IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

The Hospital Authority of Metropolitan Government of Nashville and Davidson County, Tennessee, d/b/a Nashville General Hospital et al. v. Momenta Pharmaceuticals, Inc. and Sandoz Inc.
No. 15-cv-01100

DECLARATION OF BRIAN T. FITZPATRICK

I. Background and qualifications

1. My name is Brian Fitzpatrick and I am a 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 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 Supreme Court of the United States. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. 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, 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 Institute on Class Actions in 2011, 2015, 2016, 2017, and 2019; the ABA Annual Meeting in 2012; and the ABA Section on Litigation

Annual Meeting in 2020. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to membership in the American Law Institute.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to 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, including 54 in the Sixth Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. This study has been relied upon by a number of courts, scholars, and testifying experts.[1] In addition to my empirical works, I have

[1] *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi*

also published many papers on how the economic incentives of attorneys and others affect class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "Class Action Lawyers"). These papers culminated in my recent book, THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press, 2019).

4. 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 provided to me by class counsel.[2] As I explain, based on my study of settlements

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Beverages Co., 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 2018 WL 1997257, at *7 (D.D.C. Apr. 27, 2018) (same); *Hillson v. Kelly Servs. Inc.*, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, 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*, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at *17 (S.D.N.Y. Apr. 24, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016) (same); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1246 (D.N.M. 2016) (same); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Federal National Mortgage Ass'n Secs., Deriv., and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Products Liability Litig.*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

[2] These documents included the motion to dismiss materials, the summary judgment materials, and the plaintiffs' motion for preliminary approval of the settlement, including the Declaration of Brendan P. Glackin

across the country and in the Sixth Circuit in particular, I believe the request here is within the range of reason.

II. Case background

5. The plaintiffs in this lawsuit allege that the defendants Momenta Pharmaceuticals, Inc. ("Momenta"), and Sandoz, Inc. ("Sandoz"), illegally conspired in violation of state laws to keep competition out of the market for a drug called enoxaparin that has a brand name Lovenox®. The defendants allegedly misled a standard-setting organization, the United States Pharmacopeia Convention ("USP"), into adopting a testing standard covered by a patent owned by Momenta and licensed to Sandoz. This allegedly allowed the defendants to exclude a competitor from selling generic enoxaparin for several months. The defendants moved to dismiss the complaint twice, and, after the second motion was denied (in part), the parties engaged in considerable discovery, including more than 2.6 million pages of documents, 36 depositions, and thirty-one expert reports. *See* Glackin Declaration ¶¶ 9-10, 13. The plaintiffs successfully moved for class certification and opposed the defendants' efforts to exclude their expert witness. *Id.* at ¶ 12. After this court certified the class, the defendants moved for summary judgment and that motion was pending at the time the parties reached settlement. This court preliminarily approved class settlements against each defendant on January 3, 2020. Class counsel are now moving for a fee award.

6. The class includes, with some exceptions, "[h]ospitals, third-party payors, and people without insurance who indirectly purchased, paid for, and/or reimbursed some or all of the purchase price for, generic enoxaparin or Lovenox®" in 29 states and the District of

("Glackin Declaration") and the Momenta ("Momenta Settlement Agreement") and Sandoz ("Sandoz Settlement Agreement") settlement agreements attached thereto.

Columbia. *See* Momenta Settlement Agreement ¶1(d); Sandoz Settlement Agreement" ¶1(d). Under the settlements, the class will release the defendants from, among other things, claims "related to both: (1) any purchase, payment or reimbursement for generic enoxaparin or Lovenox® up through September 30, 2015, and (2) any agreement, combination or conspiracy to raise, fix, maintain or stabilize the price of enoxaparin or Lovenox®, monopolization, or any other conduct alleged in the Action or relating to restraint of competition . . . ." Momenta Settlement Agreement ¶1(v); Sandoz Settlement Agreement ¶1(v). In exchange, the defendants will pay $120 million in cash into a settlement fund. *See* Momenta Settlement Agreement ¶11; Sandoz Settlement Agreement ¶11. This fund will be divided among different categories of class members and then distributed *pro rata* to class members who file claim forms based on the dollar value of their purchases (net of rebates, refunds, discounts, and other appropriate offsets). *See* Glackin Declaration Ex. C (distribution plan). If a balance remains in the fund even after all claims have been paid, that balance will, at the court's discretion, be redistributed to class members, donated to *cy pres*, or escheat to the state. *See* Momenta Settlement Agreement ¶22; Sandoz Settlement Agreement ¶21. No money will return to the defendants.

7. Class counsel have now moved the court to award them a fee of one-third of the $120 million fund. As I said and as I will now explain, it is my opinion that this request is reasonable in light of the awards in other cases and the need to foster the proper incentives for counsel in class action litigation.

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

8. This settlement is a so-called "common fund" settlement, where efforts by counsel have created a common fund of cash for the benefit of the plaintiffs. But because this is

a class action and the absent plaintiffs have not entered into retainer agreements with class counsel, class counsel can be compensated only from the funds they have created. This is the so-called "common fund doctrine" and it is a species of unjust enrichment: class members would be unjustly enriched if they did not pay a portion of their recoveries to class counsel.

9. At one time, courts that awarded fees in common fund cases did so using the familiar lodestar approach. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2051; *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, *reprinted in* 108 F.R.D. 237, 242-46 (1985) (hereinafter "Third Circuit Task Force"). Under this approach, courts awarded 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* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2051. Over time, however, the lodestar approach fell out of favor in common fund cases because it was difficult to calculate the lodestar (courts had to review voluminous time records and the like) and the method did not align the interests of counsel with the interests of the plaintiffs (because counsel's recovery did not depend on how much the plaintiffs recovered). *See id.* at 2051-52; *Third Circuit Task Force*, *supra*, at 246-49. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of cases, usually where the settlement calls for substantial non-monetary relief or involves a fee-shifting statute. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of class action settlements). The other large-scale study of class action fee awards found much the same. *See, e.g.,* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. Law Review 937, 945 (2017) (hereinafter "Eisenberg-Miller

2017") (finding the lodestar method used only 6.29% of the time from 2009-2013, down from 13.6% from 1993-2002 and 9.6% from 2003-2008).

10. The more popular method of calculating attorneys' fees is known as the "percentage method." Under this approach, courts select a percentage that they believe is fair to counsel, multiply the settlement amount by that percentage, and then award counsel the resulting product. The percentage approach has the advantages of being easy to calculate (because courts need not review voluminous time records and the like) and of aligning the interests of counsel with the interests of the plaintiffs (because the more the class recovers, the more class counsel receives). *See* Fitzpatrick, *Class Action Lawyers, supra,* at 2052.

11. In the Sixth Circuit, district courts have the discretion to use either the lodestar method or the percentage method in common fund cases. *See Gascho v. Global Fitness Holdings*, 822 F.3d 269, 280 (6th Cir. 2016) ("District courts have the discretion to select the particular method of calculation . . . ."); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) ("The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved. For these reasons, it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of . . . the unique circumstances of the actual cases before them."). In light of the well-recognized disadvantages of the lodestar method and the well-recognized advantages of the percentage method, it is my opinion that courts should generally use the percentage method in common fund cases unless special circumstances counsel otherwise (e.g., the settlement calls for non-monetary relief that is more substantial than the monetary relief but the non-monetary relief cannot be fairly valued and included in the percentage calculation). There are no such special circumstances counseling against the percentage method in this case;

the settlement here is all cash. For these reasons, it is my opinion that the percentage method should be used here.

12. Courts usually examine a number of factors when deciding what percentage to award class counsel under the percentage approach. *See* Fitzpatrick, *Empirical Study, supra*, at 832. In the Sixth Circuit, courts usually consider the following list of factors: "(1) the value of the benefit rendered to the plaintiff[s]; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Gascho*, 822 F.3d at 280 (quoting *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009)); *accord Bowling v. Pfizer, Inc.,* 102 F.3d 777, 780 (6th Cir. 1996); *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983). This list is not exclusive. Courts often consider other factors, including, perhaps most frequently, how the requested fee lines up with awards in other cases. *See, e.g.*, *In re Cardinal Health Inc. Securities Litigations*, 528 F.Supp.2d 752, 754 & n.2 (S.D. Ohio 2007); *In re Southeastern Milk Antitrust Litigation*, 2013 WL 2155387, at *3 (E.D. Tenn., May 17, 2013). In my opinion, a fee award equal to one-third of the settlement here is within the range of reasonable fees because it is supported by all of the factors mentioned above.

13. Consider first the factor: "(4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others." In order to intelligently assess counsel's fee request, it is helpful to consider the role that class action lawyers play in our system of civil justice and how their fees can influence that role. As I explain in my book THE CONSERVATIVE CASE FOR CLASS ACTIONS, class action lawyers perform a necessary law

enforcement role in our country—which is why they are often referred to as "private" attorneys general. In Europe, countries rely much more on the government to do things than we do. But, in America, we believe more strongly in the self-help of the private sector, including the private attorney general. Thus, we need class action lawyers because it is not desirable—nor even possible—for cash-strapped "public" attorneys general to police all wrongdoing. It is also impossible for individual litigants to police all wrongdoing: sometimes individual claims are too small to be viable on their own, and, even when they are viable, individuals do not have the incentive to invest in one claim the same way a defendant facing many similar claims does; as a result, the playing field between individual plaintiffs and defendants is often not level. *See* Fitzpatrick, *Class Action Lawyers, supra*, at 2059. Class action lawyers level the playing field and overcome the enforcement gap that would otherwise exist in our country by aggregating non-viable and underinvested claims into effective litigation vehicles. *See id.*

14. But lawyers are rational economic actors like anyone else. They will only bring lawsuits and optimally invest in them if they are compensated adequately. The fee decisions courts make at the end of successful class actions are, so to speak, the "fuel" in the engine of the private-attorney-general "automobile"; these decisions tell lawyers in future cases what they can expect to receive if they invest in a new case and ultimately win it. Accordingly, in my opinion, courts should set fee awards such that future lawyers will make the best decisions about what cases to file and how to resolve them. In my view, this means courts should set fees such that lawyers will have incentives 1) to bring as many meritorious cases as possible and 2) to litigate those cases in a way that maximizes the resulting compensation for the class and the deterrence of future wrongdoing.

15. In this case, we know the litigation is meritorious because it survived motions to dismiss and proceeded to the brink of trial. Additionally, we know that a generic competitor, Amphastar, successfully defended a patent infringement lawsuit to a jury verdict based on the conduct alleged in this case. But the competitor lawsuit did not recover anything for the class and the government has done nothing at all to rectify the alleged misconduct in this case. Moreover, the losses many class members have are small; too small to expect them all to come forward and seek redress on their own. Even for class members with large claims, they would be hobbled on their own against defendants who would have the incentive to invest more in the litigation than they do for the reasons I state above. Thus, it is only because of class counsel that the defendants here can be made fully accountable for their conduct. Lawyers need adequate incentives to take meritorious cases when no one else has, and then to prosecute them to the fullest. The way we do that is to give them a percentage of what they recover—and, indeed, a better percentage the more they recover. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 697 (1986) ("[T]he most logical answer to this problem of premature settlement would be to base fees on a graduated, increasing percentage of the recovery formula—one that operates, much like the Internal Revenue Code, to award the plaintiff's attorney a marginally greater percentage of each defined increment of the recovery."). In my opinion, the percentage requested here will help further the social goal of appropriately incentivizing lawyers to invest properly in meritorious cases like this one in the future.

16. Consider next the factors that go to the results obtained by class counsel in light of the risks presented by this litigation: "(1) the value of the benefit rendered to the plaintiff[s]," "(5) the complexity of the litigation," and "(6) the professional skill and standing of counsel

involved on both sides." In my opinion, the results here are very impressive when compared to the results in many other class actions. To begin with, the settlement here is larger than many indirect-purchaser class actions in the pharmaceutical space. *See, e.g., In re Lidoderm Antitrust Litig*., 14-md-02521, 2018 WL 4620695, at *2 (N.D. Cal. Sep. 20, 2018) ($105 million); *In re Cardizem CD Antitrust Litig*., 218 F.R.D. 508 (E.D. Mich. 2003) ($80 million); *In re Relafen Antitrust Litig.,* 231 F.R.D. 52, 74 (D. Mass. 2005) ($75 million); *In re Aggrenox Antitrust Litig*., 14-md-2516 (D. Conn.) ($54 million); *In re Solodyn Antitrust Litig.*, 14-md-02503 (D. Mass.), Dkt. 1175 ($43 million); *In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. 369, 394 (D.D.C. 2002) ($35 million for end-payor third-party payors); *In re Wellbutrin XL Antitrust Litig*., 2:08-cv-02433 (E.D. Pa.) ($11.75 million); *see also In re Loestrin 23 Fe Antitrust Litigation*, Case No. 13-md-02472 (D.R.I.) (January 2020 announcement of $62.5 million settlement on top of $1 million previously secured from an earlier-settling defendant).

17. But even more importantly: according to class counsel's expert, the $120 million recovered here is more than 50% of the maximum single damages that could have been recovered in this litigation. This is very high. The closest comparisons on which we have good data come from price-fixing cartel actions. Even though price-fixing cases benefit from the "per se" standard of liability whereas the theory of liability in this case did not, the recovery here is nearly *three times* the average cartel recovery. *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages,* 100 Iowa L. Rev. 1997, 2010 (2015) (finding the weighted average of recoveries—the authors' preferred measure—to be 19% of single damages for cartel cases between 1990 and 2014). *See also, e.g.*, *Jack Faucett Assocs., Inc. v. AT&T*, 1985 WL 5199, *6 (D.D.C., Dec. 16, 1985) (describing "approximately 50 percent of potential single damages" as "well above the range many courts

have approved as fair, reasonable, and adequate"). This excellent recovery weighs heavily in favor of granting class counsel's fee request.

18. Indeed, these results are even more impressive when compared to the risks and complexities presented by this litigation. Although I am not an expert in antitrust law, I am an expert in class actions, and I believe this case was more challenging than the typical antitrust class action I have seen. To begin with, the defendants raised a relatively novel issue with regard to whether this court even has personal jurisdiction in this case. As the court knows, the judiciary is split (albeit with the trend favoring the approach taken by the court) on whether the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), applies to class actions; if it does, this case could not be brought in its present form in this district. Even apart from *Bristol-Myers*, Momenta has continued to challenge the court's personal jurisdiction. Moreover, early in the case, plaintiffs also faced challenges based on *Noerr-Pennington* immunity—challenges class counsel overcame. With respect to the merits, cases involving indirect purchasers like this one present considerable evidentiary challenges—in particular, proving that the effects of exclusion were felt by indirect purchasers several steps down the chain of distribution. *See*, *e.g.*, IIA Areeda et al., Antitrust Law ¶ 396 (3d ed. 2006) (illustrating the "complexity" and "practical problems of proof" in indirect-purchaser suits); Ronald W. Davis, *Amchem and Antitrust: Have the Ground Rules for Antitrust Class Actions Changed?*, 12 Antitrust 39, 44 (Fall 1997) ("[T]he cold fact remains that, in order to recover, the indirect purchasers must prove something about the facts and/or the law which . . . direct purchasing . . . class members do not need to prove. That means the indirect purchaser has a harder row to hoe than the direct purchaser."). That is, plaintiffs would have had to prove, on a class-wide basis at trial, that the overcharges resulting from the defendants' conduct were

passed-through to the class members. In addition, the class faced a litany of legal and factual barriers, including: whether or not there was actually a conspiracy among the defendants; whether plaintiffs could prove a properly defined product market to show damages; whether the defendants' conduct was responsible for excluding the generic competitor Amphastar at all, let alone for several months; and how much of the class's damages could actually be traced to defendants' wrongdoing. Many of these questions could have been resolved against the class on summary judgment, and, even if the class had survived there, at trial. Moreover, even if the class had survived summary judgment and the jury, it is not clear what damages might have been awarded; for example, even if plaintiffs and the class had prevailed on liability, the jury may have awarded damages far below the maximum asserted by the class. Finally, even if the class had prevailed at all those stages and received the maximum amount of damages sought, the defendants inevitably would have taken appeals, introducing more risk (not to mention delay). Indeed, on appeal, the defendants could raise even issues they lost on their motions to dismiss, such as the statute of limitations. The prospect of appeal is not hypothetical: the defendants already filed a Rule 23(f) petition to the Sixth Circuit challenging the court's class certification decision. If one goes through each step in this litigation decision tree and assigns probabilities of success to the class at each step and then multiplies all of those probabilities together, it becomes quite clear that a 50% recovery is excellent in light of the risks. In other words, this factor, too, supports class counsel's fee request.

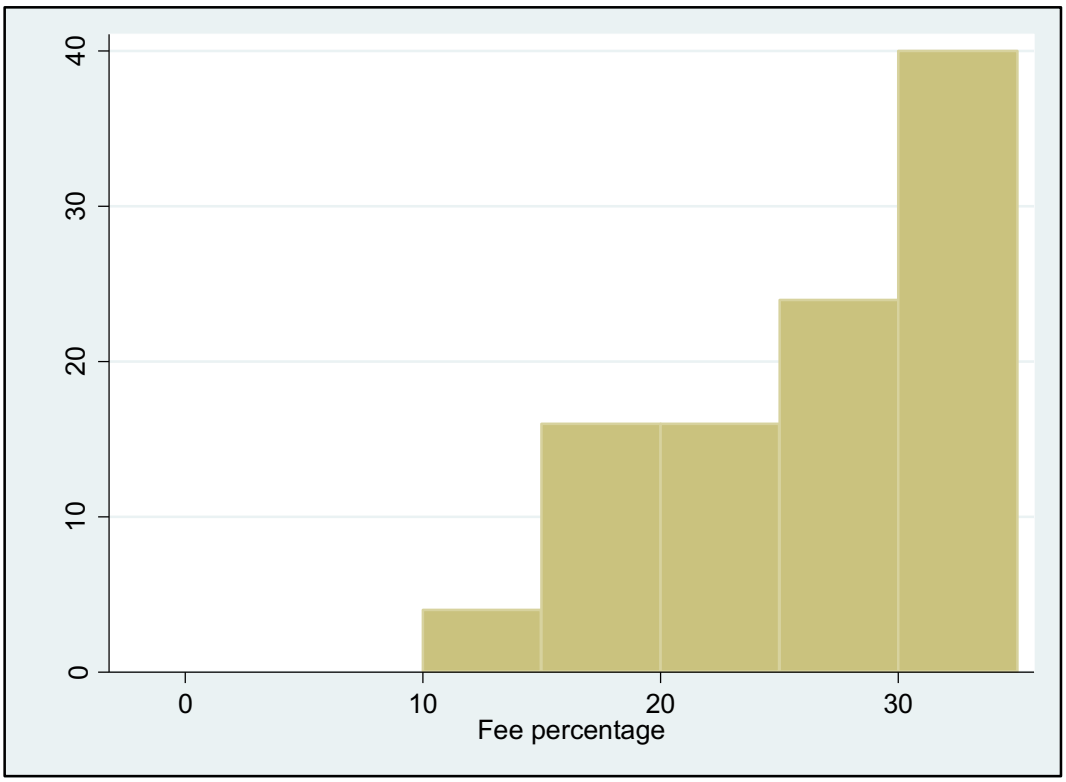
19. Consider next the percentages awarded in other cases. As I explained above, my empirical study represents an unbiased and representative sample of the fees awarded by federal courts. According to my study, the most common percentages awarded by federal district courts nationwide using the percentage method were 25%, 30%, and 33%, with nearly two-thirds of

awards between 25% and 35%, and with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study, supra*, at 833-34, 838. The other large-scale study of class action fees found much the same. *See* Eisenberg-Miller 2017, *supra*, at 951 (finding mean and median of 27% and 29% nationwide since 2009); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010) (hereinafter "Eisenberg-Miller 2010") (finding mean and median of 24% and 25% nationwide before 2009). This means that, although the amount requested here is higher than average, it is still well within the mainstream. Moreover, as I noted above, the results achieved by class counsel here are well above average, especially given the extraordinary risks class counsel took in bringing the case without assistance from other firms or the government. It gives class counsel the right incentives to award them above-average fee percentages when they achieve above-average results.

20. The fee requested here is even more mainstream among Sixth Circuit awards. There were 25 cases in my study from the Sixth Circuit in which courts used the percentage method to award attorneys' fees, and the average fee awarded was 26.1% with a median of 28%. *See id.* at 836. Indeed, a full *forty percent* of awards in the Sixth Circuit were 30% *or greater*. This can be seen from Figure 1 below, which is a complete distribution of the Sixth Circuit's percentage-method fee awards from my study**.** The figure shows what percentage of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). As the figure shows, forty percent of all settlements had fee awards that fell between 30% (inclusive) and 35%. This means the award requested here would fall right within the meatiest part of the Sixth Circuit's distribution of fee awards. Again, the other large-scale empirical study of fee awards found much the same. *See Eisenberg-Miller 2017*, *supra*, at 951 (finding mean and median in

the Sixth Circuit of 26% and 30% since 2009); *Eisenberg-Miller 2010*, *supra*, at 260 (finding both mean and median of 23% in the Sixth Circuit before 2009). As such, in my opinion, the data on awards in other cases support the fee requested here.

Figure 1: Percentage-method fee awards in the Sixth Circuit, 2006-2007



21. It is true that a $120 million settlement would be a very large one; there are only a handful of settlements this size in federal court every year. It is also true that some—but not all—courts award smaller fee percentages when the settlement amount is very large. *See* Fitzpatrick, *Empirical Study, supra*, at 838, 842-44. That is, in my empirical study, settlement size had a statistically significant but inverse relationship with the fee percentages awarded by federal courts. This relationship was found in the other large-scale academic study as well. *See Eisenberg-Miller 2010*, *supra*, at 263-65; *Eisenberg-Miller 2017, supra*, at 947-48. Thus, for example, the mean and median fee percentages awarded in the percentage-method settlements in

my dataset between $100 million and $250 million were 17.9% and 16.9%. *See Fitzpatrick, Empirical Study, supra*, at 839. *See also Eisenberg-Miller 2010, supra*, at 265 (finding mean and median of 19.4% and 19.9% in settlements between $69.6 million and $175.5 million).

22. In my opinion, it undermines rather than furthers the public policy considerations discussed above to cut fee percentages simply because settlements are large. Indeed, doing so can incentivize class action lawyers to settle for less rather than more. Consider the following example: if courts award 20% in fees of $125 million settlements, but 30% in fees of $90 million settlements, then class action lawyers are better off settling for $90 million ($27 million fee) than $125 million ($25 million fee)! Needless to say, such incentives are not good for class members. Courts attuned to these perverse incentives sometimes slash fee percentages on a marginal basis rather than an absolute basis—e.g., award 30% of the first $100 million, but 20% thereafter. Although this has the virtue of not making class counsel poorer if they work for a better settlement, it still undermines class counsel's incentive to fight for the largest recovery for the class. In my experience, it is more difficult and risky to wring from defendants the last dollars in case than it is the first dollars—yet those are the efforts and risks that marginally-declining fee percentages reward the least. This means that rational class action attorneys will at some point redirect their efforts to smaller cases where they can still earn the full return on their investment in time. For example, if class action lawyers believed that the court would award them only 20% once they hit $100 million but 30% before then, then they might redirect their time once they received a $100 million offer to smaller cases where they can still return 30% on their time. Again, such incentives are not good for class members, at least in the biggest cases (i.e., the cases where defendants have caused the most harm). As I noted above, the better way to compensate class counsel is to award them *higher* percentages as they recover more, not lower

percentages as they recover more. *See, e.g.*, Coffee, *supra*, at 697. Although the settlement here obviously will not be affected by the court's fee decision, the decision will send a signal to lawyers in the future about how courts might compensate them and they could have an effect on future cases. In my opinion, courts should not send signals that encourage lawyers to do anything other than recover the most they can from defendants.

23. Nonetheless, as I noted, courts sometimes do not follow this advice and slash fee percentages in bigger cases despite the negative incentives it may cause. It is important to realize however, that, although the fee request here would be higher than the mean and median percentages in the $100-250 million cases I studied, there are many examples of courts awarding above-average fee percentages when justified by the other factors in cases not only of this size, but also in cases larger than this one. *See, e.g., Allapattah Servs. Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) (31.33% of $1.075 billion); *In re Urethane Antitrust Litig.*, No. 04 Civ. 1616, 2016 WL 4060156, at *6 (D. Kan. July 29, 2016) (33.33% of $835 million); *Dahl v. Bain Capital Partners, LLC*, No. 07-cv-12388, Dkt. 1095 (D. Mass. Feb. 2, 2015) (33% of $590.5 million); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (33% of $510 million); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011) (30% of $410 million); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197(TFH), 2001 WL 34312839, *10, 14 (D.D.C. July 16, 2001) (34% of $359 million); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, ECF No. 543 (D. Del. 2009) (33% of $250 million); *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. Sec. Litig.*, 2012 WL 1378677, at *9 (D. Ariz.

Apr. 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. Sec. 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 have explained and continue to explain, I think the other factors also justify it here.

24. Consider next the factor: "(2) the value of the services on an hourly basis" and "(3) whether the services were undertaken on a contingent fee basis." This case has transpired for well over four years, longer than the average and median times to final settlement approval in class action cases. *See* Fitzpatrick, *Empirical Study*, *supra*, at 820 (finding average slightly above three years and median slightly below three years); *see also Eisenberg-Miller 2004, supra*, at 60 (finding mean and median times of less than 3 years). During that time, counsel reviewed millions of pages of documents, took or defended 36 fact and expert witness depositions, and engaged in significant motions practice. Indeed, according to counsel, they have recorded over 26,000 hours of work in this case, valued at approximately $12.8 million using the law firm's current rates. I have no doubt that had the class sought to "retain" counsel on an hourly basis to prosecute the case, it would have been charged millions upon millions of dollars in fees. Yet, because this litigation was taken on contingency, counsel have received no compensation for all these hours over all these years. For all the reasons I noted above, it is important to adequately compensate counsel for the risks and delayed compensation inherent in contingency fee work, lest they will be discouraged from taking cases like this one. As such, these factors, too, support the fee request here.

25. Some courts go on to consider class counsel's "lodestar" and "cross check" it against the percentage method. This is the minority approach, but it is a sizeable minority. *See* Fitzpatrick, *Empirical Study*, *supra*, at 833 (finding that only 49% of courts nationwide 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 nationwide versus 54% for percent method without lodestar crosscheck). In my opinion, the majority approach is the correct one: courts should not consider class counsel's lodestar when employing the percentage method. I say this because, as scholars have explained, considering counsel's lodestar when calculating fee percentages gives class counsel bad incentives. In particular, it has the effect of capping the amount of compensation counsel can receive from a settlement and thereby blunts their incentives to fight for the largest possible award for the class. *See* Fitzpatrick, *Class Action Lawyers*, at 2065-66. That is, the so-called "lodestar crosscheck" reintroduces the very same undesirable consequences of the lodestar method that the percentage method was designed to correct in the first place.

26. Consider the following examples. Suppose a lawyer had worked on a case for one year and accrued a lodestar of $1 million. If the lawyer believed that a court would award it a fee of 33% or 1.5 times his lodestar, whichever was lesser, then he would be completely indifferent between accepting a settlement offer at this point of $4.5 million and $45 million. Either way he would get only $1.5 million. Needless to say, the incentive to be indifferent as to the size of the settlement is not good for class members. Or suppose the lawyer had been offered a settlement offer of $9 million after one year of work. If the lawyer again believed the court would not award a fee of 33% unless it was no more than 1.5 times his lodestar, the lawyer would want to delay accepting the settlement until he could generate another $1 million in

lodestar and thereby reap the maximum fee. Again, dragging cases along for nothing is not good for class members.

27. Nonetheless, because counsel have submitted their lodestar, I will assess how their lodestar compares to other cases. Class counsel have stated that their total lodestar comes to $12.8 million in time. Thus, the fee requested here would result in a multiplier over counsel's lodestar of 3.12. By the standards of other cases, this is not out of the ordinary at all. Of the 204 cases in my study where the district court used the percentage-of-the-fund method with a lodestar crosscheck and the lodestar multiplier was ascertainable, the multipliers ranged from .07 to 10.3, with a mean and median of 1.65 and 1.34, respectively. *See* Fitzpatrick, *Empirical Study*, *supra*, at 834. Although the multiplier here would be greater than most of the cases in my study, the vast majority of class action settlements in my study recovered far less money that this one. This is important because class action fee awards in larger settlements tend to result in larger lodestar multipliers. *See* Eisenberg-Miller 2010, *supra* at 274 ("As the recovery . . . increases, the multiplier also tends to increase, with the multiplier in the highest recovery decile more than triple that of the multiplier in the lowest recovery decile."). Thus, for example, Professors Eisenberg and Miller found that the mean lodestar multiplier was 2.70 for settlements between $69.6 and $175.5 million. *See Eisenberg-Miller 2010*, *supra*, at 274. Similarly, although I did not publish this finding, of the 7 settlements between $100 and $250 million in my study where courts used the percentage method and the multipliers could be ascertained, the average multiplier was 3.47 and the median was 2.20. Those numbers are very comparable to the one here.

28. For all these reasons, I believe the fee award requested here is within the range of reasonable awards.

29. My compensation in this matter was a flat fee in no way dependent on the outcome of class counsel's fee motion.

Nashville, TN

March 2, 2020

Brian T. Fitzpatrick

EXHIBIT 1

BRIAN T. FITZPATRICK

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ACADEMIC APPOINTMENTS

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

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 INTERNATIONAL HANDBOOK OF CLASS ACTIONS (Cambridge University Press, forthcoming 2021) (ed., with Randall Thomas)

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

ACADEMIC ARTICLES

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

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

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

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

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

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

ACADEMIC PRESENTATIONS

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, Florida (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)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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)

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

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

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

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

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

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

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

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

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

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

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

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

OTHER PRESENTATIONS

Does the Way We Choose our Judges Affect Case Outcomes?, American Legislative Exchange Council 2018 Annual Meeting, New Orleans, Louisiana (August 10, 2018) (panelist)

Oversight of the Structure of the Federal Courts, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate, Washington, D.C. (July 31, 2018)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROFESSIONAL ASSOCIATIONS

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

COMMUNITY ACTIVITIES

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

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2020, the foregoing document was filed electronically with the U.S. District Court for the Middle District of Tennessee. Notice of this filing was served via the court's electronic filing system on counsel listed below:

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