans to pay into the TRP, even though they could never benefit from the program. Then, following years of proposed rules and comment periods, it decided some plans (like EWTF) did not have to contribute. But its decision as to EWTF and other self-administered, self-insured plans ("SISAs"), was only prospective and did not relieve them of the obligation to pay for benefit year 2014. Moreover, the Government continued to require self-insured plans like the Operating Engineers Trust Fund of Washington D.C ("OETF") and the Stone and Marble Masons of Metropolitan Washington, D.C. Health and Welfare Fund ("Stone Masons") (the other named plaintiffs in this Action), who use third-party administrators ("SITPAs"), to pay into the TRP for all three years (2014, 2015, 2016).

10. Sorting through these factual complexities was daunting, to the say the least. As part of their exhaustive investigation, Class Counsel reviewed, among other things: (i) the

[3] *See* Appx. Ex. E, Declaration of Luiggy Segura Regarding Settlement Administration ("Segura Declaration") at ¶¶ 3-11.

[4] If any objections are received after this submission, Class Representative and Class Counsel will address them in their reply to be filed no later than April 24, 2024.

applicable statutory language of the ACA; (ii) the legislative history of the ACA and other relevant statutes; (iii) proposed rules promulgated by the Department of Health & Human Services ("HHS"); (iv) hundreds of pages of comments to HHS's proposed rules; (v) the governing contractual agreements (trust agreements, summary plan descriptions, custody agreements, and collective bargaining agreements); (vi) media, news, and journal articles regarding the ACA and the TRP; and (vii) other publicly available information concerning the ACA and the TRP. Class Counsel also met with EWTF to better understand how the plan was structured, how it made payments, and the reasons it believed it was wrong for the Government to require EWTF to contribute to the TRP.

11. Once Class Counsel had a handle on the factual issues, the exercise turned to identifying the appropriate legal claims—an equally challenging and complex exercise. Class Counsel conducted extensive legal research to understand exactly which theories of liability EWTF could allege and how to allege them given the current state of the law. The legal questions presented in this case were untested, risky, and anything but certain. The Constitutional questions, in particular, raised highly novel issues that were rarely litigated, and even the cases that were litigated rarely prevailed against the Government.

12. Given the difficulty and uncertainty of succeeding on Constitutional claims, Class Counsel also thoroughly researched the viability of pursuing a tax refund claim against the Government. Such claims, while still rare, are more frequently litigated, and the facts here—where the Government required payment and later back tracked on its purported basis for this payment—closely aligned with those types of claims.

13. Before filing a complaint, Kessler Topaz made a formal presentation regarding the matter to EWTF's Board of Trustees during a meeting on March 29, 2016. Following the meeting, the Board of Trustees authorized EWTF's participation as a lead plaintiff.

B. The 2016 Action

14. On June 17, 2016, EWTF, on behalf of itself and the Exaction Class, filed a complaint ("2016 Complaint") against the United States of America, HHS and its then-Secretary, Sylvia Mathews Burwell (together, the "2016 Defendants") in the United States District Court for the District of Maryland, No. 16-cv-02186 ("2016 Action"), alleging claims under (1) 28 U.S.C. § 1346(a)(1); (2) the Admin. Procedures Act, 5 U.S.C. § 701 et seq.; (3) the Due Process Clause, U.S. Const. amend. V (i.e., illegal exaction claims); and (4) the Takings Clause, U.S. Const. amend. V, to recover illegally collected exactions imposed by the TRP.

15. Class Counsel's decision to initially file the action in the District of Maryland was based on extensive research and analysis regarding EWTF's potential claims. Based on this, Class Counsel determined that the claim at issue could be characterized as a tax refund claim, and the District of Maryland (where EWTF resides) was the appropriate venue. The 2016 Complaint asserted that the TRP Contribution "is an internal-revenue tax under 28 U.S.C. § 1346(a)(1) and constitutes tax revenues generated within the boundaries of the United States that have been erroneously and/or illegally assessed, collected and retained by Defendants." Complaint at ¶ 66, 2016 Action. 28 U.S.C. § 1346 empowers federal district courts to hear lawsuits seeking a refund of "any internal-revenue tax," and is construed as a waiver of sovereign immunity (i.e., the federal government has consented to tax refund lawsuits).

16. On November 28, 2016, the 2016 Defendants moved to dismiss EWTF's 2016 Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter

jurisdiction, alleging, *inter alia*, that the federal district court lacked jurisdiction under 28 U.S.C. § 1346(a)(1) because the illegal exaction was not an "internal-revenue tax."

17. On January 17, 2017, EWTF opposed the 2016 Defendants' motion to dismiss. Resp. in Opp'n, 2016 Action, (Jan. 17, 2017). EWTF argued that (1) under the Fourth Circuit's decision in *Pittston Company v. United States*, 199 F.3d 694, 702 (4th Cir. 1999), the TRP was a tax; (2) other courts had concluded that the TRP was an "internal-revenue tax" for purposes of Section 1346 (citing *Ohio v. United States*, 154 F. Supp.3d 621, 629 (S.D. Ohio 2016)); (3) the TRP was "revenue generated within the boundaries of the United States," which meant it was a tax (citing *Horizon Coal Corp. v. United* States, 43 F.3d 234, 239-40 (6th Cir. 1994)); (4) Congress's labeling of the TRP Contribution as a "fee" should be afforded little weight; and (5) the legislative history did not support the 2016 Defendants' interpretation of Section 1346.

18. On February 14, 2017, the 2016 Defendants filed a reply, arguing once again that the TRP was not a "tax" because Congress chose not to designate it as such.

19. On July 21, 2017, the District of Maryland Court found that it lacked subject-matter jurisdiction under 28 U.S.C. § 1346(a)(1), and granted the 2016 Defendants' motion to dismiss. *EWTF v. United States*, 2017 WL 3116693 (D. Md. July 21, 2017). Specifically, the Court found that "when Congress passed the ACA, it chose to label some exactions taxes but to use a variety of other labels for other exactions" and that "one of the purposes of choosing not to use the label 'tax' in the ACA was to avoid the statutory repercussions of that label." *Id.* at *4 (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)). Additionally, the District of Maryland Court found it persuasive that Congress required that the TRP Contributions be paid to "third-party reinsurance entities as opposed to the IRS, [and] placed oversight of the TRP with the Secretary

of [HHS] as opposed to the IRS or the Secretary of Treasury, and codified these provisions in Title 42 of the U.S. Code as opposed to the Internal Revenue Code." *EWTF*, 2017 WL 3116693, at *5.

20. Because the Court concluded that it did not have subject matter jurisdiction over the action, it did not address EWTF's Constitutional claims on the merits.

C. Appeal of the 2016 Action to the Fourth Circuit

21. On August 14, 2017, EWTF filed its Notice of Appeal to the Fourth Circuit Court of Appeals ("2017 Appeal").

22. EWTF filed its opening appellate brief on October 10, 2017, which pressed the same arguments raised in opposition to the 2016 Defendants' motion to dismiss.

23. The 2016 Defendants filed their response brief on November 29, 2017.

24. On December 14, 2017, EWTF filed its reply brief.

25. On September 25, 2018, the Fourth Circuit heard oral argument on EWTF's appeal, which Class Counsel spent significant time preparing for, attending, and arguing.

26. On October 23, 2018, the Fourth Circuit affirmed the District of Maryland's 12(b)(1) dismissal of EWTF's claims, concluding that 28 U.S.C. § 1346, when read in conformity with other statutory provisions governing taxpayer suits, led to the "conclusion [] that internal revenue taxes are those collected by the IRS, under the authority of the Internal Revenue Code" and therefore, "because the payment here was made not to the Treasury, but to HHS under the Transitional Reinsurance Plan, it was not an internal revenue tax." *Electrical Welfare Trust Fund v. United States*, 907 F.3d 165, 168-70 (4th Cir. 2018).

27. Nevertheless, the Fourth Circuit offered that the "Court of Federal Claims has exclusive jurisdiction over [EWTF]'s action." *Id.* at 170.

D. The 2017 CFC Action

28. While EWTF's appeal to the Fourth Circuit Court of Appeals was pending, on November 3, 2017, EWTF filed a complaint in the Court of Federal Claims ("CFC"), 2017-cv-01732 ("2017 CFC Action"), asserting that by requiring self-administered, self-insured health and welfare benefit plans to make contributions to the TRP, the United States Government: (1) erroneously or illegally assessed or collected an internal revenue tax pursuant to 28 U.S.C. § 1346(a)(1); (2) committed an unconstitutional taking in violation of the takings clause of the Fifth Amendment; and (3) committed an illegal exaction in violation of the Due Process clause of the Fifth Amendment. *Elec. Welfare Tr. Fund v. United States of America*, 2017-cv-01732.

29. On March 2, 2018, the Government moved to dismiss the 2017 CFC Action. In its defense, the Government principally asserted that, pursuant to 28 U.S.C. § 1500, the CFC was precluded from exercising jurisdiction over claims when there was an earlier-filed suit pending in another court respecting the same claim—i.e., the suit pending in the Fourth Circuit. Additionally, the Government argued that EWTF lacked Article III standing to assert claims on behalf of SITPAs because EWTF itself did not use a third-party administration ("TPA").

30. On March 23, 2018, an amended complaint was filed in the 2017 CFC Action adding two new plaintiffs, OETF and Stone Masons (together with EWTF, the "Plaintiffs"), both SITPAs.

31. On April 6, 2018, the Government moved to dismiss the amended complaint filed in the CFC. *2017 CFC Action*, ECF No. 10. The Government largely pressed the same arguments that it did in its first motion to dismiss, however, it dropped its standing arguments given the two new plaintiffs. Notably, Class Counsel had prepared to argue that Objection to the Court at the same hearing.

32. On May 16, 2018, the Government, EWTF, OETF, and Stone Masons jointly stipulated to dismiss EWTF from the CFC litigation, without prejudice, given the pendency of its Fourth Circuit appeal.

33. On June 18, 2018, Plaintiffs filed a response to the Government's motion to dismiss the amended complaint. Plaintiffs' arguments regarding 28 U.S.C. § 1346(a)(1) mainly tracked their arguments made to the Fourth Circuit (which at that point had not ruled on EWTF's appeal). Additionally, Plaintiffs asserted that the TRP Contribution was an illegal exaction because the Government misapplied the TRP statute and was not entitled to any *Chevron* deference. Further, Plaintiffs argued that the TRP Contribution was even more improperly imposed on EWTF and the Exaction Class, and the Government was not entitled to any *Chevron* deference in this regard, because the TRP statute omitted any reference to SISAs who were neither health insurance issuers nor were TPAs and thus the statute unambiguously did not apply to EWTF and the Exaction Class. Finally, Plaintiffs argued that the TRP Contribution was an unconstitutional taking, asserting that Plaintiffs had a cognizable property interest in their trust funds. Additionally, Plaintiffs argued that the TRP Contribution was a *per se* taking as a confiscation of a property interest from Plaintiffs to the Government and alternatively as regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

34. The Government filed its reply on July 16, 2018, which sought to reinforce the arguments made in its opening brief.

35. On September 14, 2018, the CFC stayed the 2017 CFC Action pending resolution of EWTF's appeal in the Fourth Circuit.

36. On November 5, 2018, the CFC lifted its stay of the litigation given the Fourth Circuit's decision discussed above. And on March 6, 2019, OETF, Stone Masons, and the

Government stipulated to dismissal of the complaint filed in the CFC without prejudice so that the case could be re-filed with EWTF once again included as a plaintiff.

E. The Instant Action

37. On March 8, 2019, Plaintiffs filed the current Action alleging both illegal exaction and takings claims. ECF No. 1. The Complaint contains the following core allegations regarding the Plaintiffs, including EWTF:

- Plaintiffs and members of the putative classes are self-insured employee health and welfare benefit plans who were required to pay into the TRP. ECF No. 1, ¶¶ 3, 27.
- Plaintiffs are 100% self-insured. *Id.* at ¶¶ 3, 4.
- EWTF and members of the Exaction Class are SISAs that do not use TPAs. *Id*. at ¶ 20.
- Plaintiffs are not commercial in nature, do not operate in the individual market, and their plans are not sold in the public marketplace because they are available only to covered workers and their families. *Id*. at ¶¶ 3, 28.
- Plaintiffs hold all of their assets in trust funds for the exclusive benefit of plan participants and their dependents. *Id.* at ¶ 29.
- Even before the ACA's reforms, Plaintiffs did not exclude participants on the basis of pre-existing conditions and thus, unlike commercial insurers, Plaintiffs did not take on any additional risk when Congress abolished denials for pre-existing conditions under the ACA. *Id*. at ¶¶ 4, 38, 50.
- Plaintiffs were ineligible to receive payments from the TRP program. *Id*. at ¶¶ 50-51.

38. The Complaint further alleged that the TRP provided for the creation of a pool of funds to be financed by the commercial insurance industry, with a purpose to "stabilize premiums for coverage in the individual market" (in which Plaintiffs did not operate) and create "risk-spreading mechanisms" (in which Plaintiffs would not participate). ECF No. 1, ¶ 38. Further, the Complaint alleged that although Congress designated the Secretary of HHS, in consultation with the National Association of Insurance Commissioners ("NAIC"), to issue rules implementing the TRP, ECF No. 1, ¶ 35; 42 U.S.C. § 18061(b)(1), HHS's rule-making authority was constrained by a set of specific instructions contained in the statute—including, expressly limiting the payment of the TRP Contribution to "health insurance issuers[] and third party administrators on behalf of group health plans." ECF No. 1, ¶ 35; 42 U.S.C. § 18061(b)(1)(A). Further, the Complaint alleged that Congress also included instructions by which HHS was to design the method of calculating the TRP Contribution reflecting "each issuers' fully insured commercial book of business for all major medical products and the total value of all fees charged by the issuer and the costs of coverage administered by the issuer as a third party administrator." ECF No. 1, ¶ 41; 42 U.S.C. § 18061(b)(3). These instructions made clear that only commercial insurers, not Plaintiffs, which had no relation to the commercial insurance industry, were required to fund the TRP and that Congress provided that only commercial issuers could receive reinsurance payments through the TRP, as it was only they who took on new risks under the ACA. 42 U.S.C. § 18061(b)(1)(B).

39. The Complaint detailed how, after receiving comments from a coalition of multiemployer plans, HHS shifted its interpretation about the applicability of the TRP to Plaintiffs—but only in part. ECF No. 1, at ¶ 63, n.24. Conceding that "the better reading of section 1341 is that a self-insured, self-administered plan should not be a contributing entity," HHS then-Secretary Sylvia Matthews Burwell agreed that Section 1341(b)(1)(A) "states that health insurance

issuers and [third-party administrators ("TPAs")] on behalf of group health plans are required to make reinsurance contributions, but does not refer to self-insured, self-administered plans." *Id.* at ¶ 15; 79 Fed. Reg. 13744, 13733 (Mar. 11, 2014). However, the agency issued a definition of contributing entity that included self-insured self-administered group health plans ("SISAs"), 45 C.F.R. § 153.20, even though Section 1341 could not, by HHS's own admission, be construed to apply to self-administered plans. ECF No. 1, at ¶¶ 15, 58; *see also* 42 U.S.C. § 18061(b)(1)(A).

40. After the filing of the Complaint, Defendant moved to dismiss the Complaint or, in the alternative, for summary judgment on May 7, 2019. ECF No. 6.

41. First, as to the illegal exaction claims, the Government argued that it was afforded *Chevron* deference because the language of the statute was ambiguous, particularly, the clause "health insurance issuers, and third-party administrators on behalf of group health plans," 42 U.S.C. § 18061(b)(1)(A). More specifically, the Government argued that although the language of the statute was silent as to SISAs, Congress's silence on the issue afforded a gap for HHS to fill and that HHS's reconsideration of its decision to apply the TRP Contribution to SISAs was also reasonable in light of perceived marketplace instability that would result from not collecting the TRP Contribution from SISAs in 2014. Furthermore, as to Plaintiffs' takings claims, the Government asserted that the TRP Contribution was a mere obligation to pay money and that Plaintiffs had not identified a legally cognizable property interest.

42. Plaintiffs filed their response on June 4, 2019. ECF No. 7. With respect to their illegal exaction claim, Plaintiffs argued that "Congress's omission of Plaintiffs and other groups from Section 1341(b)(1)(A) does not create a 'gap' that HHS was then entitled to 'fill' on its own accord, extending to [those groups] an obligation to fund a reinsurance program in which they cannot participate." *Id.* at 26. Further, Plaintiffs argued that HHS's retention of the TRP

Contribution paid by SISAs on public policy grounds was indefensible and unreasonable and the Government was owed no *Chevron* deference at all. *Id.* at 35. Further, Plaintiffs argued "Section 1341 elsewhere makes clear that only commercial issuers acting as administrators qualify as the 'third-party administrators,'" since the provision for "calculating the fee mandates that 'the contribution amount for each issuer proportionally reflect[] each issuers' [1] fully insured commercial book of business for all major medical products and [2] the total value of all fees charged by the issuer and the costs of coverage administered by the issuer as a third party administrator." *Id.* at 28. Therefore, because "none of the [Plaintiffs] had a commercial book of business, and none was administered by a health insurer," Plaintiffs argued that "Defendant ignores this limitation on the types of administrators that, even by Defendant's expansive misreading, would bring group health plans administered by third parties within the ambit of Section 1341." *Id.*

43. As to their takings claims, Plaintiffs argued that they have a cognizable property interest in their trust funds, and asserted that this case fell along the lines of specific fund of money cases like *Webb's* and *Phillips* as a result. *Id.* at 12-14, 16. Further, Plaintiffs asserted that the TRP Contribution was a *per se* taking because "HHS required that the [Plaintiffs] physically take funds held for the exclusive benefit of the participants and beneficiaries and relinquish those funds to the Government to finance the TRP." *Id.* at 17. Alternatively, Plaintiffs asserted that they satisfied the *Penn Central* factors to allege a regulatory taking. *Id.* at 18-21.

44. The Government filed its reply on June 18, 2019, in which it largely reasserted its opening brief arguments. ECF No. 8.

45. This Court held oral argument on Defendant's Motion on October 20, 2020.

46. On July 30, 2021, this Court entered an order denying the Government's Motion in part ("MTD Order"). 155 Fed. Cl. 169, ECF No. 22. As to the exaction claim brought by EWTF, this Court found that the statute expressly limited the entities that were required to pay the Contribution to "health insurance issuers, and third-party administrators on behalf of group health plans[.]" MTD Order, 155 Fed. Cl. 169, 183 (2021) (quoting 42 U.S.C. § 18061(b)(1)(A)). Given this express language, this Court found that the "plain language of section 18061(b)(1)(A)" did not apply to EWTF because it was a SISA. *Id.* at 183. This Court further held that "Defendant's interpretation is in complete contravention of . . . well-established tenet[s] of statutory interpretation and effectively reads 'third party administrators' out of the statute" and that "[i]f Congress meant that all group health plans would pay the TRP, it could have easily omitted its third-party administrator qualifier." *Id.* Further, this Court found that "HHS did not have authority to ignore the plain language of the statute in the name of public policy or administrative efficiency." *Id.* at 184. Accordingly, this Court denied dismissal of EWTF and the putative Exaction Class's illegal exaction claim.

47. As to OETF and Stone Masons's illegal exaction claim, this Court found that the TRP statute was ambiguous because "[n]othing in the statute preclude[d] HHS from calculating fees for group health plans administered by an ASO. The statute does not differentiate between third-party administrators, which are also health insurance issuers, and those third-party administrators, which are not." *Id.* at 184-85. Therefore, it proceeded to *Chevron* step two, under which it was required to accept HHS's rule, explaining "[w]ether or not this Court agrees with *Chevron*, it is bound to follow it as a lower court, and HHS's interpretation is entitled to deference." *Id.* at 187; *see also id.* at 188 ("Even if this Court disagrees with HHS's rationale, it is not this Court's job to make policy."). This Court accordingly dismissed OETF's and Stone Masons'

illegal exaction claim under step two of *Chevron*, finding that HHS's interpretation as to the applicability of the TRP statute to them was reasonable in light of the statute's ambiguity and Congress's intent behind the TRP program.

48. As to Plaintiffs' takings claims, this Court stated that "Plaintiffs and the beneficiaries of their plans may have some property right in the employee contributions paid into the ERISA funds or may have some contractual right to these funds" but "neither party has submitted to this Court information concerning how Plaintiffs' plans are funded or the nature of the agreements governing the use of the funds." *Id.* at 192-93. It accordingly denied Defendant's Motion to Dismiss as to Plaintiffs' takings claims and allowed them to proceed to discovery. *Id.*

49. The Court's MTD Order was a major victory for all Plaintiffs. The Court resolved EWTF's and the putative Exaction Class's claims in their favor. The Court also allowed the takings claims to proceed—an important insurance policy for the putative Exaction Class, which was permitted to assert the claim in the alternative until judgment was ultimately entered. The significant work done by Class Counsel with respect to the takings claims benefited EWTF and members of the Exaction Class up until the time when the Court entered summary judgment in favor of the Exaction Class.[5] This included work with experts, researching and drafting legal memoranda regarding likely issues for dispositive motions, and briefing class certification for a putative takings class which, until they obtained judgment, included SISAs.

[5] In this Court's MTD Order, it noted in a footnote that "if EWTF ultimately succeeds on its illegal exaction claim, it cannot also proceed under its Takings Claim." *Id.* at 188 n.11. However, it also noted that EWTF continued to have live takings claims until any ruling on summary judgment. *Id.*

F. The Parties' Discovery Efforts

50. Throughout this litigation, Class Counsel have vigorously pursued discovery from the Government. A summary of Class Counsel's and Class Representative's discovery efforts is provided below.

1. Joint Preliminary Status Report and Proposal for Further Proceedings, and Initial Disclosures

51. In August 2021, the parties held a series of conferences to discuss a discovery plan for this matter. As a result of these discussions, the parties submitted a Joint Discovery Plan to Govern Further Proceedings. ECF No. 26 at 1. With respect to EWTF's illegal exaction claim, Class Counsel stated that they "intend[ed] to move to certify a class pursuant to Rule of the Court of Federal Claims 23 and w[ould] approach the Government seeking a stipulation regarding the appropriateness of class certification of this claim" and that after a class is certified, "EWTF intend[ed] to move for summary judgment on its illegal exaction claim because there [were] no genuine issues of material law or fact." *Id.* at 2. Class Counsel also proposed a comprehensive schedule to govern the remainder of the Action.

52. In its portion of the Joint Status Report, the Government stated that it did not object to Class Counsel's proposed path forward for the illegal exaction claim, but it objected to any proposal to include the takings claims on the same schedule until Plaintiffs filed an amended complaint, and the Government had an opportunity to respond to that pleading. Class Counsel disputed the Government's proposal, characterizing it as an attempt to further delay the matter and arguing that Plaintiffs should have an opportunity to develop their takings claims in discovery.

53. The Court entered an initial Scheduling Order on September 1, 2021 that largely tracked Class Counsel's proposal. ECF No. 27. In particular, the Scheduling Order adopted Plaintiffs' proposed schedule for both the takings and exaction claims. And although it required

Plaintiffs to submit an amended complaint, it did not allow the Government to respond to that pleading.

54. Plaintiffs filed an Amended Complaint on September 14, 2021, adding additional substantive allegations regarding the property interest associated with their takings claims. ECF No. 28.

55. At the parties' joint request, the schedule was twice extended. ECF Nos. 30, 47.

56. On October 19, 2021, the parties exchanged initial disclosures pursuant to Rule 26(a)(1).

2. Protective Order Dispute

57. On January 4, 2022, after several rounds of negotiation with the Government, Class Counsel filed a motion for a protective order to govern the production of discovery material. ECF No. 31. Class Counsel argued that a protective order was appropriate in this case given the nature of the information at issue, including: "(i) confidential financial information, (ii) information regarding confidential business practices (including information implicating privacy rights of third parties), and (iii) information protected by and subject to the HIPAA Privacy Rule." ECF No. 31 at 1.

58. While the parties agreed on many provisions of the proposed order, the Government sought to modify the protective order in one material respect: by including language that would allow the Government to share discovery information with investigative authorities for the purposes of potential prosecution.[6]

[6] The Government's proposed language stated: "Additionally, nothing in this Order shall prevent or in any way limit or impair the right of counsel for the United States to disclose to any agency of the United States (including other divisions and branches of the U.S. Department of Justice) any document or information regarding any potential violation of law or regulation or, subject to procedures that maintain the confidentiality of Covered Information consistent with this Order,

59. Rather than accept the Government's proposal, Class Counsel elected to litigate the dispute. Class Counsel told the Court that "discovery produced in this case should be used only for this case" and that "a party bringing suit or defending itself in a case should not be concerned that information turned over during the discovery process will be weaponized for some other, unrelated purpose." *Id.* at 2. Class Counsel asserted that it is "standard practice in complex litigations like this one, [that] materials covered by the [Proposed] Protective Order should be used solely for prosecution of this action." *Id.* at 3. Class Counsel further asserted that "a plaintiff who brings meritorious claims against the Government should not be subject to fear of retaliatory prosecution," particularly where the Government had "not explained why it is entitled to an absolute right to share Covered Information with persons or agencies" not involved in the litigation or that it "provided any reason to believe that any of the Plaintiffs have violated any laws or regulations." *Id.* at 2-4. Additionally, Class Counsel asserted that the "the Court should order the Government to immediately produce documents and provide discovery material that would otherwise be subject to the [Proposed] Protective Order, on an interim, 'Attorneys' Eyes Only' basis" in order for the parties to efficiently move discovery forward. *Id.* at 5.

60. The Government filed its response to Plaintiffs' motion for a protective order on January 10, 2022. ECF No. 33. The Government asserted that "the protective order cannot be construed to hamstring the Government's ability to investigate and, if necessary, prosecute suspected violations of Federal statutes and regulations." *Id.* at 3. Additionally, it asserted that Plaintiffs' due process rights would be protected because the agency-investigation provision "gives

prevent or limit in any way the use of such documents and information by an agency in any proceeding regarding any potential violation of law or regulation." *Id.* at 2-3.

plaintiffs advance notice of any intent to disclose protected information to other agencies, as well as a process through which they could challenge the disclosure before the Court." *Id.* at 4.

61. On January 13, 2022, a hearing was held in which the Court heard oral argument on the protective order issue. ECF No. 37. The Court was ultimately persuaded by Class Counsel's arguments, and specifically stated that it was "concerned" about the use of such an agency-investigation provision. *Id.* at 4, 16.

62. On January 13, 2022, this Court granted Plaintiffs' application and signed Plaintiffs' [Proposed] Protective Order. ECF No. 35.

3. Discovery Served on the Government and Third Parties

63. Plaintiffs served their First Set of Interrogatories and Document Requests on October 27, 2021 and November 4, 2021, respectively. Among other things, those requests asked the Government to identify all SISAs that paid the TRP Contribution for benefit year 2014, as well as the amounts of such payments and any offsets (refunds).

64. In response to these Requests, on January 19 and March 10, 2022, the Government produced two spreadsheets showing that SISAs paid more than $250 million in TRP Contributions for benefit year 2014. ECF No. 52 at Exs. 1, 2.

65. On January 21, 2022, Plaintiffs requested (1) additional information regarding SISAs listed in the two spreadsheets produced by the Government and (2) that the Government immediately produce payment documents, from Pay.gov, associated with these funds' payment of the TRP Contribution. After several weeks of discussions and negotiations, on March 4, 2022, the Government represented that it would produce all "information contained in the CMS submission Forms and/or Pay.gov receipts (including payment amount, transaction date, benefit year, contact information for each authorizing official, account holder name, pay.gov tracking ID, and invoice number)."

66. On March 10, 2022, the Government produced a spreadsheet containing detailed Pay.gov information for all SISAs. This Pay.gov information was critical to the opt-in campaign (discussed further below) because it provided Plaintiffs with contact information for Exaction Class members. Among other things, this information was used to mail and email the opt-in notices and forms. Together with the SISA refund information (discussed below), the Pay.gov information also allowed Class Counsel to accurately compute damages down to the penny, which was done with the assistance of a forensic accountant.

67. Plaintiffs engaged in significant negotiations and meet and confers with the Government regarding additional discovery as well. In particular, Plaintiffs pressed the Government on its responses to RFPs seeking information regarding: (i) any refunds received by group health plans for their TRP Contribution in benefit years 2014-16; (ii) whether any plan was provided a benefit or payment from the TRP Program; (iii) whether any plans were excluded from paying the TRP Contribution; (iv) whether any non-Governmental entity worked on the proposed rules concerning the TRP Program; and (v) clarification regarding terms used in certain spreadsheets produced by the Government. Plaintiffs ultimately obtained valuable information in response to these requests. For example, the Government admitted that no group health plan received any benefit from the TRP, nor did it exclude any from participation. Also, as noted, the refund information was necessary for Class Counsel to accurately compute damages.

68. Plaintiffs also pressed the Government on its objection that it "did not collect information that would permit it to distinguish between self-insured group health plans administered by non-health insurers" and "self-insured group plans administered by health insurers." This purportedly made it impossible for the Government to produce any documents or

answer any interrogatories that sought information regarding SITPAs—i.e., members of the putative takings class.

69. On January 21, 2022, consistent with the parties' negotiated agreement, Plaintiffs served amended discovery requests that, among other things: (i) did not differentiate between issuer and non-issuer TPAs, and (ii) asked the Government to identify TPAs that paid contributions on behalf of putative class members. Plaintiffs also specifically requested payment documents regarding SITPAs. In response to multiple follow up requests and communications, as well as Plaintiffs' amended requests, the Government ultimately produced the information requested by Plaintiffs for SITPAs. All of this information was necessary for Class Counsel to determine who was part of the putative takings class, as well as calculate damages for these putative class members.

70. Class Counsel also served two third-party subpoenas on (1) the NAIC, the insurance-industry backed organization that, together with HHS, was charged with implementing rules for the TRP, and (2) the AFL-CIO, the largest federation of unions in the United States, who had previously opposed the rules promulgated by the HHS. Class Counsel received nearly 4,000 pages of documents in response to these efforts, some of which were cited by Class Counsel's experts and used in pleadings before this Court.

4. EWTF's Participation in Discovery

71. EWTF was an active participant in discovery. EWTF responded to twenty-four document requests and sixteen interrogatories from the Government. In response to Defendant's discovery requests, and with the assistance of Class Counsel, it collected, reviewed, and produced more than 2,000 pages of documents. EWTF also actively supervised the litigation, and received regular updates from Class Counsel. McCarron Decl., ¶¶ 7-11.

72. The parties litigated one dispute regarding discovery served on EWTF. Specifically, in February 2022, the Government sought to compel Plaintiffs to provide responses to contention interrogatories regarding the basis for their legally cognizable property interest. ECF No. 38. In response, Class Counsel argued that the Government's requests—served while discovery was still ongoing—were premature and that Plaintiffs would supplement their responses after the close of fact discovery and the exchange of expert reports. ECF No. 41 at 1. The Court held a hearing on this issue on March 1, 2022. The Court granted in part and denied in part Defendant's motion to compel, on the record, after hearing oral argument. ECF No. 45. The Court agreed with Class Counsel that the requests were premature, and permitted Plaintiffs to supplement their contention interrogatories at a later date. ECF No. 43.

5. Expedited Exaction Schedule

73. Several months into discovery, in March 2022, Class Counsel negotiated an expedited schedule for the illegal exaction claim, whereby separate deadlines were set for class certification and dispositive motions related to this claim. The joint proposal was presented to the Court on March 21, 2022, and entered the same day. ECF No. 47.

74. The strategy of moving the exaction claims towards resolution as quickly as possible ultimately worked as planned. Less than a month after the schedule was entered, Class Counsel moved to certify the Exaction Class, which the Court granted in July 2022. Later that same month, Class Counsel moved for summary judgment on these claims, which the Court granted in December 2022. During this time, and as set forth below, Class Counsel also conducted a lengthy and complex opt-in campaign.

75. By contrast, class certification for the takings claims was not fully briefed until January 2023, and summary judgment was not fully briefed until April 2023.

76. In short, the expedited schedule allowed Class Counsel to certify the Exaction Class, conduct an opt-in campaign, defeat objections to Exaction Class member participation, move for summary judgment, move for final certification, and obtain Rule 54(b) Judgment in just over a year—a truly remarkable effort.

6. Expert Discovery

77. Class Counsel engaged two expert witnesses in the case. Both expert witnesses provided a detailed expert report for the matter and both were thoroughly prepared for deposition by Class Counsel and examined by the Government.

78. First, Class Counsel engaged Kathryn Bakich, who is the National Health Compliance Practice Leader and a Senior Vice President at Segal, a national employee benefits and human resources consulting firm with over 1,000 employees. Ms. Bakich opined on the nature of Plaintiffs' trusts and trust assets. She explained that multiemployer plans are established under a joint trust agreement and the only purpose of the trust is that they are non-profit entities designed solely to provide health and welfare benefits to workers and their families. Ms. Bakich further explained that the TRP Contribution was paid from the pool of workers' money held in trust. The Government deposed, and Class Counsel defended, Ms. Bakich on October 11, 2022—a deposition lasting nearly the fully allotted time.

79. Class Counsel also engaged Adam E. Block, an Associate Professor of Health Policy and Management at New York Medical College who has worked in health economics in government, academia, for health plans, and for providers for the last 20-plus years. Dr. Block provided an economic opinion, based on his experience helping to draft legislation and developing regulations, that the TRP had a negative material impact on self-insured plans and their beneficiaries. The Government deposed, and Class Counsel defended, Dr. Block on October 7, 2022.

G. Class Certification

80. On April 8, 2022, EWTF filed its motion for class certification. ECF No. 53. EWTF moved to certify a class with the following definition: "All self-administered, self-insured employee health and welfare benefit plans that are or were subject to the assessment and collection of the Transitional Reinsurance Contribution under Section 1341 of the Affordable Care Act for benefit year 2014. ECF No. 53-1 at 1.

81. EWTF argued that it and the Exaction Class satisfied the Rule 23 requirements. Specifically: (1) the Exaction Class satisfied the numerosity requirement because "according to Defendant's own records, the Class consists of more than 650 SISAs that paid the Contribution"; (2) the Exaction Class satisfied the commonality and predominance requirement because the "illegal exaction claims center on a single common question—whether HHS improperly required SISAs to pay the TRP Contribution for benefit year 2014 in contravention of the plain language of 42 U.S.C. § 18061, thereby illegally exacting funds from all Class Members"; (3) EWTF's claims were typical of the Exaction Class's claims because its illegal exaction claim "is identical to the legal theory asserted by the Class"; (4) EWTF and Class Counsel fairly and adequately represented the Exaction Class because Class Counsel are highly qualified and because EWTF asserts the same legal claim as the class and "has actively participated in this action"; and (5) the superiority requirement was met because "all Class members' claims can be resolved by answering the same straightforward legal question" in one proceeding. *Id.* at 8-15.

82. On May 16, 2022, the Government filed its response. ECF No. 65. The Government stated that it did not oppose the certification of the Exaction Class, however, it pointed out that "each of the entities within the spreadsheet [it] produced in discovery, which lists 652 self-identified SISAs, [does not] automatically fit[] within the proposed class definition" because "there is a distinct subgroup of self-insured group health plans [so-called nominal SISAs] that should be

excluded from the illegal exaction class even if they are listed in the aforementioned spreadsheet." *Id.* at 4. The Government stated that the plans in the spreadsheet could be divided into two distinct subgroups: "plans that did not use a TPA at all ('true SISAs'), and plans that used a TPA for a small portion of their operation ('nominal SISAs')." *Id*. The Government asserted that the latter group cannot assert an illegal exaction claim because nominal SISAs "are more akin to TPA-administered plans" whose illegal exaction claims have already been dismissed by this Court. *Id.* at 5. Therefore, the Government asserted that "in the event EWTF argues that the class definition it proposes is broad enough to encompass nominal SISAs in addition to true SISAs, then the Court should deny EWTF's motion in its entirety." *Id.* at 7.

83. EWTF filed its reply on June 3, 2022. ECF No. 69. EWTF addressed the Government's concerns by asserting that there would be no issue with precisely identifying members of the Exaction Class and discerning true from nominal SISAs because "it will be established (through, for example, evidence or attestation under penalty of perjury) which entities are true SISAs" when they opt-into the class. *Id.* at 3.

84. This Court granted EWTF's Motion for Class Certification on June 22, 2022, finding that the requirements of RCFC Rule 23 were met. 160 Fed. Cl. 462 (2022). Specifically, this Court found that: (1) numerosity was met because "the number of class members is sufficiently large to warrant class certification"; (2) commonality and predominance were met because "[a]n identical legal question is present for each potential class member" i.e., whether the Defendant "improperly required self-administered, self-insured entities to pay the TRP contribution for benefit year 2014" which was calculable using a common methodology and "was a single act that affected all putative class members"; (3) typicality was met because EWTF's illegal exaction theory was "identical to the legal theory asserted by the class"; (4) adequacy was met because

Class Counsel "[has] the requisite experience, knowledge, and resources to represent the proposed class" and there was no detectable "conflict between EWTF and the proposed class members, and Defendant does not identify any such conflicts"; and (5) superiority was met because of the "direct overlap between EWTF's claims and those of the proposed class." *Id.* at 467-69. Accordingly, this Court certified the Exaction Class and adopted the proposed class definition. In a footnote, this Court also noted that "[t]he parties further agree that this class definition excludes nominal self-insured, self-administered entities, which use a third-party administrator for a small portion of their operation." *Id.* at 470, n.1.

H. The Opt-In Campaign

85. On July 22, 2022, after negotiating the contents of the notice and opt-in form with the Government, Class Counsel submitted an unopposed motion for approval of proposed notice plan for the Exaction Class ("Notice Motion"). ECF No. 76. Among other things, Class Counsel proposed to send a cover letter, notice packet, and opt-in form to putative Exaction Class members via overnight and electronic mail. *Id.* at 3. Class Counsel proposed to identify members of the Exaction Class through records provided by the Government (the "Government Records" or the "SISA Records"). *Id*. The Government Records were derived from the Pay.gov database that was obtained through discovery and referenced above. Class Counsel further proposed that an informational website be created and that a dedicated team from the notice administrator, JND, be made available to answer questions and provide service to Exaction Class members. *Id.*

86. This Court granted the Notice Motion on July 27, 2022. ECF No. 77.

87. Class Counsel ran a thorough and complex notice and opt-in program. Consistent with the Notice Plan, using the Government Records, JND sent overnight mail and email notice to all putative members of the Exaction Class (roughly 650). JND also established an interactive website and made a dedicated team available to putative members of the Exaction Class. On

October 24, 2022, at Class Counsel's direction, JND sent a reminder email to putative Exaction Class members, again using the email addresses provided in the Government Records. During this time, Class Counsel also responded to numerous inquiries from putative Exaction Class members regarding eligibility and other issues. Class Counsel also conducted an extensive outreach program to ensure putative Exaction Class members received the notice and were aware of the opt-in deadline.

88. On November 7, 2022, EWTF moved for an extension of the opt-in deadline based on several grounds. ECF No. 87. First, while helpful, the Government Records turned out to be incomplete and, at times, inaccurate. For example, certain putative Exaction Class members (i) were no longer in existence or had since merged with other health and welfare plans; (ii) had changed addresses or telephone numbers; and/or (iii) listed employee contacts who were no longer with the entity given the passage of time since the 2014 TRP Contribution was made. This was likely due to the fact that the contact information the Government produced was 10 years old (and thus at times stale) and also self-reported (and thus susceptible to human error). Class Counsel worked diligently to update contact information and identify accurate contacts for all members of the Exaction Class, but the process was very time-consuming and tedious. To assist with this process, Class Counsel were aided by Kessler Topaz's investigative department, led by former members of federal law enforcement experienced in locating individuals and entities.

89. Moreover, based on discussions with putative Exaction Class members, Class Counsel learned that participation in this Action often required formal trustee and/or board approval, which is given at pre-scheduled trustee or board meetings, and necessitated additional time. In other words, this was not a case where individuals could simply decide whether to opt-in

to a class; instead, the Exaction Class was comprised of entities that had defined decision-making processes they were required to follow.

90. While Class Counsel approached the Government to obtain an agreement on the extension, the Government declined, and the parties were forced to brief the issue on an expedited basis. On November 9, 2022, the Government opposed EWTF's motion to extend the opt-in period. ECF No. 89. The Government principally argued EWTF had sent a "second round of notices" after the September 12, 2022 deadline. *Id.* at 3. Additionally, the Government proposed that if any extension of the time to opt-in should be granted, it should "be strictly limited to the 165 potential class members to which class action notices were sent after September 12, 2022." *Id*. at 7.

91. On November 11, 2022, Class Counsel filed a reply. ECF No. 91. Class Counsel explained that it was necessary and vital to reach as many putative class members as possible to ensure they had an opportunity to recover. Class Counsel further asserted that there had been no second round of notices, rather, "[w]here it appeared that the initial Notice Packet was not delivered" Class Counsel and JND undertook further efforts to reach that Exaction Class member, which was "the process identified in Plaintiff's Notice Motion, which the Government did not oppose and the Court approved." *Id.* at 2. Additionally, Class Counsel argued that limiting the extension of time to opt in to the 165 potential Exaction Class members sent notice after September 12, 2022 was an unworkable compromise because the "process of identifying members of the Exaction Class who did not actually receive the Notice Packet [wa]s ongoing, time consuming, and not susceptible to easy quantification" and "d[id] not reflect the realities of: (i) the incomplete and inaccurate Government Records, and (ii) the difficulty of determining, with precision, which Exaction Class members actually received Notice." *Id.* at 6.

92. On November 11, 2022, this Court granted the extension, persuaded by Class Counsel's argument "concerning the difficulty effecting notice on a quarter of the potential class members" and noting that the "Notice Schedule does not expressly forbid the [follow up] of which Defendant complains, and Defendant does not cite any authority supporting its position." ECF No. 92 at 2, 4. Accordingly, this Court granted EWTF's motion to extend the opt-in period until December 19, 2022 finding that the "roughly three-quarters of all potential class members who have not yet opted-in to the class should receive the benefit of the brief extended opt-in period." *Id.* at 5. The Court additionally found "it was reasonable and proper, even necessary, for Plaintiff, as class representative, to ensure each potential class member received a notice." *Id.* at 4.

93. Armed with additional time, Class Counsel continued to reach out to and follow up with plans for the remainder of the opt-in period.

94. Over the course of several months—from September 2022 to February 2023—Class Counsel were in near daily contact with hundreds of potential Exaction Class members. Questions from potential Exaction Class members ranged from administrative (How can I submit a claim?), to procedural (When will the Court rule on summary judgment?), to substantive (Is my plan eligible?). One of the most complex and difficult questions posed during this time was whether a given plan fell within the class definition, a determination complicated by the objection raised by the Government during class certification briefing. As stated above, while HHS allowed for a *de minimis* exception (a plan would still qualify as self-administered even if it used third party administrators for up to 5% of its operations), the Exaction Class definition did not. Many plans were confused and even upset by this and it fell on Class Counsel to not only explain this seeming incongruity, but to also act as a gatekeeper to ensure qualifying SISAs were allowed to opt in to the Exaction Class.

95. Through the tremendous efforts of Class Counsel, 634 opt-ins were ultimately received.

I. Final Certification of Exaction Class

96. On November 11, 2022, the Court directed Class Counsel to "certify final membership in the Exaction Class by identifying the name of each member of the Exaction Class to the Court and providing, to the Court and Defendant, a copy of the opt-in form completed by each Exaction Class member and submitted to Class Counsel." ECF No. 92 at 5.

97. Pursuant to this order, Class Counsel undertook the complex and time-consuming task of evaluating each of the hundreds of opt-in forms for eligibility in the Exaction Class.

98. Of the 634 opt-ins received, 330 plans were matched to the SISA Records using all available information submitted by each plan including: the plan unique ID (as supplied by JND), name, address, Employee Identification Number ("EIN"), and/or plan contact(s). Matching these plans to the SISA Records was a laborious, highly technical, and time-consuming process. All plans who submitted an opt-in form and were matched to the SISA Records were included in the Exaction Class.

99. In addition, 267 plans submitted opt-ins that could not be matched to the SISA Records. These plans were notified by email that "Class Counsel will recommend to the Court that your plan be removed from the Exaction Class without prejudice" ("Exclusion Notification"). The Exclusion Notification further stated: "If you believe this decision was made in error, you may submit additional evidence" to establish that the plan is covered by the Exaction Class definition.

100. Following the Exclusion Notification, approximately 90 plans submitted additional documentation and evidence (primarily in the form of IRS Form 5500, payment confirmations, and Summary Plan Descriptions ("SPDs")). Approximately 177 plans did not respond to the Exclusion Notification.

101. Over the course of several weeks, Class Counsel reviewed the additional evidence submitted by plans, spoke to representatives from nearly all 90 plans individually, and consulted with our retained expert on a number of issues and eligibility questions raised by putative Exaction Class members. Following this review, Class Counsel determined that 27 additional plans (less than a third of the plans who submitted additional evidence) should be included in the Exaction Class. Class Counsel determined that the remaining 63 were not eligible based on either the plan's failure to provide additional documentation, or Class Counsel's review of supplemental information provided by the plan, including payment confirmations and SPDs. In certain instances, insufficient supplemental information was provided (for example, some plans failed to provide payment confirmations) and in other instances, the information provided demonstrated the exclusion was appropriate (for example, certain SPDs identified that plans were not self-administered).

102. After this extensive outreach and verification program run by Class Counsel, a total of 357 plans, with damages totaling $185,230,024.42, were certified to this Court for entry of a Rule 54(b) judgment. Damages calculations were aided by Class Representative's forensic accountant, who reviewed and synthesized thousands of individual payment confirmations to assign an individual damages amount to each plan. Class Counsel had multiple meetings with this expert during the process.

103. On March 1, 2023, Defendant filed its objection to Class Counsel's certification of final membership in the Exaction Class ("Objection"). ECF No. 114. The Government claimed that 157 plans listed in the final certification (nearly half of the entire Exaction Class) should not be included in the Exaction Class. Collectively, the 157 plans challenged by the Government paid more than $100 million into the TRP and the Government's motion sought to preclude the plans

from recovering this amount. The Government's Objection was based on its review of Form 5500, a joint Department of Labor and IRS compliance, research, and disclosure tool for employee benefit plans. Specifically, it contended that 200 plans within the class had checked either the claims processor (service code 12) or contract administrator (service code 13) box on their Form 5500, which according to the Government, indicated that the plan used a TPA and was therefore ineligible for Exaction Class membership. *Id.* at 5-7.

104. Class Counsel filed a reply on March 28, 2023, which strenuously opposed the Government's Objection. ECF No. 118. Class Counsel asserted that the present record was more than sufficient to establish Exaction Class membership rather than using the Form 5500 as a basis for exclusion. In particular, each plan the Government objected to declared "under penalty of perjury" that it "did not use a Third Party Administrator for any portion of its claims processing or adjudication or enrollment for benefit year 2014." *Id.* at 1. Class Counsel asserted that the parties specifically negotiated and agreed on this language in the opt-in form and notice, "and the process followed here closely resemble[d] the process followed by the Government when it collected more than $180 million from Exaction Class members nearly a decade ago." *Id.*

105. Class Counsel further asserted that the Form 5500 completed by Exaction Class members simply did not contain the level of detail necessary to support the Government's conclusions about whether a specific class member used a TPA. Class Counsel further discussed a letter they received from counsel for Automatic Sprinkler Local 281, U.A. Welfare Fund ("Local 281"), which explained as much. The Government objected to Local 281's inclusion in the Exaction Class because its 2014 Form 5500 listed BlueCross BlueShield of Illinois ("BCBSIL") with service code 12. However, in its letter, Local 281 explained that a "deeper understanding of the Fund's operations—which cannot be gleaned from the 5500 Schedule C service codes—

reveals that BCBSIL merely provided network access and claim repricing services to the Fund, and BCBSIL did not 'process claims." *Id.* at 11. In other words, notwithstanding the information on the Form 5500, it was eligible to participate in the Exaction Class.

106. Based on Class Counsel's strong opposition, the Government ultimately dropped its objection but not until immediately prior to the scheduled hearing where the Court was to hear argument on Defendant's Objection. ECF No. 126.

107. The next day, on May 12, 2023, this Court then entered an order directing the Clerk of Court to enter partial judgment in favor of the 357 Exaction Class members in the total amount of $185,230,024.42 in damages. ECF No. 123.

108. The Clerk of Court entered 54(b) Judgment on the same day. ECF No. 124.

J. Summary Judgment

109. Contemporaneous with the class certification and opt-in proceedings, on July 15, 2022, Class Counsel filed EWTF's Motion for Summary Judgment on the exaction claim. ECF No. 72. EWTF asserted that based on the plain language of Section 1341, the Government indisputably illegally exacted funds from the Exaction Class. EWTF further asserted that this Court's "MTD Order plainly, and correctly, adjudicated EWTF's illegal exaction claim" and that "there are no exceptional circumstances that would justify departing from the Court's ruling." ECF No. 72-1 at 8. Additionally, pointing to the Pay.gov records obtained in discovery, EWTF argued that the amount of damages in the case was not in dispute *Id.* at 11-12.

110. On August 30, 2022, the Government filed its response. ECF No. 80. The Government's opposition stated that EWTF's illegal exaction claim lacked merit as a matter of law, but it "refrain[ed] from reiterating here the arguments we made in our prior motion [to dismiss or for summary judgment]" which the Court disagreed with and "interpreted 42 U.S.C. § 18061 in a manner that effectively resolves EWTF's summary judgment motion in its favor." *Id.* at 2.

However, the Government reserved the right to make all arguments on appeal if EWTF's motion was granted.

111. EWTF filed its reply on September 13, 2022. ECF No. 81. In addition to pointing out that the Government largely conceded, EWTF requested this Court to "defer entering judgment in favor of EWTF and the Class until after Class notice is complete and the opt-in period expires" to "ensure all members of the Exaction Class are bound by the Court's judgment." *Id.* at 2.

112. At a December 21, 2022 hearing on EWTF's Motion for Summary Judgment, the Government acknowledged that there were no genuine issues of material fact on the illegal exaction issue. Accordingly, the Court granted EWTF's motion on the record. ECF No. 100. On December 21, 2022, in its Order granting summary judgment, the Court stated that it "will direct entry of judgment on the Class's illegal exaction claim pursuant to Rule 54(b) upon receiving the certification of final Class membership, which shall contain the name and damages owed to each member of the Illegal Exaction Class." ECF No. 97.

K. Federal Circuit Notice of Appeal and Exaction Class Settlement

113. On June 26, 2023, six weeks following entry of the Judgment on behalf of the Exaction Class, Defendant filed a notice of appeal regarding the illegal exaction claim ("Exaction Appeal"). ECF No. 128. The scope of Defendant's appeal included the Court's MTD Order and the Court's Order granting the Exaction Class's Motion for Summary Judgment, entered on December 21, 2022 (ECF No. 97).

114. While the Government's appeal was pending, the parties began to explore the possibility of resolving the illegal exaction claim through settlement to avoid the risk and expense of continued litigation. Over the course of several weeks in May and June 2023, the parties engaged in good-faith, arm's-length negotiations, which included several proposals and counterproposals.

115. On July 7, 2023, the parties filed a joint motion to stay proceedings in the Federal Circuit because they had entered into good-faith settlement negotiations. Joint Mot. to Stay Proceedings, Exaction Appeal, No. 23-2105 (Fed. Cir. July 7, 2023), ECF No. 6. On July 27, 2023, the Clerk of Court of the Federal Circuit granted the stay and directed the parties to file a status report no later than October 10, 2023, and every 30 days thereafter as necessary. Order, Exaction Appeal, (July 27, 2023), ECF No. 8. The Government thereafter began the lengthy process of having the settlement approved by the necessary parties, including the Associate Attorney General.

116. In compliance with this directive, on October 10, 2023, the parties filed a joint status report stating that the parties continued to negotiate a potential settlement and that "additional time [wa]s necessary to finalize the negotiations and obtain the necessary authority to settle from the Attorney General's authorized representative." Joint Status Report, Exaction Appeal, (Oct. 10, 2023), ECF No. 9.

117. On November 9, 2023, the parties filed an additional joint status report indicating that the parties had agreed to settle this matter, "and the settlement framework has now been approved by both the Attorney General's authorized representative and the Electrical Welfare Trust Fund, as class representative, on behalf of the Exaction Class." Joint Status Report, Exaction Appeal, (Dec. 20, 2023), ECF No. 10.

118. On December 20, 2023 the Federal Circuit entered an order remanding the matter to this Court for review of the settlement agreement. Order, Exaction Appeal, (Dec. 20, 2023), ECF No. 12. That same day, with the case now remanded, this Court issued an order directing the parties to file a joint status report by January 5, 2024 providing a proposed joint schedule for all future proceedings. ECF No. 139.

119. On January 4, 2024, the parties filed a Joint Status Report with this Court setting forth a jointly proposed schedule for all future proceedings. ECF No. 140. On January 8, 2024, this Court adopted the parties' proposed schedule in part and ordered that the parties file a motion for preliminary approval of settlement by February 16, 2024. ECF No. 141.

120. Thereafter, the parties began negotiating the specific terms of their agreement to resolve the Action.

III. THE SETTLEMENT, PREPARATION OF SETTLEMENT DOCUMENTS, AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

121. On February 16, 2024, Class Representative filed the Settlement Agreement (and related exhibits) along with its Unopposed Motion for Preliminary Approval of Proposed Settlement and Authorization to Disseminate Notice of Settlement ("Preliminary Approval Motion") and supporting brief. ECF No. 142. On February 21, 2024, the Court entered its Order ("Preliminary Approval Order") preliminarily approving the Settlement Agreement as "fair, reasonable, and adequate and in the best interest of the Settlement Class." ECF No. 143, ¶ 1. The Court set the final Fairness Hearing for May 1, 2024, at 1:00 p.m. ET. *Id.* at ¶ 4.

IV. RISKS OF CONTINUED LITIGATION

122. After final judgment was entered, the Government informed Class Counsel that it intended to file an appeal with the U.S. Court of Appeals for the Federal Circuit. On appeal, Defendant would have renewed its arguments as to why Class Representative had failed to establish liability, thereby exposing the Exaction Class to the risk of having their favorable judgment reversed after nearly a decade of litigation.

123. While Class Counsel believed in the Exaction Class's claims, an appeal is not without risk, especially in the Federal Circuit where the Government is a repeat litigant and thus has greater institutional knowledge of the venue and its judges.

124. Equally important, an appeal to the Federal Circuit can take one to two years to resolve (and, in some cases, longer). *See Median Time to Disposition in Cases Terminated After Hearing or Submission*, U.S. Court of Appeals for the Fed. Cir., https://cafc.uscourts.gov/wp-content/uploads/reports-stats/FY2023/MedDispTimeMERITS-Table-FY23.pdf (last visited Mar. 25, 2024) (median time for disposition of appeal from Court of Federal Claims was 13.5 months in 2023). This is significant because the judgment cannot be distributed until it is ruled on by the Federal Circuit, and it will not collect interest during the pendency of any appeal.

125. In order to avoid the risks on appeal and any further delay to Exaction Class members who paid the exaction nearly a decade ago, Class Counsel negotiated a significant Settlement, primarily discounted for the time value of money over the course of the appeal. Indeed, when factoring in the time value of money over the course of the appeal, this recovery is roughly the same as the $185 million Judgment.

126. It has been nearly a decade since Class Representative and the Exaction Class were improperly required to contribute to the TRP, and it has taken years of litigation to reach this juncture in the litigation. In Class Counsel's view, a final result representing over 91% of recoverable damages is exceptional.

V. COMPLIANCE WITH THE COURT'S PRELIMINARY APPROVAL ORDER AND REACTION OF THE EXACTION CLASS TO DATE

127. By its Preliminary Approval Order, the Court approved JND (the administrator that conducted the opt-in notice campaign) to act as Settlement Administrator. ECF No. 143, ¶ 2. As Settlement Administrator, JND was responsible for: (i) emailing the Notice to all 357 Exaction Class Members at the e-mail addresses provided in connection with the opt-in notice process; and (ii) displaying the Notice, operative Complaint, Settlement Agreement, and Preliminary Approval Order on the website for the matter (www.TRPLitigation.com/exaction). *Id.* at ¶ 3(a). The Notice

contains important information concerning the Settlement, along with the rights of Exaction Class members in connection therewith, including their right (and the deadline) to file a written objection to the Settlement, Class Counsel's request for attorneys' fees and litigation expenses and the case contribution award to EWTF. The Notice also provides an explanation of the procedures for allocating and distributing the funds pursuant to the Settlement, the date and time of the Fairness Hearing, and how to obtain more information. The Notice also informs recipients of Class Counsel's intent to apply for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund plus litigation expenses, as well as a case contribution award to EWTF.

128. In accordance with the Preliminary Approval Order, JND emailed the Notice to the 357 Exaction Class members by March 7, 2024. Segura Decl., ¶ 9. For the 15 Exaction Class members whose emails were returned as undeliverable, JND mailed the Notice by overnight mail. *Id*. at ¶ 11. In addition, JND posted the required documents on the case website. *Id*. at ¶ 14.

129. JND also updated and currently maintains the dedicated case website, www.TRPLitigation.com/exaction, to provide Exaction Class members with information concerning the Settlement and the important dates and deadlines in connection therewith, as well as downloadable copies of the Notice and other Settlement-related documents. *Id*. at ¶ 14. Additionally, JND maintains a toll-free hotline and interactive voice response system to respond to inquiries. *Id*. at ¶ 16. Exaction Class members with questions can also contact JND by sending an email to the case-specific e-mail address, info@TRPLitigation.com. *Id*. at ¶ 15.

130. As noted above and as set forth in the Notice, the deadline for objecting to any aspect of the Settlement, including Class Counsel's request for fees and expenses, is April 10, 2024. To date, there have been no objections. Should any objections be received, Class Counsel will address them in their reply to be filed no later than April 24, 2024.

VI. THE PLAN FOR ALLOCATING THE NET SETTLEMENT FUND TO THE EXACTION CLASS IS FAIR, REASONABLE, AND ADEQUATE

131. As set forth in the Notice, Exaction Class members will receive their *pro rata* share of the Net Settlement Fund (i.e., the Settlement Amount less Court-approved fees, expenses, and any case contribution award), based on the total amount of the Exaction Class member's 2014 TRP contribution.

132. More specifically, each Exaction Class Member's payment amount will be determined by (i) dividing their respective 2014 TRP contribution (as set forth in Exhibit 1 to the Judgment) by the total 2014 TRP contributions for all Exaction Class members—with the resulting fraction expressed as a percentage that is then (ii) multiplied by the Net Settlement Fund.

133. Once the Settlement receives final approval and the Government has paid the Settlement Amount, JND will send each Exaction Class member their *pro rata* payment by check or wire transfer. With respect to check payments, in the event JND is unable to locate a valid mailing address, the amount represented by that check shall revert to the Net Settlement Fund and be redistributed to Exaction Class members on a *pro rata* basis, up to an amount that represents Exaction Class members' individual TRP contributions. *See* Settlement Agreement, ¶ 22.

134. If any settlement payment check remains uncashed 90 days after issuance, that check shall be void, and the amounts represented by that uncashed check shall revert to the Net Settlement Fund and be redistributed to Exaction Class members on a *pro rata* basis, up to an amount that represents Exaction Class members' individual TRP contributions. In the event redistribution of uncashed settlement funds would result in settlement payments in excess of Exaction Class members' TRP contributions, JND shall return the exceeding amount to the Government. *Id.* at ¶ 23.

135. To date, there have been no objections to this proposed plan for allocating and distributing the Net Settlement Fund.

VII. THE FEE AND EXPENSE APPLICATION

136. In addition to seeking final approval of the Settlement, Class Counsel are applying for an award of attorneys' fees and expenses incurred during the course of the Action. Specifically, Class Counsel are applying for attorneys' fees in the amount of 25% of the Settlement Amount (net of expenses) and for out-of-pocket costs and expenses in the total amount of $513,631.77.[7] In addition, Class Counsel also seek a case contribution award of $25,000 for Class Representative who devoted significant time and effort to the Action during its pendency. As noted above, Class Counsel's Fee and Expense Application is consistent with what was set forth in the Notice and, to date, not one objection to Class Counsel's request for attorneys' fees, expenses, and/or case contribution award has been received.

137. Below is a summary of the primary factual bases for Class Counsel's Fee and Expense Application. A full analysis of the factors considered by Federal Claims courts when evaluating requests for attorneys' fees and expenses from a common fund, as well as supporting legal authority, is presented in the accompanying Fee Memorandum.[8]

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[7] A breakdown of Kessler Topaz's time and expenses is included with this Declaration. Paragraph 148 below provides a chart listing the attorneys and professional support staff members at Kessler Topaz who worked on the Action, their hourly rates, and the lodestar value of the time expended by such attorneys and professional support staff. Paragraph 153 below provides a chart listing the expenses incurred by Kessler Topaz by category. The time and expenses incurred by McChesney & Dale are included in the Declaration of Charles F. Fuller ("Fuller Declaration" or "Fuller Decl."), Appx. Ex. B. The Fuller Declaration along with the Declaration of William P. Dale, (Appx. Ex. C), provide additional detail regarding the work performed by McChesney & Dale.

[8] Federal Claims courts are guided by the following factors when determining whether a fee percentage sought from a common fund is fair and reasonable: (1) the quality of counsel, (2) the complexity and duration of the litigation, (3) the risk of nonrecovery, (4) the fee that likely would have been negotiated between private parties in similar cases, (5) any class members' objections to the settlement terms or fees requested by class counsel, (6) the percentage applied in other class

A. Class Counsel's Fee Request Is Fair and Reasonable and Warrants Approval

1. The Result Achieved and the Quality of Counsel

138. The $169 million cash Settlement is an exceptional result—providing for a substantial (and certain) recovery of ***91.25%*** of the Exaction Class's damages (i.e., a mere 8.75% reduction on the total damages awarded in the Court's Judgment). This level of recovery in a class action is rare. Moreover, as a result of the Settlement, Exaction Class members will receive meaningful compensation for their losses ***now***—while avoiding the risk, delay, and expense of litigating Defendant's pending appeal, which could have further delayed any recovery for additional years. Notably, the average recovery for Exaction Class members, net of fees and expenses, is more than $350,000, with more than half of the Exaction Class (182 plans) receiving more than $100,000 each and almost 10% of the Exaction Class (30 plans) receiving more than $1 million each.

139. This recovery would not have been possible without the dedicated efforts of Class Counsel, who have been prosecuting the Exaction Class's claims for nearly a decade. Class Counsel are experienced in complex class actions, and have long and successful track records representing class members in such cases. The result here reflects the superior quality of this representation. And, there is no doubt Class Counsel's experience (and persistence) led directly to the extraordinary result achieved.

140. The quality of the work performed by Class Counsel in obtaining the Settlement should also be evaluated in light of the quality of opposing counsel. The DOJ was a formidable opponent and its attorneys possessed undeniable experience and skill. In the face of this formidable

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actions, and (7) the size of the award. *See Moore v. United States*, 63 Fed. Cl. 781, 786 (2005). *See also* Fee Memorandum, § III.C.

defense, Class Counsel were nonetheless able to develop a case that was sufficiently strong to persuade the Government to settle the Action on terms favorable to the Exaction Class.

2. The Risks of Litigation and the Need to Ensure the Availability of Competent Counsel in High-Risk Contingent Cases

141. The risks faced by Class Counsel in prosecuting this Action are highly relevant to the Court's consideration of an award of attorneys' fees, as well as its approval of the Settlement. Here, as detailed above and in the accompanying memoranda, Class Counsel had to overcome significant adversity in prosecuting the Exaction Class's claims, which were novel, and without a clear litigation path.

142. These case-specific litigation risks are in addition to the risk that Class Counsel undertook prosecuting the Action on a contingent-fee basis. From the outset, Class Counsel understood that this would be a complex, expensive, and potentially lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and financial expenditures that vigorous prosecution of the case would require. In undertaking that responsibility, Class Counsel were obligated to ensure that sufficient resources (in terms of attorney and support-staff time) were dedicated to prosecuting the Action, and that funds were available to compensate vendors and consultants and to cover the considerable out-of-pocket costs that a case like this typically demands. With a typical lag time of several years for these cases to conclude—and in this case, nearly a decade—the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an hourly, ongoing basis.

143. Class Counsel also bore the risk that no recovery would be achieved. Class Counsel are aware that despite the most vigorous and competent efforts, a law firm's success in contingent litigation such as this is never guaranteed. Moreover, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win at trial, or

to persuade a sophisticated defendant to engage in serious settlement negotiations at meaningful levels. Indeed, Class Counsel are acutely aware of many hard-fought lawsuits in which, because of the discovery of facts unknown when the case commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts by counsel produced no fee.

144. Class Counsel's efforts, in the face of substantial risks and uncertainties, have resulted in a substantial and certain recovery for the Exaction Class. In these circumstances, and in consideration of Class Counsel's hard work and the exceptional result achieved for the Exaction Class, Class Counsel believe their fee request is fair and reasonable and should be approved.

3. The Time and Labor Devoted by Class Counsel

145. Class Counsel have prosecuted this Action for nearly a decade. As noted above, during the course of the Action, Class Counsel: (i) exhaustively investigated the Exaction Class's claims; (ii) researched and prepared multiple complaints based on that investigation; (iii) opposed (and defeated) Defendant's motion to dismiss in this Court; (iv) engaged in discovery, including participating in numerous meet and confers with Defendant over the scope of discovery; (v) successfully moved for class certification; (vi) assisted in a vigorous notice campaign, including the review and analysis of over 600 opt-in requests; (vii) defended the Exaction Class against Defendant's objections to membership (which would have erased nearly $100 million from the Judgment); (viii) successfully moved for summary judgment and secured a Judgment for 100% of the Exaction Class's damages; and (ix) engaged in several weeks of settlement negotiations with Defendant. Moreover, Class Counsel will continue to perform legal work on behalf of the Exaction Class through the Fairness Hearing and beyond. Additional resources will be expended assisting with inquiries from Exaction Class members and working with JND to distribute the Net Settlement Fund. No additional legal fees will be sought for this work.

146. Throughout the Action, Class Counsel maintained an appropriate level of staffing that avoided unnecessary duplication of effort and ensured the efficient prosecution of this Action. As the lead partner on the case, I personally monitored and maintained control of the work performed in this Action.

147. Class Counsel have spent a total of 9,042 hours on this Action from the time when potential claims were being investigated through March 22, 2024, resulting in an aggregate lodestar (i.e., hours multiplier by current hourly rates) of $6,351,779.50. Class Counsel have removed certain time from their lodestar that could be attributed to the takings claim after summary judgment was granted in favor of the Exaction Class. In addition, no time expended on the application for attorneys' fees and expenses is included in the lodestar.

148. Based on my work in the Action, as well as the review of time records reflecting work performed by other attorneys and professional support staff at or on behalf of Kessler Topaz in the Action ("Timekeepers"), as reported by the Timekeepers, I directed the preparation of the chart below. The below chart: (i) identifies the names and employment positions (i.e., titles) of the Timekeepers who devoted ten (10) or more hours to the Action; (ii) provides the number of hours that each Timekeeper expended in connection with work on the Action, from the time when potential claims were being investigated through March 22, 2024; (iii) provides each Timekeeper's current hourly rate;[9] and (iv) provides the lodestar of each Timekeeper and the entire firm. The chart was prepared from daily time records regularly prepared and maintained by my firm in the ordinary course of business, which are available at the request of the Court. As noted above, certain time has been excluded from my firm's lodestar (*see supra* ¶ 147). I believe that the number of

[9] For personnel who are no longer employed by my firm, the lodestar calculation is based upon the hourly rates for such personnel in his or her final year of employment by my firm.

hours expended and the services performed by the attorneys and professional support staff employees at or on behalf of Kessler Topaz were reasonable and necessary for the effective and efficient prosecution and resolution of the Action on behalf of the Exaction Class. My firm's current hourly rates are largely based upon a combination of the title, the specific years of experience for each attorney and professional support staff employee, as well as market rates for practitioners in the field. These hourly rates are comparable to rates previously submitted by Kessler Topaz, which have been accepted by courts in other complex contingent class actions for purposes of "cross-checking" lodestar against a proposed fee based on the percentage-of-the-fund method.

Kessler Topaz Meltzer & Check, LLP Time Report From Inception Through March 22, 2024			
NAME	**HOURLY RATE**	**HOURS**	**LODESTAR**
Partners			
Eric Gerard	$780.00	90.60	$70,668.00
Joseph Meltzer	$1,195.00	836.40	$999,498.00
Melissa Yeates	$1,145.00	1563.30	$1,789,978.50
Counsel / Associates			
Varun Elangovan	$480.00	1021.30	$490,224.00
Jennifer Enck	$750.00	120.40	$90,300.00
Mark Franek	$505.00	40.40	$20,402.00
Brandon Herling	$390.00	22.50	$8,775.00
Samantha E. Holbrook	$450.00	655.40	$294,930.00
Jordan Jacobson	$620.00	313.90	$194,618.00
Natalie Lesser	$535.00	33.20	$17,762.00
Lauren McGinley	$480.00	199.20	$95,616.00
Jonathan Neumann	$750.00	1531.80	$1,148,850.00
Kye Kyung Park	$480.00	10.80	$5,184.00
Ardit Prifti	$400.00	58.90	$23,560.00
Christopher Reese	$450.00	42.00	$18,900.00
Kelsey Sheronas	$510.00	509.70	$259,947.00
Staff Attorneys			
Andrew Peoples	$455.00	117.40	$53,417.00

Contract Attorney			
Dominique Grenier	$370.00	511.50	$189,255.00
Paralegals			
Megan Corson	$320.00	182.70	$58,464.00
Courtney Hemsley	$405.00	390.70	$158,233.50
Deborah Moffo	$250.00	140.40	$35,100.00
Ron Muchnick	$250.00	37.20	$9,300.00
Lacey Russo	$275.00	54.50	$14,987.50
Julie Wotring	$320.00	15.50	$4,960.00
Investigators			
Sarah Eidle	$300.00	11.00	$3,300.00
Kerry Seidel	$400.00	11.10	$4,440.00
TOTALS		**8,521.80**	**$6,060,669.50**

149. McChesney & Dale incurred an additional 520.20 hours on the Action, resulting in a lodestar of $291,110.00. The time incurred by McChesney & Dale is fully set forth in the Fuller Declaration.

150. Thus, pursuant to a lodestar "cross-check," Class Counsel's fee request of 25% of the Settlement Amount (net of expenses) would yield a multiplier of approximately 6.63 on Class Counsel's aggregate lodestar of $6,351,779.50. This multiplier falls within the range of multipliers awarded by courts in other complex cases. *See* Fee Memorandum, § III.D; Appx. Ex. F, Declaration of Brian T. Fitzpatrick at ¶¶ 25-26.

B. Class Counsel's Request for Expenses Warrants Approval

151. Class Counsel also seek payment from the Settlement Fund of $513,631.77 for out-of-pocket costs and expenses that were reasonably and necessarily incurred by Class Counsel in connection with the Action. The Notice informed Exaction Class members that Class Counsel would be requesting payment of these expenses.

152. From the inception of the Action, Class Counsel were aware that they might not recover any of the costs and expenses they incurred in prosecuting the claims against Defendant and, at a minimum, would not recover any expenses until the Action was successfully resolved.

Class Counsel also understood that, even assuming the Action was ultimately successful, an award of costs and expenses would not compensate counsel for the lost use or opportunity costs of funds advanced to prosecute the claims against Defendant. Class Counsel were motivated to, and did, take appropriate steps to avoid incurring unnecessary expenses and to minimize costs without compromising their vigorous and efficient prosecution of the Action. Class Counsel maintained strict control over the expenses in this Action.

153. Class Counsel have incurred a total of $513,631.77 in out-of-pocket costs and expenses in connection with the Action. The below chart sets forth the expenses (by category) incurred by Kessler Topaz. These expenses are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records, and other source materials, and are an accurate record of the expenses incurred.

Kessler Topaz Meltzer & Check, LLP Expense Report	
Expense Category	**Total**
Commercial Copies	$847.73
Internal Reproduction/Copies – 58,113 @ 0.10 per page	$5,811.30
Online Research	$57,171.69
Court Fees (filings, etc.)	$1,126.00
Court Reporters/Transcripts	$2,368.17
Postage/Overnight Mail/Messenger	$698.04
Expert Fees	$80,807.45
Settlement Administrator (Opt-In Notice and Settlement Administration Costs)	$341,159.39
Travel (Transportation, Meals, Lodging, etc.)	$6,499.69
Document Hosting	$15,338.03
TOTAL	**$511,827.49**

154. McChesney & Dale incurred an additional $1,804.28 in expenses. McChesney & Dale's expenses are documented in the Fuller Declaration. These expenses breakdown as follows: (i) $1,055.00 for court fees; (ii) $475.00 for service of process costs; (iii) $65.34 for overnight mail and postage; (iv) $19.71 for internal reproduction costs; and (v) $189.23 for out-of-town travel.

155. Class Counsel also request a case contribution award in the amount of $25,000 to EWTF for its work as Class Representative on behalf of the Exaction Class. EWTF has been committed to pursuing the Exaction Class's claims since it became involved in the Action in 2016. Specifically, its efforts included, among other things: (i) engaging in initial discussions with Class Counsel for purposes of gathering facts to assist in the development of EWTF's claims; (ii) reviewing and commenting on all material Court submissions and other case documents; (iii) participating in discovery, including responding to initial disclosures, 24 document requests, and 16 interrogatories served by Defendant and gathering and producing over 2,000 pages of documents; (iv) participating in discussions with Class Counsel regarding litigation strategy and developments in the litigation, including settlement; and (v) approving the Settlement. McCarron Decl., ¶¶ 7-12, 18. These efforts are precisely the types of activities courts have found to support these types of awards.

VIII. CONCLUSION

156. For all the reasons set forth above, Class Counsel respectfully submit that the Settlement and the Plan of Allocation should be approved as fair, reasonable, and adequate. Class Counsel further submit that the requested fee in the amount of 25% of the Settlement Amount (net of expenses) should be approved as fair and reasonable, and the request for Class Counsel's out-of-pocket costs and expenses in the amount of $513,631.77, and a case contribution award to Class Representative in the amount of $25,000, should be approved.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 27th of March, 2024.

JOSEPH H. MELTZER

EXHIBIT B

In the United States Court of Federal Claims

THE ELECTRICAL WELFARE TRUST FUND, THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., and THE STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND on behalf of themselves and all others similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 19-353 C Judge Roumel

DECLARATION OF CHARLES F. FULLER ON BEHALF OF MCCHESNEY & DALE, P.C. IN SUPPORT OF (I) MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN FOR ALLOCATING NET SETTLEMENT FUND TO EXACTION CLASS MEMBERS; AND (II) MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARD

I, Charles F. Fuller, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a Principal of the law firm of McChesney & Dale, P.C. ("McChesney & Dale").[1] I submit this Declaration in support of Motion for Final Approval of Settlement and Plan for Allocating Net Settlement Fund to Exaction Class Members and Motion for an Award of Attorneys' Fees, Expenses, and Case Contribution Award in the above-captioned class action ("Action"). Unless otherwise stated herein, I have personal knowledge of the facts set forth herein and, if called upon, could and would testify thereto.

[1] Capitalized terms that are not defined in this Declaration have the same meanings as set forth in the Settlement Agreement dated February 16, 2024. ECF No. 142-1.

2. My firm, along with Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"), serves as Court-appointed Class Counsel for Class Representative EWTF and the Exaction Class. My firm has been involved in this Action since its inception and has been involved in the following activities on behalf of Class Representative and the Exaction Class: (1) studying and analyzing the Transitional Reinsurance Program (hereafter "TRP") statute and implementing federal regulations; (2) investigating the TRP; (3) communicating with national and regional employee benefit plans and associations concerning the TRP and its impact on employee benefit health and welfare plans; (4) reviewing publications discussing the TRP and its impact; (5) preparing comments to the Centers for Medicare and Medicaid Services, Department of Health and Human Services on proposed rules published in the Federal Register relating to the TRP and the proposed definition of "contributing entity", the inclusion of the proposed definition of "Third Party Administrator", and the scope of services that would constitute "use" under the TRP; (6) researching causes of action for the application of the TRP to Class Representative and similarly situated employee benefit health and welfare plans (i.e., the Exaction Class); (7) reviewing and/or drafting and/or commenting upon pleadings including the Complaint, First Amended Complaint and Second Amended Complaint, motions to dismiss the complaints and responses thereto, motions for summary judgment and responses thereto, motion for class certification, and other pleadings; (8) providing assistance to the Class Representative as needed in responding to discovery requests from Defendant or assisting Kessler Topaz with same; (9) communicating with, meeting with, and assisting Kessler Topaz and the Class Representative throughout the Action; and (10) assisting Kessler Topaz with the proposed settlement before the Court, communicating with and fully advising the Class Representative on the proposed settlement, and fully responding to questions

and concerns of the Class Representative concerning the proposed settlement, including through presentations to EWTF's Board of Trustees.

3. The schedule attached hereto as Exhibit 1 is a summary indicating the amount of time spent by the attorneys of my firm who devoted ten (10) or more hours to the Action, from the time when potential claims were being investigated through March 20, 2024. The lodestar calculation for myself is based on my current hourly rate and for Mr. Dale, who is no longer employed by my firm, his hourly rate in his final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. No time expended on the application for attorneys' fees and expenses, or related to takings matters after judgment was entered for the Exaction Class, has been included.

4. The hourly rates for the attorneys in my firm included in Exhibit 1 are their standard rates for similar litigation matters. My firm's hourly rates are largely based upon a combination of the title, cost to the firm, and the specific years of experience for each attorney, as well as market rates for practitioners in the field. These hourly rates are the same as the usual and customary hourly rates charged for their services in similar litigation matters.

5. The total number of hours expended by McChesney & Dale in the Action, from inception through March 20, 2024, as reflected in Exhibit 1, is 520.20. The total lodestar for McChesney & Dale, as reflected in Exhibit 1, is $291,110.00, consisting entirely of attorneys' time.

6. Expense items are being submitted separately and are not duplicated in my firm's hourly rates. As set forth in Exhibit 2 hereto, McChesney & Dale is seeking reimbursement for a

total of $1,804.28 in expenses incurred in connection with the prosecution and resolution of the Action.

7. The expenses incurred by McChesney & Dale in the Action are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

I hereby declare under penalty of perjury that the foregoing facts are true and correct.

Executed on March 26, 2024.

/s/ Charles F. Fuller
CHARLES F. FULLER

EXHIBIT 1

The Electrical Welfare Trust Fund, et al. v. United States of America
Civil Action No. 19-353 C (Fed. Cl.)

MCCHESNEY & DALE, P.C.

TIME REPORT

From Inception Through March 20, 2024

NAME	HOURLY RATE	HOURS	LODESTAR
Partners			
William P. Dale	$600.00	309.60	$185,760.00
Charles F. Fuller	$500.00	210.60	$105,350.00
TOTALS		520.20	$291,110.00

EXHIBIT 2

The Electrical Welfare Trust Fund, et al. v. United States of America
Civil Action No. 19-353 C (Fed. Cl.)

MCCHESNEY & DALE, P.C.

EXPENSE REPORT

CATEGORY	AMOUNT
Court Filing and Other Fees	$1,055.00
Service of Process	$ 475.00
Overnight Mail & Postage	$ 65.34
Internal Reproduction Costs	$ 19.71
Out of Town Travel (Transportation, Hotels & Meals)	$ 189.23
TOTAL EXPENSES:	**$1,804.28**

EXHIBIT C

In the United States Court of Federal Claims

THE ELECTRICAL WELFARE TRUST FUND, THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., and THE STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND on behalf of themselves and all others similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 19-353 C Judge Roumel

DECLARATION OF WILLIAM P. DALE IN SUPPORT OF (I) MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN FOR ALLOCATING NET SETTLEMENT FUND TO EXACTION CLASS MEMBERS; AND (II) MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARD TO CLASS REPRESENTATIVE

1. I, William P. Dale, am the founder of McChesney & Dale, P.C. ("McChesney & Dale"), and was a Principal of the firm until my retirement in December 2019.

2. I submit this Declaration in support of the Motion for Final Approval of Settlement and Plan for Allocating Net Settlement Fund to Exaction Class Members and the Motion for an Award of Attorneys' Fees, Expenses, and Case Contribution Award to Class Representative. I have personal knowledge of the facts set forth herein and, if called upon, could and would testify thereto.

3. On March 10, 2013, Congress passed the Affordable Care Act, which constituted a massive restructuring of healthcare in the United States. On December 2, 2013, the Department of Health and Human Services (HHS) published regulations which, in Part 153, Section 153.20, established a definition of "contributing entity" for purposes of that Act.

4. At the time, I represented a Taft-Hartley, ERISA, trust fund known as the Electrical Welfare Trust Fund (EWTF). Pursuant to those regulations, HHS's definition of contributing entity resulted in EWTF being compelled to pay a transitional reinsurance contribution for 2014 in excess of $1 million.

5. In my view, EWTF received no benefit for making that payment, nor should it have had to make that payment under the Affordable Care Act. I wrote a lengthy comment to HHS on December 24, 2013, regarding the impropriety of the HHS regulation. Although the final regulations reflected changes that made these regulations less onerous to my client in subsequent years (2015, 2016), the final regulations did not relieve the fund of its $1 million payment for benefit year 2014.

6. The Employee Retirement Income Security Act of 1974 provides that assets held in a Taft-Hartley welfare trust fund must be used for the exclusive benefit of the participants and

beneficiaries of the fund. In my view, the HHS regulations and its definition of "contributing entity" were contrary to law. I believed it was wrong for the regulations to impose the transitional reinsurance contribution on my client, as well as on other trust funds similarly situated, of which there were many.

7. At that time, I had recently coordinated litigation in a separate matter with the law firm of Kessler Topaz Meltzer Check, LLP, resulting in a favorable result to our mutual client. I knew the firm to be specialists in large class action litigation, and I considered it to be highly qualified and capable of addressing this substantial issue in court. I felt that the HHS regulations constituted a grave disservice to many trust funds and believed institution of litigation to be appropriate. I knew Joseph Meltzer from the prior litigation and contacted him to address my concerns and to see if he and his firm would be available to undertake representation of EWTF and a proposed class of similarly situated trust funds. On March 7, 2014, I wrote him a letter enclosing my commentary, and commentary provided to me by the National Coordinating Committee for Multi-Employer Plans (NCCMP), outlining its objections to these regulations, and requesting to meet with Mr. Meltzer to discuss possible representation.

8. Although I believed the regulations to constitute a violation of the rights of ERISA plans, and their participants and beneficiaries, I was aware of no other effort in the United States to remedy these violations of the law. I therefore felt that it was necessary to actively advocate for this litigation and sought Mr. Meltzer's help in pursuing it. I also attempted to get the NCCMP involved, as its mission is to provide legislative assistance on behalf of multiemployer trust funds, but I did not get a favorable response from them.

9. I did meet with Mr. Meltzer and ultimately was able to convince him that pursuing these claims through class action litigation would be feasible and appropriate and, thankfully, Joe

and his firm took the case, filed it, and have very doggedly pursued it to a very successful resolution, resulting in recoveries to hundreds of multi-employer plans.

10. Getting Mr. Meltzer to agree to take this litigation, however, took quite a bit of effort and over two years.

11. Mr. Meltzer and I had numerous discussions regarding the novel nature of the claims and the feasibility of litigation on a class basis. I initially contacted him on March 7, 2014, seeking his involvement. I then contacted him multiple times to urge his involvement, preparing several detailed memoranda addressing legal points that I believed supported pursuing the claims.

12. Mr. Meltzer recognized the significant risks associated with pursuing the claims and funding the litigation. Indeed, on September 1, 2015, he wrote me and told me with respect to the litigation that "it's an uphill climb." After I responded with another legal memo, he wrote me on September 30, 2015, telling me "while we're not prepared to say you've changed our minds, we will concede that your arguments were persuasive and we'd like to discuss further." Mr. Meltzer's open mind proved extremely beneficial for our client.

13. Mr. Meltzer met with EWTF to undertake his engagement on March 29, 2016.

14. I wish to express my gratitude to Mr. Meltzer and the members of his firm for their outstanding legal services throughout this litigation.

I hereby declare under penalty of perjury that the foregoing facts are true and correct. Executed on March 25, 2024.

WILLIAM P. DALE

EXHIBIT D

In the United States Court of Federal Claims

THE ELECTRICAL WELFARE TRUST FUND, THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., and THE STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND on behalf of themselves and all others similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 19-353 C Judge Roumel

DECLARATION OF MICHAEL MCCARRON IN SUPPORT OF (I) MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN FOR ALLOCATING NET SETTLEMENT FUND TO EXACTION CLASS MEMBERS; AND (II) MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARD TO CLASS REPRESENTATIVE

I, Michael McCarron, declare as follows:

1. I am the Fund Administrator for the Electrical Welfare Trust Fund ("EWTF"), the Court-appointed Class Representative in this class action ("Action").[1]

2. I submit this Declaration in support of Motion for Final Approval of Settlement and Plan for Allocating Net Settlement Fund to Exaction Class Members and the Motion for an Award of Attorneys' Fees, Expenses, and Case Contribution Award to Class Representative. I have

[1] Unless otherwise defined in this Declaration, all capitalized terms have the meanings set forth in the Settlement Agreement (ECF No. 142-1).

personal knowledge of the matters set forth in this Declaration and, if called upon, I could and would testify competently thereto.

3. EWTF is a multiemployer health and welfare trust fund established by and between the International Brotherhood of Electrical Workers Local Union No. 26 and the National Electrical Contractors Association—Washington D.C. Chapter located in Lanham, Maryland.

4. EWTF is a Taft-Hartley trust fund, established through the collective bargaining process and subject to the provisions of the Employee Retirement Income Security Act of 1974, which provides health and welfare benefits to eligible participants, including union electricians performing work under the applicable collective bargaining agreement in Washington D.C., Maryland, and Virginia.

5. Like other members of the Exaction Class, EWTF is self-administered. Thus, it (1) determines plan eligibility and controls enrollment for its participants; (2) performs claims processing and adjudication; and (3) directly pays the health care costs incurred by its participants and beneficiaries.

6. EWTF was required by Defendant to pay the Transitional Reinsurance Contribution for benefit year 2014 and paid $1,038,429 to the federal government.

I. EWTF's Involvement in and Oversight of the Action on Behalf of the Exaction Class

7. EWTF has been involved in this litigation since its inception. EWTF's Board of Trustees formally authorized its involvement as a lead plaintiff during a Board meeting on March 29, 2016. On June 22, 2022, the Court formally appointed EWTF as Class Representative for the Exaction Class.

8. From the outset of the litigation, EWTF has been committed to prosecuting this case and maximizing the recovery for the Exaction Class. As the Class Representative, EWTF

understood that it owed a fiduciary duty to all Exaction Class members to provide fair and adequate representation and has diligently worked with counsel to prosecute the case vigorously.

9. On behalf of EWTF, I have personally reviewed and monitored the progress and the prosecution of this litigation by Kessler Topaz Meltzer & Check, LLP and McChesney & Dale, P.C. (together, "Class Counsel"). In particular, I have, *inter alia*: (i) received and reviewed periodic updates and other correspondence from Class Counsel regarding the case; (ii) reviewed and commented on all material Court submissions and other case documents; (iii) participated in discovery to date, including responding to initial disclosures, 24 document requests, and 16 interrogatories; (iv) gathered and produced over 2,000 pages of documents on behalf of EWTF; and (v) participated in discussions with Class Counsel regarding litigation strategy and developments in the litigation, including settlement.

10. EWTF authorized and closely followed all settlement negotiations. EWTF's Board of Trustees formally approved the principal terms of the settlement during a Board meeting held in June 2023. EWTF also reviewed and approved the Settlement Agreement that was executed by Class Counsel and Defendant on February 16, 2024.

11. Further, EWTF has reviewed the briefs and other documents related to the Settlement, including those that were submitted in connection with preliminary approval, and those that are presently being submitted in support of (i) Motion for Final Approval of Settlement and Plan for Allocating the Net Settlement Fund to Exaction Class Members; and (ii) Motion for Attorneys' Fees, Expenses, and Case Contribution Award to Class Representative.

II. EWTF Endorses Approval of the Settlement

12. Based on its involvement throughout the prosecution and resolution of the Action, EWTF believes that the proposed Settlement is fair, reasonable, and adequate and in the best interest of the Exaction Class. Moreover, EWTF believes that the Settlement represents an

exceptional recovery for the Class, particularly given (i) the Settlement recovers 91.25% of all recoverable damages against the Government; (ii) the time that has elapsed since Exaction Class members were forced to make TRP Contributions in 2014; and (iii) the continued risk and delay of litigating the Government's appeal. Therefore, EWTF strongly endorses approval of the Settlement by the Court.

III. EWTF Supports Class Counsel's Motion for Attorneys' Fees and Litigation Expenses

13. While it is understood that the ultimate determination of Class Counsel's attorneys' fees and expenses rests with the Court, EWTF supports Class Counsel's request for attorneys' fees in the amount of 25% of the Settlement Amount (which represents a lodestar multiplier of 6.63).

14. Moreover, EWTF takes seriously its role as Class Representative to ensure that the attorneys' fees are fair in light of the result achieved for the Exaction Class, the work performed by Class Counsel, and the substantial risks involved in the Action. Here, EWTF believes that the requested fee is fair and reasonable in light of the $169 million recovery obtained for the Exaction Class—which represents 91.25% of all recoverable damages—the excellent work performed by Class Counsel over the course of many years, and the risks and challenges undertaken by Class Counsel in litigating the Action.

15. EWTF further believes that the litigation expenses requested by Class Counsel are reasonable, and represent costs and expenses necessary for the successful prosecution and resolution of this case.

16. Based on the foregoing, and consistent with its obligation to the Exaction Class to obtain the best result at the most efficient cost, EWTF fully supports Class Counsel's request for attorneys' fees and litigation expenses.

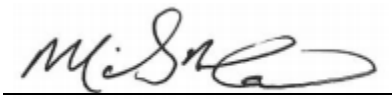
17. Finally, EWTF understands that any case contribution award is entirely at the discretion of the Court. The facts upon which this declaration is based are in no way dependent on the Court's determination with respect to the contribution award. EWTF supports the settlement and Class Counsel's fee request irrespective of how the Court rules with respect to the request for a case contribution award.

IV. Conclusion

18. In conclusion, EWTF was closely involved throughout the prosecution and resolution of the claims in the Action and strongly endorses the Settlement as fair, reasonable, and adequate, and believes it represents a truly excellent recovery for the Exaction Class. EWTF further supports Class Counsel's request for attorneys' fees and litigation expenses, in light of the work performed by Class Counsel, the excellent recovery obtained for the Exaction Class, and the risks to litigating this case and securing the settlement.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 25th day of March, 2024



Michael McCarron

EXHIBIT E

In the United States Court of Federal Claims

THE ELECTRICAL WELFARE TRUST FUND, THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., and THE STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND on behalf of themselves and all others similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 19-353 C Judge Roumel

DECLARATION OF LUIGGY SEGURA REGARDING SETTLEMENT ADMINISTRATION

I, Luiggy Segura, hereby declare under penalty of perjury as follows:

1. I am the Vice President of Securities Class Actions at JND Legal Administration ("JND"). Pursuant to the Court's Order dated February 21, 2024 (ECF No. 143) ("Preliminary Approval Order"), the Court approved JND to act as the Settlement Administrator in connection with the proposed settlement of the illegal exaction claim ("Settlement") in the above-captioned action ("Action").[1] I am over 21 years of age and am not a party to the Action. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could and would testify competently thereto.

[1] All capitalized terms used in this declaration that are not otherwise defined herein shall have the meanings ascribed to them in the Settlement Agreement dated February 16, 2024 (ECF No. 142-1) ("Settlement Agreement").

SETTLEMENT CLASS MEMBER DATA

2. The Court previously certified an opt-in class consisting of all self-administered, self-insured employee health and welfare benefit plans that are or were subject to the assessment and collection of the TRP contribution under Section 1341 of the Affordable Care Act for benefit year 2014. ECF No. 70. The opt-in period has concluded and a complete list of the 357 plans that submitted opt-in notice forms and were accepted as members of the Exaction Class by the Court is set forth in Exhibit A to the Settlement Agreement.

NOTICE PROGRAM

3. An adequate notice program must satisfy "due process" when reaching a class. The United States Supreme Court, in the seminal case of *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974), clearly stated that direct notice (when possible) is the preferred method for reaching a class. In addition, Rule 23(c)(2)(B) of the Rules of the United States Court of Federal Claims ("RCFC") requires that "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." RCFC 23(c)(2)(B).

4. JND routinely utilizes e-mail notification in our class action notice campaigns, as it did here. In JND's experience, when class members' e-mail addresses are available, e-mail notice is the best type of direct notice because email is currently the primary way that people communicate, and it is an inexpensive method of communication. Here, Exaction Class members provided e-mail addresses in connection with the opt-in process. As a result, it was determined that JND would implement the standard industry practice of sending e-mail notice to Exaction Class members first, and then follow up with a mailed notice to those Exaction Class members whose emails were returned as undeliverable.

5. JND uses industry-leading e-mail solutions in order to achieve the most efficient e-mail notification campaigns. JND's Data Team is staffed with e-mail experts and software solution teams to tailor-make each notice program. Further, JND provides individualized support during each notice program and manages our sender reputation with the Internet Service Providers ("ISPs"). For each of our e-mail notice programs, we analyze the program's data and monitor the ongoing effectiveness of the notification campaign, adjusting the campaign as needed. These actions ensure the highest possible deliverability of the emails so that as many class members receive notice as possible.

6. In this case, prior to sending emails, JND worked with Class Counsel to draft a cover email ("E-Mail Notice") for delivering the Court-approved Notice of Class Action Settlement ("Notice") and formatted the E-Mail Notice in a manner to improve deliverability. This process included running the E-mail Notice through spam testing software, URL shortening, reverse Domain Name System ("DNS") lookup, and hostname evaluation. Additionally, we checked the send domain against the 25 most common IPv4 blacklists. IPv4 refers to "Internet Protocol Version 4." IPv4 is the standard network addressing system for computer systems on the internet. IPv4 blacklists are maintained by various organizations to help in the identification of IP addresses flagged or blacklisted because of certain types of activity. During the course of any e-mail campaign, JND continuously monitors these blacklists for the appearance of IP addresses we are using to deliver emails in order to ensure that there is no impact to e-mail deliverability in the event that an IP address is incorrectly blacklisted.

7. In addition, for e-mail notice campaigns, JND utilizes a verification program to eliminate invalid e-mail addresses and spam traps that would otherwise negatively impact deliverability. JND then reviews the list of e-mail addresses for formatting and incomplete addresses

to further identify all invalid e-mail addresses. The e-mail notice is then formatted and structured in a way that receiving servers expect, allowing the e-mail notice to pass easily to the recipient.

8. To ensure readability of the E-mail Notice here, JND formatted the content of the E-mail Notice into a structure applicable to all e-mail platforms. Before starting the e-mail notice campaign, JND emailed a test E-mail Notice to multiple ISPs and opened the E-mail Notice on multiple devices (e.g., iPhones, other companies' phones, desktop computers, tablets, etc.) to ensure the E-mail Notice opened as expected.

9. On March 7, 2024, JND completed its initial notice campaign to the 357 verified e-mail addresses for Exaction Class members. The E-mail Notice attached the Notice and contained the Exaction Class member's unique Identification Number as well as a link to the Case Website (addressed below). A sample E-mail Notice is attached hereto as Exhibit A.

10. Of the 357 E-mail Notices sent, 342 were confirmed as delivered. A total of 15 E-mail Notices were returned undeliverable.

11. On March 11, 2024, JND disseminated the Notice via overnight mail to the 15 Exaction Class members whose E-mail Notices were returned undeliverable. As of the date of this declaration, all of the mailed Notices have been delivered.

REACH

12. The Federal Judicial Center's (FJC) Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide considers 70%-95% reach among class members to be a "high percentage" and reasonable. Here, the notice campaign to Exaction Class members exceeded those benchmarks. Here, 100% of Exaction Class members were reached (95.7% by email, and the remainder by overnight mail).

13. Aa a result, the notice program implemented here was consistent with other effective

class action notice programs, provided the best notice practicable under the circumstances of this case, and conformed to all aspects of RCFC 23.

CASE WEBSITE

14. The Case Website, www.TRPLitigation.com, was established in connection with the opt-in notice campaign that took place in September 2022. JND has posted multiple updates to the Case Website since September 2022, including information regarding the Settlement. The address for the Case Website was set forth in the E-mail Notice and the Notice. The Case Website includes information regarding the Action and the proposed Settlement, including the objection deadline, and details about the Court's Fairness Hearing. Copies of the Notice as well as the Settlement Agreement, Preliminary Approval Order, and operative Complaint are posted on the Case Website and are available for downloading. The Case Website is accessible 24 hours a day, 7 days a week. JND will continue to update the Case Website as necessary through the administration of the Settlement.

15. JND also established and currently maintains a dedicated e-mail address, info@TRPLitigation.com, to receive and respond to Exaction Class member inquiries.

TOLL-FREE NUMBER

16. In connection with the opt-in notice campaign, JND also established and continues to maintain a case-specific toll-free telephone number (1-877-654-1971) with interactive voice response ("IVR") technology, which Exaction Class members may call to obtain information about the Settlement, including responses to frequently asked questions and information about important dates and deadlines. The toll-free number is available 24 hours a day, 7 days a week. JND will continue to update the toll-free telephone number as necessary through the administration of the Settlement.

OBJECTIONS

17. The deadline for Exaction Class members to submit an objection to the Settlement, Class Counsel's request for an award of attorneys' fee and expenses, and the request for a case contribution award to Class Representative is April 10, 2024. The Notice informed recipients of the requirements for submitting an objection. Although objections are to be filed with the Court, with copies sent to Class Counsel and Defendant's Counsel, JND monitors its P.O. Box for objections.

18. As of the date of this declaration, JND has not received, and is not aware of, any objections.

FEES AND EXPENSES FOR SETTLEMENT ADMINISTRATION

19. JND has incurred approximately $47,000 in connection with providing notice of the Settlement to Exaction Class members and anticipates that it will incur an additional $103,000 through the conclusion of the administration, including for communicating with Exaction Class members regarding their payments, processing and distributing payments from the Settlement Fund, and handling any uncashed or remaining funds. Due to the large value of the payments to individual Exaction Class members, JND's work going forward will include quality assurance of the payment amounts and check recipient information, dissemination of overnight/express mailed payments (with signature receipts requested), and verification of electronic payments to ensure correct recipients/payment instructions.

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CONCLUSION

20. The notice program for this Settlement was designed to reach all Exaction Class members and provide them with the opportunity to review the plain language Notice and take steps to obtain additional information regarding the Settlement. In JND's opinion, the notice program described herein did just that. It provided the best notice practicable under the circumstances, was consistent with the requirements of RCFC 23 and all applicable court rules, and exceeded the "reach" of other court-approved best-notice-practicable notice programs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 26, 2024, in New Hyde Park, New York.

Luiggy Segura

Luiggy Segura

EXHIBIT A

From: info@TRPLitigation.com
To:
Subject: ACA TRP Litigation – Notice of Class Action Settlement

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Dear [Name],

We are writing to you as the Court-approved Settlement Administrator for the litigation captioned *Electrical Welfare Trust Fund v. United States*, Case No. 19-353C, currently pending in the United States Court of Federal Claims ("Action").

Please find attached the Notice of Class Action Settlement ("Notice"). The Notice can also be viewed on the case website at www.TRPLitigation.com/exaction.

You are receiving this Notice because you opted into the Action on behalf of the following entity or entities, who the Court accepted as part of the Exaction Class:

[Name(s)]	**[JND Unique ID]**

Should you have any questions regarding the Notice or the Settlement, please do not hesitate to contact us by calling 1-877-654-1971, emailing info@TRPLitigation.com, visiting the case website at www.TRPLitigation.com/exaction, or writing to:

TRP Litigation
c/o JND Legal Administration
PO Box 91381
Seattle, WA 98111

You may also contact Class Counsel:

Joseph H. Meltzer
jmeltzer@ktmc.com
Melissa L. Yeates
myeates@ktmc.com
Jonathan F. Neumann
jneumann@ktmc.com
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

Thank you and best regards,

To unsubscribe from this list, please click on the following link: Unsubscribe

EXHIBIT F

In the United States Court of Federal Claims

THE ELECTRICAL WELFARE TRUST FUND, THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., and THE STONE & MARBLE MASONS OF METROPOLITAN WASHINGTON, D.C. HEALTH AND WELFARE FUND on behalf of themselves and all others similarly situated, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 19-353 C Judge Roumel

DECLARATION OF BRIAN T. FITZPATRICK

I. My background and qualifications

1. I am the Milton R. Underwood Chair in Free Enterprise and 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. I speak only for myself and not for Vanderbilt.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. 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 NYU Journal of Law & Business, the Fordham Law Review, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been 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, 2017, 2019, and 2023; the Annual Conference of the ABA's Litigation Section in 2021; 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 the membership of the American Law Institute. In 2021, I became the co-editor (with Randall Thomas) of THE CAMBRIDGE HANDBOOK ON CLASS ACTIONS: AN INTERNATIONAL SURVEY.

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 one subject matter 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 also several times 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. *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. Since then, this study has been relied upon regularly by a number of courts, scholars, and testifying experts.[1] I have attached this study as Exhibit 2 and will draw upon it in this declaration.

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[1] *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *Kuhr v. Mayo Clinic Jacksonville*, No. 3:19-cv-453-MMH-MCR, 2021 WL 1207878, at *12-13 (M.D. Fla. Mar. 30, 2021) (same); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2020 WL 6891417, at *3 (S.D.N.Y. Nov. 24, 2020) (same); *Shah v. Zimmer Biomet Holdings, Inc.*, No. 3:16-cv-815-PPS-MGG, 2020 WL 5627171, at *10 (N.D. Ind. Sept. 18, 2020) (same); *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *In re Wells Fargo & Co. S'holder Derivative Litig.*, No. 16-cv-05541-JST, 2020 WL 1786159, at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, No. CV 11-10230-MLW, 2020 WL 949885, 2020 WL 949885, at *52 (D. Mass. Feb. 27, 2020), *appeal dismissed sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp*., No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CRB, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, No. 18 Civ. 455 (LGS), 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, No. 15–3509, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 3:07-cv-5944 JST, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, No. MDL 2328, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 58 F.Supp.3d 167, 172 (D. Mass. 2014) (same); *Tennille v. W. Union Co.*, No. 09–cv–00938–JLK–KMT, 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 & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, No. 11–1546, 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 Se. Milk Antitrust Litig.*, No. 2:07–CV 208, 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*, No. 10 C 816, 2011 WL

4. In addition to my empirical works, I have also published many law-and-economics papers on the incentives of attorneys and others in class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151 (2021) (hereinafter "*A Fiduciary Judge*"); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "*Class Action Lawyers*"); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Much of this work was discussed in a book published by the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019). The thesis of the book is that the so-called "private attorney general" is superior to the public attorney general in the enforcement of the rules that free markets need in order to operate effectively, and that courts should provide proper incentives to encourage such private attorney general behavior. I will also draw upon this work in this declaration.

5. I have been asked by class counsel to opine on whether the attorneys' fees they have requested here are reasonable in light of the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of documents; I have attached a list of these documents in Exhibit 3 (and describe there how I refer to them herein). As I explain, based on my study of settlements across the country, I believe the request here is reasonable in light of the empirical studies and research on economic incentives in class action litigation.

II. Case background

6. This litigation began in 2016 but the particular lawsuit that led to the present settlement was filed in 2019. The lawsuit alleges that the United States violated a federal statute

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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).

and ultimately the U.S. Constitution by exacting fees from the plaintiffs that they did not owe. After surviving a motion to dismiss, exchanging discovery, certifying a class, notifying the class members and collecting opt ins, class counsel won this lawsuit on summary judgment. But the United States appealed and the parties have now settled. The court preliminarily approved the settlement on February 21, 2024. The parties are now asking the court to grant final approval and class counsel is seeking a fee award.

7. The class includes 357 self-insured group health plans that opted into the class. They will share $169 million in cash, to be distributed *pro rata* in proportion to the fees they paid after the deduction of attorneys' fees, expenses, class representative award, and any other administrative costs. *See* Settlement Agreement ¶¶ 13, 20. In exchange, the class will release the United States from "all claims . . . arising out of the complaint or otherwise related to this case . . . ." *Id.* at ¶ 15.

8. Class counsel have now moved the court for an award of attorneys' fees equal to 25% of the cash settlement. It is my opinion that the fee request is more than reasonable in light of the empirical studies and research on economic incentives in class action litigation, especially given the outstanding results obtained.

III. Percentage versus lodestar method

9. When a class action reaches settlement or judgment and no fee shifting statute is triggered and the defendant has not agreed to pay class counsel's fees, class counsel is paid by the class members themselves pursuant to the common law of unjust enrichment. This is sometimes called the "common fund" or "common benefit" doctrine. It requires the court to decide how much of their class action proceeds it is fair to ask class members to pay to class counsel.

10. At one time, courts that awarded fees in common fund class action cases did so using the familiar "lodestar" approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043, 2051 (2010) (hereinafter "Class Action Lawyers"). Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on 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.* 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 the like. 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 entirely or almost entirely injunctive in nature. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of class action 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 et al., *Attorneys' Fees in Class Action Settlements: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) ("Eisenberg-Miller 2017") (finding lodestar method used less than 7% of the time since 2009); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 267 (2010) ("Eisenberg-Miller 2010")

(finding lodestar method used only 13.6% of the time before 2002 and less than 10% of the time thereafter and before 2009).

11. 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. These same reasons also drive private parties that hire lawyers on contingency—including sophisticated corporations—to use the percentage method over the lodestar method. *See, e.g.*, David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012); Herbert M. Kritzer, RISKS, REPUTATIONS, AND REWARDS 39-40 (1998).

12. In this jurisdiction, courts have the discretion to use either the lodestar method or the percentage method. *See, e.g.*, *Health Republic Ins. Co. v. United States*, 58 F.4th 63 1365, 1371 (2023) ("We have recognized that the Claims Court has discretion to decide what method to use."). Nonetheless, 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 the percentage method should be used whenever the value of the settlement or judgment can be reliably calculated; the lodestar method should be used only where the value cannot be reliably calculated and the percentage method is therefore not feasible or when the method is required by law, such as by a fee-shifting statute. This is not just my view, but the view of other leading class action scholars.

See Principles of the Law of Aggregate Litigation § 3.13 (2010) (cmt. b) ("Although many courts in common-fund cases permit use of either a percentage-of-the-fund approach or a lodestar . . . most courts and commentators now believe that the percentage method is superior."). Because this settlement consists of all cash, in my opinion the percentage method should be used here. I will therefore proceed under that method.

IV. Selecting the percentage

13. Courts usually examine a number of factors to select the right percentage under the percentage method. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832. The Federal Circuit has not "enumerated what facts must be considered when this method is used," but it has cited the following factors that are commonly used in this jurisdiction: "(1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members' objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award." *Health Republic*, 58 F.4th at 1372. In my opinion, the fee request is reasonable because it is supported by all the relevant factors that can be determined at this time.[2]

14. Consider first factor "(4) the fee that likely would have been negotiated between private parties in similar cases." The request here is 25% of the cash settlement. It is well known that this is well below what private parties negotiate when they hire lawyers on contingency. *See, e.g.*, Kritzer, *supra*, at 39-40 (finding most percentages at one-third). Professor Kritzer's data is largely drawn from personal injury cases, but, even when sophisticated corporations hire lawyers

[2] The fifth factor—"(5) class members' objections to the settlement terms or fees requested by class counsel"—is not yet applicable because the deadline to file an objection has not yet passed.

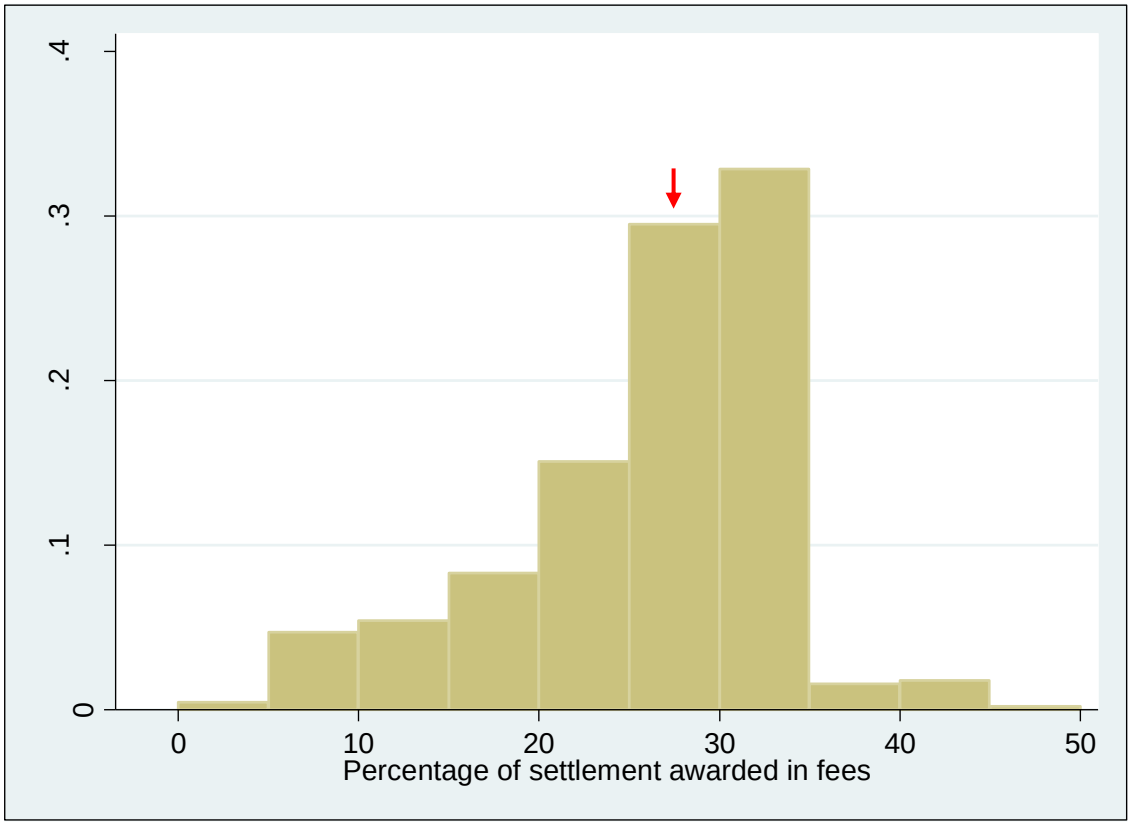
on contingency for complex litigation like patent cases, they agree to pay more than 25%. *See, e.g.*, Schwartz, *supra*, at 360 (2012) (finding the average fixed percentage to be 38.6% and the average escalating percentage to rise from 28% upon filing to 40.2% through appeal). Similarly, in antitrust class actions, corporations tend to accept fee awards well above 25% without objection. *See* Fitzpatrick, *A Fiduciary Judge*, *supra*, at 1161-62, 1172-78 (examining nearly 20 years of uncontested fee awards in pharmaceutical antitrust class actions, almost all of which were 33.3%). Although this is neither an antitrust nor a patent case, we don't have to speculate that the class members would have negotiated a number like 25% in this case because, unlike elsewhere in the federal judiciary, in this Court class members must *opt in* to a class action. When class members were given the choice to do so here, they were informed that class counsel would request a fee of "up to 25%," yet everyone in the class decided to opt in anyway. This is as close to a consensual, privately negotiated fee percentage that you can get in class action litigation. Thus, this factor strongly favors the fee request.

15. Consider next factors "(6) the percentage applied in other class actions" and "(7) the size of the award." According to my empirical study, the most common fee percentages awarded in class actions 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.[3] In particular, the figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). The request here would fall into the bar depicted by the red arrow. Tallying

[3] Although it would normally be instructive to examine fee awards within the circuit as well as those nationwide, no circuit sees fewer class actions than the Federal Circuit. *See* Fitzpatrick, *Empirical Study*, *supra* at 822. Thus, in my opinion, intracircuit analysis would not be meaningful here.

up the other bars shows that some *two-thirds* of all percentage method fee awards were equal to *or greater than* the request here. My numbers largely agree with the other large-scale academic studies of class action fee awards, which show similar or even higher typical awards in more recent years. *See Eisenberg-Miller 2010*, *supra*, at 260 (finding mean and median of 24% and 25%, respectively through 2008); *Eisenberg-Miller 2017*, *supra*, at 951 (finding mean and median of 27% and 29% respectively, from 2009 to 2013). Thus, in my opinion, these factors clearly support the fee request.

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



16. It is true that the settlement here is unusually large. Less than 10% of class action settlements total over $100 million in any given year. *See* Fitzpatrick, *Empirical Study*, *supra*, at 839. This is notable because some federal courts award lower percentages in cases where settlements are larger. *See id.* at 838, 842-44 (finding relationship statistically significant);

Eisenberg-Miller 2017, *supra*, at 947-48 (same); *Eisenberg-Miller 2010*, *supra*, at 263-65 (same). For several reasons, this does not change my opinion that this factor weighs in favor of the fee request.

17. First, I think the entire endeavor of lowering fee percentages simply because a settlement is large creates terrible incentives for class counsel. Indeed, it can actually make class counsel *better off* by resolving a case for less rather than more if it is not done only on the margin (e.g., only for the *portion* above $100 million). *See, e.g.*, *In re Synthroid I*, 264 F.3d 712, 718 (7th Cir. 2001) (Easterbrook, J.) ("This means that counsel for the consumer class could have received [more] fees had they settled for [less] but were limited . . . in fees because they obtained an extra $14 million for their clients . . . . Why there should be such a notch is a mystery. Markets would not tolerate that effect . . . ."). Consider the following example: if courts award class action attorneys 25% of settlements in cases that settle for less than $100 million, but 18% of settlements when they are over $100 million (the averages I found in my study, see below), then rational class action attorneys will prefer to settle cases for $90 million (*i.e.*, a $22.5 million fee award) than for $110 million (*i.e.*, a $19.8 million fee award). As Judge Easterbrook noted above, rational clients who want to maximize their own recoveries would never agree to such an arrangement. This is why studies even of sophisticated corporate clients do not report any such practice among them when they hire lawyers on contingency, even in the biggest cases like patent litigation. *See*, *e.g.*, Schwartz, *supra*, at 360; Fitzpatrick, *A Fiduciary Judge*, *supra*, at 1159-63. In my opinion, courts should not force a fee arrangement on class members that they would never choose themselves. To the contrary: courts are supposed to be serving as fiduciaries for absent class members. *See* William B. Rubenstein, Newberg and Rubenstein on Class Actions § 13.40 (6th ed. 2022) ("[T]he law requires the judge to act as a fiduciary" for class members). This is all the more imperative in

the Federal Circuit in light of factor (4): "the fee that likely would have been negotiated between private parties in similar cases." Private parties simply do not pay worse percentages for better results.

18. Second, while some courts have awarded lower fee percentages as settlement sizes increase, many other courts do not follow this practice. *See, e.g., Allapattah Srvcs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) ("While some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, that approach is antithetical to the percentage of the recovery method adopted by the Eleventh Circuit . . . . . By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (quoting *Allapattah*); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 8:10ML-02151-JVS, 2013 WL 12327929, at 17 n. 16 (C.D. Cal., Jun. 17, 2013) ("The Court also agrees with … other courts, e.g., *Allapattah Servs.*, 454 F. Supp. 2d at 1213, which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class").

19. Nonetheless, the percentage requested here is still in line with those awarded in other class action cases. The settlement range from my study that this settlement falls into is the range between $100 million and $250 million (inclusive). According to my study, the mean and median fee percentages awarded in settlements in this range were 17.9% and 16.9%, respectively. *See* Fitzpatrick, *Empirical Study*, *supra*, at 839; *see also Eisenberg-Miller 2010*, *supra*, at 265 (finding mean of 19.4% and median of 19.9% for settlements between $69.6 and $175.5. million).

It is true that the fee request here is therefore above average compared to similarly-size settlements. But it is not far from the average—it is well within two standard deviations (5.2%, *see id.*) of the mean—and it is important to note that, as the standard deviation reminds us, the average is just a middle point along a distribution of higher and lower fee awards. Judges have awarded fees of 25% *or more* in plenty of settlements above $100 million when the facts and circumstances justify it. *See, e.g.*, *In re: Syngenta AG MIR 162 Corn Litigation*, 357 F.Supp.3d 1094, 1110 (D. Kan. 2018) (33.33% of $1.5 billion); *Allapattah Servs. Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1218 (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) (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 Litigation*, 830 F.Supp.2d 1330, 1358 (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); *Hale v. State Farm*, No. 12-00660-DRH-SCW (S.D. Ill., Dec. 16, 2018) (33.33% of $250 million); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, ECF No. 543 (D. Del. 2009) (33% of $250 million); *In re Buspirone Antitrust Litig.*, No. 01-md-1413 (S.D.N.Y. Apr. 11, 2003) (33% of $220 million); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *1 (E.D. Pa., June 2, 2004) (30% of $202 million); *In re Relafen Antitrust Litig.*, No. 01-12239, at 8 (D. Mass. Apr. 9, 2004) (33% of $175 million); *In re Apollo Group Inc. Securities Litigation*, 2012 WL 1378677, at *9 (D. Ariz. April 20, 2012) (33% of $145 million); *In re Combustion Inc.*, 968 F. Supp. 1116, 1142 (W.D. La. 1997) (36% of $127 million); *Kurzwell v. Philip Morris Companies*, 1999 WL 1076105, at *1 (S.D.N.Y., Nov. 30, 1999) (30% of $123 million); *In re Ikon Office Solutions, Inc. Securities Litig.*, 194 F.R.D.

166, 197 (E.D. Pa. 2000) (30% of $111 million); *City of Greenville v. Syngenta Crop Protection*, 904 F. Supp. 2d 902, 908-09 (S.D. Ill. 2012) (33% of $105 million). As I explain below, the facts and circumstances of this settlement clearly support an above-average fee award even if the court is otherwise inclined to award smaller percentages when there are bigger recoveries. Thus, no matter how you slice it, it is my opinion that these factors support the fee request.

20. Consider next the factors that go to the results obtained by class counsel in light of the risks presented by the litigation: "(1) the quality of counsel," "(2) the complexity and duration of the litigation," and "(3) the risk of nonrecovery." As I noted, the recovery here is very large, but whether or not it is a good recovery depends on the underlying damages the class might have recovered discounted by the risks that the class faced. It is on these factors that the fee request really shines. The settlement represents over 91% of the class's damages. It is very rare to recover this much of the class's damages in a class action settlement. Although there is no published data on typical recovery percentages in class actions against the federal government, the published data we do have—in antitrust cases and securities fraud cases—tells us that a recovery like this one is many times better than the typical class action settlement. *See, e.g.*, Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review, at p. 18 (fig. 19), available at https://www.nera.com/publications/archive/2023/recent-trends-in-securities-class--action-litigation--2022-full-.html (finding that the median securities fraud class action between 2013 and 2022 settled for between 1.5% and 2.5% of the most common measure of investor losses, depending on the year); 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 and 2014). Obviously, if anyone had asked class members whether

they would have accepted 91 cents on the dollar in order to avoid the risks involved in this litigation, they would have answered with a resounding yes. Indeed, it is worth noting that the only reason class counsel were able to secure such a recovery was because class counsel won the case outright. The 9% haircut represents only a small concession to account for the risk and delay on appeal. In other words, it is hard to see what more the class could have possibly hoped for. Thus, all of these factors clearly support the fee request.

V. The lodestar crosscheck

21. Class counsel's lodestar is not one of the factors listed above. Nonetheless, a significant minority of courts use the so-called "lodestar crosscheck" with the percentage method, *see* Fitzpatrick, *Empirical Study*, *supra*, at 833 (finding that 49% of courts consider lodestar when awarding fees with the percentage method); *Eisenberg-Miller 2017*, *supra*, at 945 (finding percent method with lodestar crosscheck used 38% of the time versus 54% for percent method without lodestar crosscheck), and the Federal Circuit recently held that courts should do it when it was promised in the opt-in notice, as it was here. *See Health Republic*, 58 F.4th at 1374. As such, I wish to say a few words about it.

22. To begin with, in my opinion, economic theory shows that the lodestar crosscheck is a mistake. It brings through the backdoor all of the bad things the lodestar method used to bring through the front door. Not only does the court have to concern itself again with class counsel's timesheets, but, more importantly, it reintroduces the very same misaligned incentives that the percentage method was designed to correct in the first place. *See* Fitzpatrick, *A Fiduciary Judge*, *supra*, at 1167.

23. Consider the following examples. Suppose a lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 25% fee

if it exceeded twice his lodestar, then he would be *rationally indifferent* between settling the case for $8 million and $80 million (or any number higher than $8 million). Either way he will get the same $2 million fee. Needless to say, the incentive to be indifferent as to the size of the settlement is not good for class members. Or suppose counsel believed that the most he could wring from the defendant in this example was $16 million. In order to reap the maximum 25% fee with the lodestar crosscheck, he would have to generate an additional $1 million in lodestar before agreeing to the settlement; this would give him incentive to *drag the case out* before sealing the deal. Again, dragging cases along for nothing is not good for class members.

24. This is why the marketplace does not use the lodestar crosscheck when they hire lawyers on contingency. Professor Schwartz did not report any crosscheck agreements in his study of patent litigation. Professor Kritzer has never reported any in his studies of contingency fees more broadly. The Seventh Circuit thinks it is so irrational it has all but banned the practice for the same reason it banned the bigger-recovery-begets-smaller-fee practice I discussed above. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (holding that "a lodestar check is not . . . required methodology" because "[t]he . . . argument . . . that any percentage fee award exceeding a certain lodestar multiplier is excessive . . . echoes the 'megafund' cap we rejected in *Synthroid*"). To the extent the court should be guided by factor (4)—"the fee that likely would have been negotiated between private parties in similar cases"—it should therefore not be guided by the lodestar crosscheck.

25. The stated rationale of the crosscheck is to prevent class counsel from reaping a so-called "windfall." *Health Republic*, 58 F.4th at 1374. In my opinion, there will be no such windfall here. If the fee request is granted, class counsel will receive a multiplier of 6.63. Although this would be above average, *see* Fitzpatrick, *Empirical Study*, *supra*, at 834; *Eisenberg-Miller 2010*,

supra, at 274; *Health Republic*, 58 F.4th at 1374, it would be well within the range of previous cases. *See also, e.g.*, *Lloyd v. Navy Fed. Credit Union*, 2019 WL 2269958, at *13 (S.D. Cal. May 28, 2019) (awarding fee even though "[t]he Court is aware that a lodestar cross-check would likely result in a multiplier of around 10.96"); *In re Doral Financial Corp. Securities Litigation*, No. 05-cv-04014-RO (S.D.N.Y. Jul. 17, 2007) (ECF 65) (same with 10.26 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, No. 11-cv-00011 (D.N.J. Jan. 26, 2015) (awarding fee with 8.91 multiplier); *Raetsch v. Lucent Tech., Inc.*, No. 05-cv-05134 (D.N.J. Nov. 8., 2010) (same with 8.77 multiplier); *Thacker v. Chesapeake Appalachia, L.L.C.*, No. 07-cv-00026 (E.D. Ky. Mar. 3, 2010) (same with 8.47 multiplier); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (same with 8.3 multiplier); *Hainey v. Parrott*, 2007 WL 3308027, at *1 (S.D. Ohio Nov. 6, 2007) (same with 7.47 multiplier); *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 732 (3rd Cir. 2001) (same with of 7 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 362 F.Supp.2d 587 (E.D. Pa. 2005) (same with 6.96 multiplier); *Steiner v. American Broadcasting Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming fee with 6.85 multiplier); *In re IDB Communication Group, Inc., Sec. Litig.*, No. 94-3618 (C.D. Cal. Jan. 17, 1997) (awarding fee with 6.2 multiplier); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (same with 6 multiplier); *In re RJR Nabisco*, 1992 WL 210138 (same); *In re Charter Communications, Inc., Securities Litigation*, 2005 WL 4045741, *18 (E.D. Mo. 2005) (same with 5.61 multiplier); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197 (S.D.N.Y.1997) (same with 5.5 multiplier); *Di Giacomo v. Plains All Am. Pipeline*, 2001 WL 3463337 at *10 (S.D. Tex. Dec.18, 2001) (same with 5.3 multiplier). Indeed, in my empirical

study of only two years of federal class actions settlements, the lodestar multipliers ranged from .07 to 10.3. *See* Fitzpatrick, *Empirical Study*, *supra*, at 834.

26. Moreover, class counsel have been litigating this matter for some eight years without a penny in compensation and by fighting so long and so hard they recovered nearly every dollar for the class. This is nearly *three times* as long as class counsel fight before they settle. *See* Fitzpatrick, *Empirical Study*, *supra*, at 820 (finding mean and median times to settlement of around three years). What possible purpose would it serve to punish them for doing so efficiently? Windfalls result when class action lawyers settle cases quickly for very little. They do not result from years of litigation that results in a complete and total victory for the class. In my opinion, rejecting class counsel's fee request under these circumstances simply because they did not log more hours will only incentivize lawyers in the future to drag things out, churn hours, and inefficiently staff cases to avoid the same fate. That will not be good for anyone. Thus, in my opinion, even the lodestar crosscheck supports class counsel's fee request.

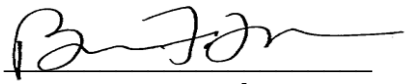
VI. Conclusion

27. For all these reasons, it is my opinion that class counsel's fee request is reasonable in light of the empirical studies and research on economic incentives.

28. My compensation in this matter is a flat fee in no way dependent on the outcome of class counsel's fee petition.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 26th day of March, 2024



Brian T. Fitzpatrick

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EXHIBIT 1

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Milton R. Underwood Chair in Free Enterprise*, 2020 to present
- *FedEx Research Professor*, 2014-2015
- *Professor of Law*, 2012 to present
- *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

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

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 CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (Cambridge University Press 2021) (ed., with Randall Thomas)

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press 2019) (winner of the Pound Institute's 2022 Civil Justice Scholarship Award)

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Entrapment of the Little Guy: Resisting the Erosion of Investor, Employee and Consumer Protections, Institute for Law and Economic Policy, San Diego, CA (Jan. 27, 2023)

A New Source of Data for Non-Securities Class Actions, William & Mary Law School, Williamsburg, VA (Nov. 10, 2022)

Can Courts Avoid Politicization in a Polarized America?, American Bar Association Annual Meeting, Chicago, IL (Aug. 5, 2022) (panelist)

A New Source of Data for Non-Securities Class Actions, Seventh Annual Civil Procedure Workshop, Cardozo Law School, New York, NY (May 20, 2022)

Resolution Issues in Class Actions and Mass Torts, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Mar. 11, 2022) (panelist)

Developments in Discovery Reform, George Mason Law & Economics Center Fifteenth Annual Judicial Symposium on Civil Justice Issues, Charleston, SC (Nov. 16, 2021) (panelist)

Locality Litigation and Public Entity Incentives to File Lawsuits: Public Interest, Politics, Public Finance or Financial Gain?, George Mason Law & Economics Center Symposium on Novel Liability Theories and the Incentives Driving Them, Nashville, TN (Oct. 25, 2021) (panelist)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, University of California Hastings College of the Law, San Francisco, CA (Nov. 3, 2020)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, The Judicial Role in Professional Regulation, Stein Colloquium, Fordham Law School, New York, NY (Oct. 9, 2020)

Objector Blackmail Update: What Have the 2018 Amendments Done?, Institute for Law and Economic Policy, Fordham Law School, New York, NY (Feb. 28, 2020)

Keynote Debate: The Conservative Case for Class Actions, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Jan. 24, 2020)

The Future of Class Actions, National Consumer Law Center Class Action Symposium, Boston, MA (Nov. 16, 2019) (panelist)

The Conservative Case for Class Actions, Center for Civil Justice, NYU Law School, New York, NY (Nov.11, 2019)

Deregulation and Private Enforcement, Class Actions, Mass Torts, and MDLs: The Next 50 Years, Pound Institute Academic Symposium, Lewis & Clark Law School, Portland, OR (Nov. 2, 2019)

Class Actions and Accountability in Finance, Investors and the Rule of Law Conference, Institute for Investor Protection, Loyola University Chicago Law School, Chicago, IL (Oct. 25, 2019) (panelist)

Incentivizing Lawyers as Teams, University of Texas at Austin Law School, Austin, TX (Oct. 22, 2019)

"Dueling Pianos": A Debate on the Continuing Need for Class Actions, Twenty Third Annual National Institute on Class Actions, American Bar Association, Nashville, TN (Oct. 18, 2019) (panelist)

A Debate on the Utility of Class Actions, Contemporary Issues in Complex Litigation Conference, Northwestern Law School, Chicago, IL (Oct.16, 2019) (panelist)

Litigation Funding, Forty Seventh Annual Meeting, Intellectual Property Owners Association, Washington, DC (Sep. 26, 2019) (panelist)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, International Class Actions Conference, Vanderbilt Law School, Nashville, TN (Aug. 24, 2019)

A New Source of Class Action Data, Corporate Accountability Conference, Institute for Law and Economic Policy, San Juan, Puerto Rico (April 12, 2019)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, Ninth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 14, 2018)

MDL: Uniform Rules v. Best Practices, Miami Law Class Action & Complex Litigation Forum, University of Miami Law School, Miami, FL (Dec. 7, 2018) (panelist)

Third Party Finance of Attorneys in Traditional and Complex Litigation, George Washington Law School, Washington, D.C. (Nov. 2, 2018) (panelist)

MDL at 50 - The 50th Anniversary of Multidistrict Litigation, New York University Law School, New York, New York (Oct. 10, 2018) (panelist)

The Discovery Tax, Law & Economics Seminar, Harvard Law School, Cambridge, Massachusetts (Sep. 11, 2018)

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)

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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)

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Memo to Mitch: Repeal the Republican Tax Increase, THE HILL (July 17, 2020)

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Proposed Reforms to Texas Judicial Selection, 24 TEX. R. L. & POL. 307 (2020)

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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)

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"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)

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

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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 Legal Studies
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies
Referee, Supreme Court Economic Review
Reviewer, Aspen Publishing
Reviewer, Cambridge University Press
Reviewer, University Press of Kansas
Reviewer, Palgrave Macmillan
Reviewer, Oxford University Press
Reviewer, Routledge
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights, 2009-2015
Board of Directors, Tennessee Stonewall Bar Association, 2012-2022
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia & California (inactive)

COMMUNITY ACTIVITIES

Board of Directors, Beacon Center, 2018-present; Board of Directors, Nashville Ballet, 2011-2017 & 2019-2022; Nashville Talking Library for the Blind, 2008-2009

EXHIBIT 2

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An Empirical Study of Class Action Settlements and Their Fee Awards

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This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either 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 those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. Introduction

Class actions have been the source of great controversy in the United States. Corporations fear them.[1] Policymakers have tried to corral them.[2] Commentators and scholars have

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[1]See, e.g., Robert W. Wood, Defining Employees and Independent Contractors, Bus. L. Today 45, 48 (May–June 2008).

[2]See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

suggested countless ways to reform them.[3] Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.[4]

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.[5] I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;[6] these future studies are important because there may be more class action settlements in state courts than there are in federal court.[7]

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either 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 those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

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[3]See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1080–81 (2005).

[4]See, e.g., Samuel Issacharoff & Geoffrey Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009).

[5]See, e.g., Emery Lee & Thomas E. Willing, Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions 11 (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, How the Merits Matter: D&O Insurance and Securities Settlements, 157 U. Pa. L. Rev. 755 (2009).

[6]Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Suits, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133 (2004); Findings of the Study of California Class Action Litigation (Administrative Office of the Courts) (First Interim Report, 2009).

[7]See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 56 (2000).

any given year.[8] As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over $33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

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[8]Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly $5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. Prior Empirical Studies of Class Action Settlements

There are many existing empirical studies of federal securities class action settlements.[9] Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.[10] Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between $7 billion and $17 billion per year.[11] Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

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[9]See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <http://ssrn.com/abstract=870577> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

[10]See, e.g., RiskMetrics Group, available at <http://www.riskmetrics.com/scas>.

[11]See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

the settlements that courts have awarded to class action lawyers.[12] These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.[13] These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.[14] None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,[15] which was recently updated to include data through 2008,[16] and a 2003 study by Class Action Reports.[17] The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.[18] Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, $116 million and $12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.[19] Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

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[12]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–24, 28–36; Perino, Markets and Monitors, supra note 9, at 12–28, 39–44; Perino, Milberg Weiss, supra note 9, at 32–33, 39–60.

[13]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–18, 22, 28, 33; Perino, Markets and Monitors, supra note 9, at 20–21, 40; Perino, Milberg Weiss, supra note 9, at 32–33, 51–53.

[14]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 14–24, 29–30, 33–34; Perino, Markets and Monitors, supra note 9, at 20–28, 41; Perino, Milberg Weiss, supra note 9, at 39–58.

[15]See Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27 (2004).

[16]See Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II].

[17]See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (Mar.–Apr. 2003).

[18]See Eisenberg & Miller II, supra note 16, at 251.

[19]Id. at 258–59.

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.[20] For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.[21] Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.[22] Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of $35.4 and $7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.[23] Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.[24]

III. Federal Class Action Settlements, 2006 and 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,[25] (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website[26]—and (3) a list from the Administrative Office of Courts of all district court cases

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[20]See Eisenberg & Miller, supra note 15, at 61–62.

[21]See Eisenberg & Miller II, supra note 16, at 278.

[22]See Eisenberg & Miller, supra note 15, at 34.

[23]Id. at 47, 51.

[24]Id. at 61–62.

[25]The searches consisted of the following terms: ("class action" & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & "class action"); ("class action" /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); ("class action" /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

[26]See <http://classactionworld.com/>.

coded as class actions that terminated by settlement between 2005 and 2008.[27] I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.[28] For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a *16*-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.[29]

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.[30] My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

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[27]I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

[28]See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

[29]A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

[30]See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation: Cases and Materials 1061 (2d ed. 2006).

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.[31]

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.[32] At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

	Number of Settlements	
Subject Matter	*2006*	*2007*
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

[31]See Halliburton Co. v. Graves, No. 04-00280 (S.D. Tex., Sept. 28, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Aug. 29, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Sept. 17, 2007).

[32]See, e.g., John C. Coffee, Jr., Reforming the Security Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1539–40 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

expected in light of Supreme Court precedent over the last two decades,[33] there were almost no mass tort class actions (included in the "Other" category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court[34]) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.[35] However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.[36] This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.[37] When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.[38] So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.[39] Prior to the Supreme Court's 1997 opinion in *Amchem Products, Inc. v. Windsor*,[40] it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

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[33]See, e.g., Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

[34]See Eisenberg & Miller II, supra note 16, at 257.

[35]Id. at 262.

[36]Id.

[37]See Martin H. Redish, Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545, 553 (2006).

[38]See Amchem Prods., Inc v Windsor, 521 U.S. 591, 620 (1997).

[39]See Redish, supra note 368, at 557–59.

[40]521 U.S. 591 (1997).

state and federal court between 2003 and 2008 were settlement classes.[41] It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.[42] As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

Subject Matter	*Average*	*Median*	*Minimum*	*Maximum*
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

[41]See Eisenberg & Miller II, supra note 16, at 266.

[42]The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.[43] Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.[44] The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.[45] The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.[46]

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

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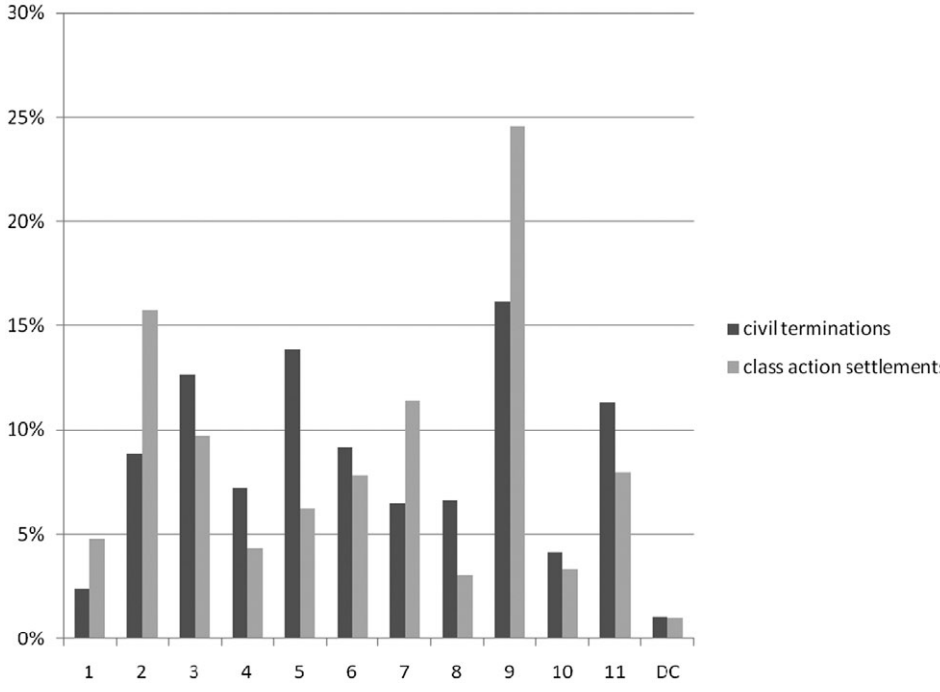
[43]See Eisenberg & Miller, supra note 15, at 59–60.

[44]See Clemmons v. Rent-a-Center W., Inc., No. 05-6307 (D. Or. Jan. 20, 2006).

[45]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006).

[46]See Eisenberg & Miller II, supra note 16, at 260.

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



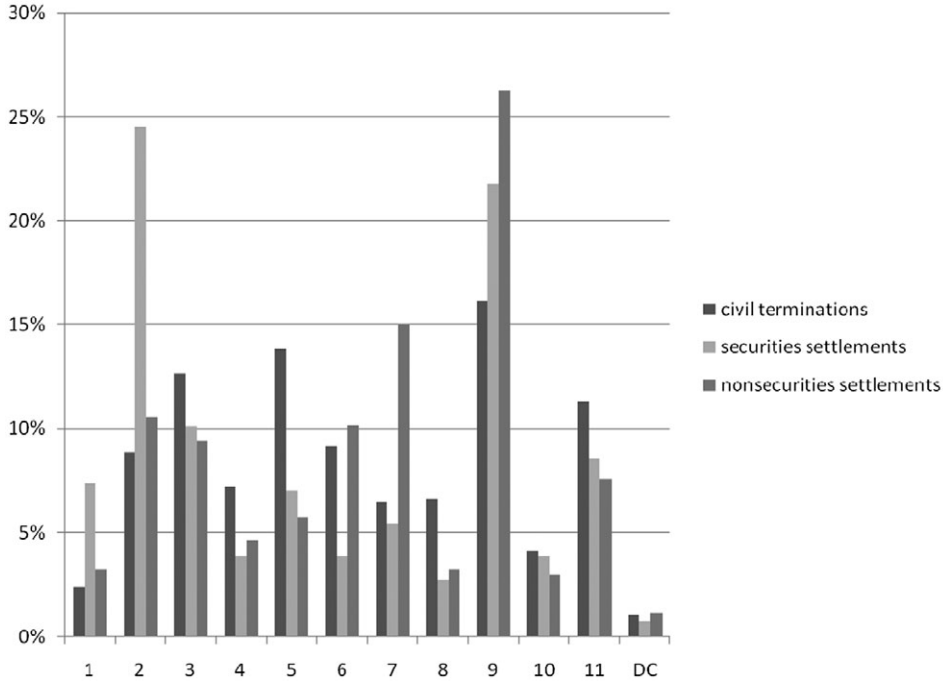
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.[47] One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

[47]See Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

tions in which defendants have their corporate headquarters or other operations.[48] This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit's overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

[48]See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant's corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.[49] In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.[50]

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

Subject Matter	*Cash*	*In-Kind Relief*	*Injunctive or Declaratory Relief*
Securities ($n = 257$)	100%	0%	2%
Labor and employment ($n = 94$)	95%	6%	29%
Consumer ($n = 87$)	74%	30%	37%
Employee benefits ($n = 61$)	90%	0%	34%
Civil rights ($n = 61$)	49%	2%	75%
Debt collection ($n = 42$)	98%	0%	12%
Antitrust ($n = 30$)	97%	13%	7%
Commercial ($n = 13$)	92%	0%	62%
Other ($n = 43$)	77%	7%	33%
All ($n = 688$)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

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[49]See Fed. R. Civ. P. 23(b).

[50]These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,[51] consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

	Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)			
Subject Matter	*2006* (n = *304*)		*2007* (n = *384*)	
Securities	$16,728	76%	$8,038	73%
Labor and employment	$266.5	1%	$547.7	5%
Consumer	$517.3	2%	$732.8	7%
Employee benefits	$443.8	2%	$280.8	3%
Civil rights	$265.4	1%	$81.7	1%
Debt collection	$8.9	<1%	$5.7	<1%
Antitrust	$1,079	5%	$660.5	6%
Commercial	$1,217	6%	$124.0	1%
Other	$1,568	7%	$592.5	5%
Total	$22,093	100%	$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks' offices.

[51]See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are "seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong").

includes all determinate[52] payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.[53] I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only $1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.[54]

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over $33 billion was approved in the 2006–2007 settlements. Over $22 billion was approved in 2006 and over $11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled $6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than $1 billion were approved in 2006.[55] Indeed, it is worth noting that the eight settlements for more than $1

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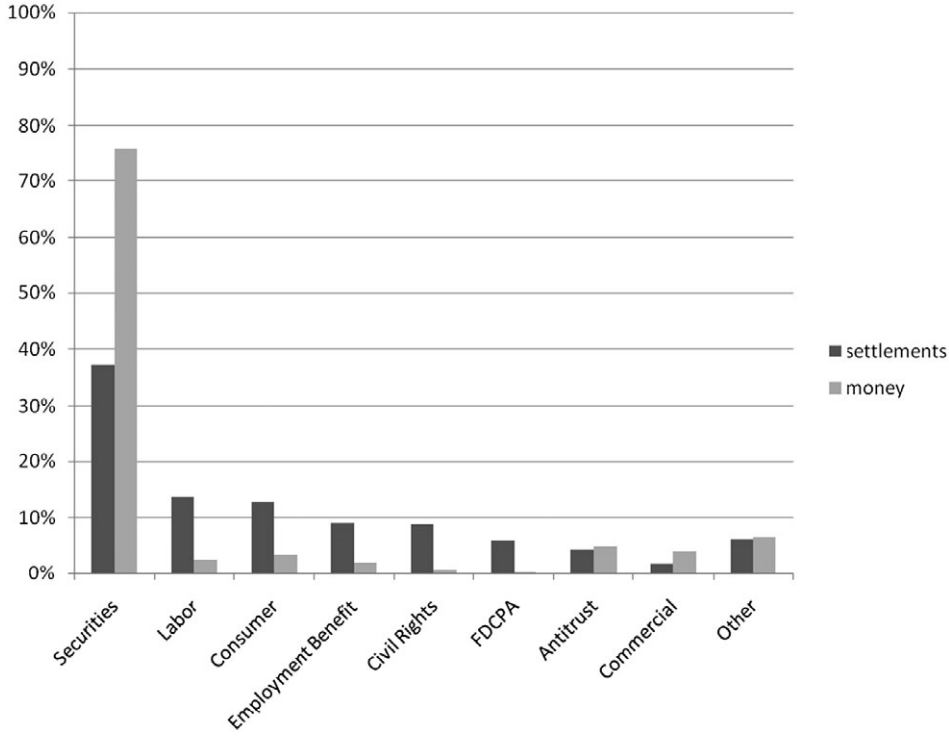
[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

[53]In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

[54]See Hensler et al., supra note 7, at 427–30.

[55]See In re Enron Corp. Secs. Litig., MDL 1446 (S.D. Tex. May 24, 2006) ($6,600,000,000); In re Tyco Int'l Ltd. Multidistrict Litig., MDL 02-1335 (D.N.H. Dec. 19, 2007) ($3,200,000,000); In re AOL Time Warner, Inc. Secs. & "ERISA" Litig., MDL 1500 (S.D.N.Y. Apr. 6, 2006) ($2,500,000,000); In re: Diet Drugs Prods. Liab. Litig., MDL 1203 (E.D. Pa. May 24, 2006) ($1,275,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel I), No. 01-1855 (S.D.N.Y. Dec. 26, 2006) ($1,142,780,000); In re Royal Ahold N.V. Secs. & ERISA Litig., 03-1539 (D. Md. Jun. 16, 2006)

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks' offices.

billion accounted for almost $18 billion of the $33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below $10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

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($1,100,000,000); Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) ($1,075,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) ($1,074,270,000).

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

Settlement Size (in Millions)	*Number of Settlements*
[$0 to $1]	131 (21.7%)
($1 to $10]	261 (43.1%)
($10 to $50]	139 (23.0%)
($50 to $100]	33 (5.45%)
($100 to $500]	31 (5.12%)
($500 to $6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

Subject Matter	*Average*	*Median*
Securities ($n = 257$)	$96.4	$8.0
Labor and employment ($n = 88$)	$9.2	$1.8
Consumer ($n = 65$)	$18.8	$2.9
Employee benefits ($n = 52$)	$13.9	$5.3
Civil rights ($n = 34$)	$9.7	$2.5
Debt collection ($n = 40$)	$0.37	$0.088
Antitrust ($n = 29$)	$60.0	$22.0
Commercial ($n = 12$)	$111.7	$7.1
Other ($n = 28$)	$76.6	$6.2
All ($N = 605$)	$54.7	$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost $55 million, but the median was only $5.1 million. (With the $6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to $43.8 million and, for securities cases, dropped to $71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around $100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above $1 billion;[56] when that settlement is removed, the average for commercial cases was only $24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was $112 million and the median was $12.9 million, both in 2006 dollars,[57] more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of $115 million and $11.7 million (both again in 2006 dollars),[58] respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did ($39.5 million in 2006 dollars), but a larger median ($8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more "mega" class actions today than there were before 2003, explaining its smaller mean.[59]

It is interesting to ask how significant the $16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. "tort" system every year by a financial services consulting firm, Tillinghast-Towers Perrin.[60] These studies are not directly

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[56]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving $1,075,000,000 settlement).

[57]See Eisenberg & Miller, supra note 15, at 47.

[58]See Eisenberg & Miller II, supra note 16, at 262.

[59]There were eight class action settlements during 2006 and 2007 of more than $1 billion. See note 55 supra.

[60]Some commentators have been critical of Tillinghast's reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders, 14 Conn. Ins. L.J. 75, 84 (2007); John Fabian Witt, Form and Substance in the Law of

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred $160 billion and $164 billion, respectively, to claimants and their lawyers.[61] The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. Attorney Fees in Federal Class Action Settlements, 2006 and 2007

A. Total Amount of Fees and Expenses

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some $16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.[62] The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some $5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.[63] The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the $6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.[64] Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 Loy. L.A.L. Rev. 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

[61]See Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008). The report calculates $252 billion in total tort "costs" in 2007 and $246.9 billion in 2006, id., but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003).

[62]See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little? 158 U. Pa. L. Rev. 2043, 2043–44 (2010).

[63]In some of the partial settlements, see note 29 supra, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

[64]See, e.g., Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

	Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area	
Subject Matter	*2006 (n = 292)*	*2007 (n = 363)*
Securities	$1,899 (11%)	$1,467 (20%)
Labor and employment	$75.1 (28%)	$144.5 (26%)
Consumer	$126.4 (24%)	$65.3 (9%)
Employee benefits	$57.1 (13%)	$71.9 (26%)
Civil rights	$31.0 (12%)	$32.2 (39%)
Debt collection	$2.5 (28%)	$1.1 (19%)
Antitrust	$274.6 (26%)	$157.3 (24%)
Commercial	$347.3 (29%)	$18.2 (15%)
Other	$119.3 (8%)	$103.3 (17%)
Total	$2,932 (13%)	$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.[65] If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.[66] To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

[65]Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

[66]See Hensler et al., supra note 7, at 427–30.

must be "reasonable."[67] Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.[68] The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.[69] The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a "lodestar cross-check").[70] My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.[71] The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.[72] Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

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[67]Fed. R. Civ. P. 23(h).

[68]The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (same); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

[69]See Eisenberg & Miller, supra note 15, at 31.

[70]Id. at 31–32.

[71]These numbers are based on the fee method described in the district court's order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel's motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an "other" method.

[72]See Eisenberg & Miller II, supra note 16, at 267.

that use the percentage-of-the-settlement method usually rely on a multifactor test[73] and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.[74] In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.[75] Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.[76] Nonetheless, presumptions, of course, can be overcome and, as one court has put it, "[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case."[77] The court added: "[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility."[78] It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court's order or counsel's motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.[79]

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

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[73]The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (six factors); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

[74]See Eisenberg & Miller, supra note 15, at 32.

[75]See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003).

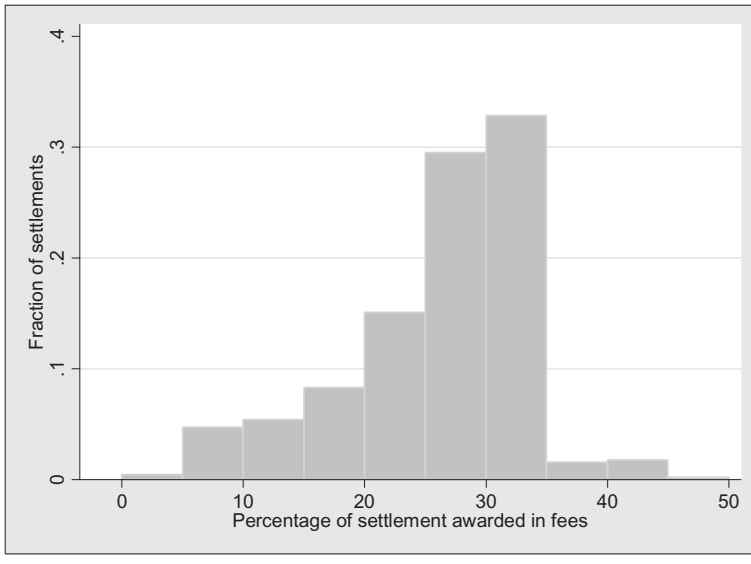
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

[77]*Camden I Condo. Ass'n*, 946 F.2d at 774.

[78]*Camden I Condo. Ass'n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

[79]See Eisenberg & Miller II, supra note 16, at 259.

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



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.[80]

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,[81] a bit lower than the ranges in my

[80]It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

[81]See Eisenberg & Miller II, supra note 16, at 262.

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

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

SOURCES: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Circuit	*Mean*	*Median*
First ($n = 27$)	27.0	25.0
Second ($n = 72$)	23.8	24.5
Third ($n = 50$)	25.4	29.3
Fourth ($n = 19$)	25.2	28.0
Fifth ($n = 27$)	26.4	29.0
Sixth ($n = 25$)	26.1	28.0
Seventh ($n = 39$)	27.4	29.0
Eighth ($n = 15$)	26.1	30.0
Ninth ($n = 111$)	23.9	25.0
Tenth ($n = 18$)	25.3	25.5
Eleventh ($n = 35$)	28.1	30.0
DC ($n = 6$)	26.9	26.0

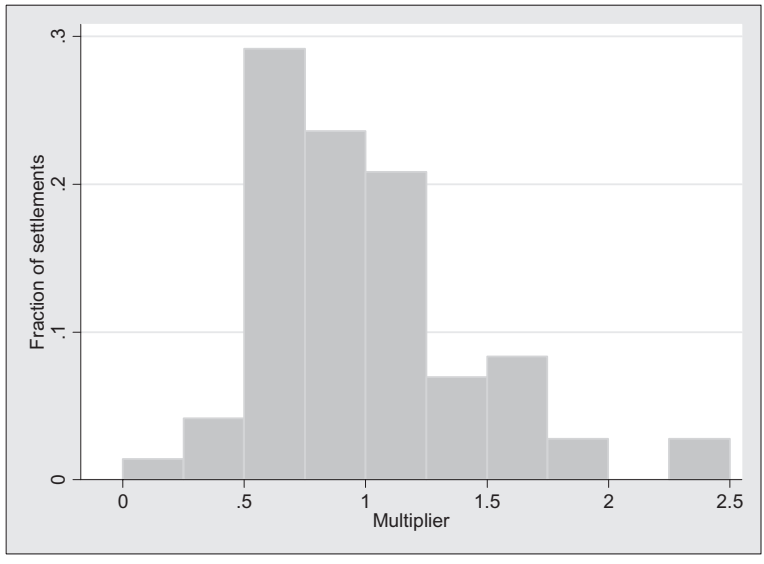
SOURCES: Westlaw, PACER, district court clerks' offices.

settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly $5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



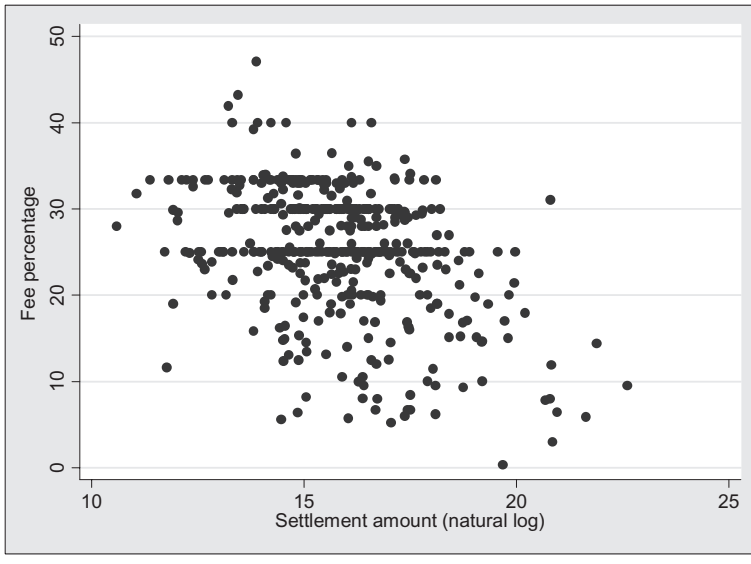
SOURCES: Westlaw, PACER, district court clerks' offices.

are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.[82] To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.[83] In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent.

[83]See Eisenberg & Miller II, supra note 16, at 265.

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
[$0 to $0.75] ($n = 45$)	28.8%	29.6%	6.1%
($0.75 to $1.75] ($n = 44$)	28.7%	30.0%	6.2%
($1.75 to $2.85] ($n = 45$)	26.5%	29.3%	7.9%
($2.85 to $4.45] ($n = 45$)	26.0%	27.5%	6.3%
($4.45 to $7.0] ($n = 44$)	27.4%	29.7%	5.1%
($7.0 to $10.0] ($n = 43$)	26.4%	28.0%	6.6%
($10.0 to $15.2] ($n = 45$)	24.8%	25.0%	6.4%
($15.2 to $30.0] ($n = 46$)	24.4%	25.0%	7.5%
($30.0 to $72.5] ($n = 42$)	22.3%	24.9%	8.4%
($72.5 to $6,600] ($n = 45$)	18.4%	19.0%	7.9%

SOURCES: Westlaw, PACER, district court clerks' offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
($72.5 to $100] ($n = 12$)	23.7%	24.3%	5.3%
($100 to $250] ($n = 14$)	17.9%	16.9%	5.2%
($250 to $500] ($n = 8$)	17.8%	19.5%	7.9%
($500 to $1,000] ($n = 2$)	12.9%	12.9%	7.2%
($1,000 to $6,600] ($n = 9$)	13.7%	9.5%	11%

SOURCES: Westlaw, PACER, district court clerks' offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.[84] It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.[85] Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.[86] The independent

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[84]See generally C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996). See also Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. Chi. L. Rev. 715, 724–25 (2008).

[85]See Brian T. Fitzpatrick, The End of Objector Blackmail? 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

[86]Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.[87]

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.[88] One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),[89] judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.[90]

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

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appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier ($6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

[87]Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008); Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994).

[88]Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

[89]See Fitzpatrick, supra note 85, at 1640.

[90]See Eisenberg & Miller II, supra note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, supra note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Settlement amount (natural log)	−1.77	−1.76	−1.76	−1.41	−1.78
	(−5.43)**	(−8.52)**	(−7.16)**	(−4.00)**	(−8.67)**
Age of case (natural log days)	1.66	1.99	1.13	1.72	2.00
	(2.31)**	(2.71)**	(1.21)	(1.47)	(2.69)**
Judge's political affiliation (1 = Democrat)	−0.630	−0.345	0.657	−1.43	−0.232
	(−0.83)	(−0.49)	(0.76)	(−1.20)	(−0.34)
Settlement class		0.150	0.873	−1.62	0.124
		(0.19)	(0.84)	(−1.00)	(0.15)
1st Circuit		3.30	4.41	0.031	0.579
		(2.74)**	(3.32)**	(0.01)	(0.51)
2d Circuit		0.513	−0.813	2.93	−2.23
		(0.44)	(−0.61)	(1.14)	(−1.98)**
3d Circuit		2.25	4.00	−1.11	—
		(1.99)**	(3.85)**	(−0.50)	
4th Circuit		2.34	0.544	3.81	—
		(1.22)	(0.19)	(1.35)	
5th Circuit		2.98	1.09	6.11	0.230
		(1.90)*	(0.65)	(1.97)**	(0.15)
6th Circuit		2.91	0.838	4.41	—
		(2.28)**	(0.57)	(2.15)**	
7th Circuit		2.55	3.22	2.90	−0.227
		(2.23)**	(2.36)**	(1.46)	(−0.20)
8th Circuit		2.12	−0.759	3.73	−0.586
		(0.97)	(−0.24)	(1.19)	(−0.28)
9th Circuit		—	—	—	−2.73
					(−3.44)**
10th Circuit		1.45	−0.254	3.16	—
		(0.94)	(−0.13)	(1.29)	
11th Circuit		4.05	3.85	4.14	—
		(3.44)**	(3.07)**	(1.88)*	
DC Circuit		2.76	2.60	2.41	—
		(1.10)	(0.80)	(0.64)	
Securities case		—			—
Labor and employment case		2.93		—	2.85
		(3.00)**			(2.94)**
Consumer case		−1.65		−4.39	−1.62
		(−0.88)		(−2.20)**	(−0.88)
Employee benefits case		−0.306		−4.23	−0.325
		(−0.23)		(−2.55)**	(−0.26)
Civil rights case		1.85		−2.05	1.76
		(0.99)		(−0.97)	(0.95)
Debt collection case		−4.93		−7.93	−5.04
		(−1.71)*		(−2.49)**	(−1.75)*
Antitrust case		3.06		0.937	2.78
		(2.11)**		(0.47)	(1.98)**

Table 12 *Continued*

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Commercial case		−0.028		−2.65	0.178
		(−0.01)		(−0.73)	(0.05)
Other case		−0.340		−3.73	−0.221
		(−0.17)		(−1.65)	(−0.11)
Constant	42.1	37.2	43.0	38.2	40.1
	(7.29)**	(6.08)**	(6.72)**	(4.14)**	(7.62)**
N	427	427	232	195	427
R^2	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.
SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.[91] Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.[92] On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.[93] Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as "unambiguous." Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

[91]See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

[92]Id. at 178–79.

[93]See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, supra note 81, at 734.

with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,[94] and that settlement classes were not associated with fee percentages in their 2003–2008 data set.[95]

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.[96]

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[94]See Eisenberg & Miller, supra note 15, at 61.

[95]See Eisenberg & Miller II, supra note 16, at 266.

[96]This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.[97] This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.[98] This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.[99]

V. Conclusion

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than $33 billion. Of this $33 billion, nearly $5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

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[97]See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

[98]The Ninth Circuit's differences persisted.

[99]See Eisenberg & Miller II, supra note 16, at 260.

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.

EXHIBIT 3

Documents reviewed:

- Memorandum and Order (document 22, filed 7/30/21)
- Memorandum and Order (document 70, filed 6/22/22)
- Order (document 97, filed 12/21/22)
- Condensed Transcript (Dec. 21, 2022)
- Judgment (document 124, filed 5/12/23)
- Class Representative Electrical Welfare Trust Fund's Unopposed Motion for Preliminary Approval of Settlement and Authorization to Disseminate Notice of Settlement (document 142, filed 2/16/24)
- Settlement Agreement (document 142-1, filed 2/16/24)
- Notice of Class Action Settlement (document 142-2, filed 2/16/24)