IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION This Document Relates To: THE DIRECT PURCHASER PLAINTIFF ACTION	Case No.: 1:16-cv-08637 The Honorable Thomas M. Durkin Magistrate Judge Jeffrey T. Gilbert

DECLARATION OF BRIAN T. FITZPATRICK REGARDING DIRECT PURCHASER PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

I. 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 was paid a flat fee for this declaration and it is in no way dependent on the outcome of Direct Purchaser Plaintiffs' fee petition. 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 Fordham 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 Institutes on Class Actions in 2011, 2015, 2016, 2017, and 2019; 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. Earlier this year, I became the co-author of The Cambridge Handbook of Class Actions: An International Survey (with Randall Thomas).

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 still 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 79 from the Seventh 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. Since then, this study has been relied upon regularly by a number of courts, scholars, and testifying experts.[1]

---

[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 Wells Fargo & Co. S'holder Derivative Litig.*, 2020 WL 1786159 at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, 2020 WL 949885 at *52 (D. Mass. Feb. 27, 2020) (same); *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 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.*, 313 F. Supp. 3d 27, 38 (D.D.C. 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); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Prods. Distrib. 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 Mktg. 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 & 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. Assoc. Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. 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 Se. 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).

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); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Much of this work was discussed in a book I recently published with 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. This work, too, has been relied upon by courts and scholars.[2] I have attached the most recent piece—*A Fiduciary Judge*—as Exhibit 2 and will draw upon it in this declaration.

II. SUMMARY OF OPINIONS

5. I have been asked by Direct Purchaser Plaintiffs (DPPs) to opine on the two questions put to them by this Court's August 4, 2021, Order (ECF No. 4915). The documents I reviewed to do so are listed in Exhibit 3. My opinions are as follows:

- First, the best existing evidence suggests that parties in the legal market overwhelmingly reject the so-called "sliding scale" method to pay lawyers who work on contingency in favor of flat percentages of one-third and the like or a

[2] *See, e.g.*, *Briseno v. Henderson*, 998 F.3d 1014, 1025, 1029 (9th Cir. 2021); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 960 (11th Cir. 2020) (Jordan, J., dissenting); *Tershakovec v. Ford Motor Co.*, 2021 WL 2700347, at *18 (S.D. Fla. July 1, 2021); *Vita Nuova, Inc. v. Azar*, 2020 WL 8271942, at *3 n.5 (N.D. Tex. Dec. 2, 2020).

formula where the percentage increases even further depending on the procedural maturity of the case when it is resolved. This is true even among very sophisticated clients like large corporations and it is true even in large cases like patent infringement litigation. This should not be surprising: economic models of rational actors show that the sliding-scale method has serious drawbacks.

- Second, one of the drawbacks of the sliding-scale method is it is extremely difficult to set the inflection points in the formula at the outset of a case: to do this intelligently, we would need to know what the outcome of the litigation would be at each additional unit of effort by the lawyer. No one knows this. That is, it is my opinion that it is impossible to create a decreasing scale that is representative of the rate that would have been agreed to in the market in this case. If the court wishes to use a variable rather than a flat percentage, the one that has the most support from market data and economic models of rational clients is one that escalates based on procedural maturity—*i.e.*, one that pays a higher percentage if the case goes to trial, to appeal, etc.

III. CASE BACKGROUND

6. This litigation was filed by DPPs in September 2016 as a putative class action against some of the largest corporations in the world accusing them of conspiring to fix prices on certain chicken products in the United States. Counsel for DPPs discovered the predicate for these allegations on their own; this litigation did not follow on a government investigation; indeed, the government investigation followed on this litigation (and has now led to criminal indictments). The allegations in the complaint survived the Defendants' motions to dismiss and the parties have since engaged in considerable discovery (until it was stayed, in whole and then in part, by the

Department of Justice's follow-on investigation). DPP Counsel have litigated this case for five years without any payment of attorneys' fees or reimbursement of significant expenses incurred in the litigation. The docket and history of the case shows that this is an extremely hard-fought and adversarial case. At the time DPPs petitioned for attorneys' fees, six of the twenty Defendants had settled. Those settlements total some $170 million, the majority of which (approximately $155 million) was from the most recent settlements with Tyson and Pilgrim's. Litigation against the other fourteen Defendants is ongoing, including a pending motion for class certification. In light of the settlements obtained to date, DPPs have now sought an interim fee award.

IV. THE SEVENTH CIRCUIT'S MARKET-BASED APPROACH TO FEE AWARDS IN CLASS ACTIONS

7. The Seventh Circuit is unique among federal circuits in that it requires district courts to replicate the market for legal services when it sets fees in class actions. *See, e.g.*, *Americana Art China v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 246 (7th Cir. 2014) ("[W]e always seek to replicate the market value of an attorney's services . . . ."); *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) ("[A]ttorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services."); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("When attorney's fees are deducted from class damages, the district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."); *Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007) ("Because the court chose to wait until the end of litigation, it was required to set the fee by estimating what the parties would have agreed to had negotiations occurred at the outset."); *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") ("We have held repeatedly that, when deciding on appropriate fee levels in

common-fund cases, courts must do their best to award counsel the market price for legal services . . . ."). It is well known that the market for legal services in the United States virtually always pays lawyers who work on contingency like class counsel with a percentage of the client's recovery. *See* Fitzpatrick, *A Fiduciary Guide, supra*, at 1159-61.

8. In theory, judges could determine the market fee percentage in class action cases by holding an auction for the class counsel position at the start of litigation. *See id*. at 1164. In practice, though, this is difficult to do for a variety of reasons. *See id.* at 1165-66. Indeed, the obstacles are so severe that experimentation with auctions has all but ceased. *See id.* For example, I suspect it would have been impossible to conduct an auction in this case given that DPP Lead Counsel were the only attorneys who applied to lead the case.

9. Instead, district courts in the Seventh Circuit and elsewhere almost always set fees *ex post* when a fee petition accompanies settlements or when judgment has been entered for plaintiffs. In these situations, the Seventh Circuit has instructed district courts to estimate what the *ex ante* market percentage would have been for the legal services rendered by class counsel by looking at a number of circumstantial factors. These factors include (1) fee contracts that any large-stakes class members signed with their attorneys in this litigation, *see In re Synthroid Marketing Litig.*, 325 F.3d 974, 976 (7th Cir. 2003) ("*Synthroid II*") (analyzing fee contracts from large-stakes class members who "hired law firms to conduct this litigation"); *Synthroid I*, 264 F.3d at 719-20 (instructing courts to examine "actual agreements" between large-stakes class members and their attorneys in that very litigation); (2) fee contracts large-stakes plaintiffs sign with attorneys in similar litigation, *see Rohm & Haas*, 658 F.3d at 635 ("'actual fee contracts that were privately negotiated for similar litigation'"), *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (same); (3) fee percentages awarded by other district court judges trying to mimic the market

rate for class action lawyering in similar cases, *see Taubenfeld*, 415 F.3d at 599 (affirming award where "the court considered awards made by courts in other class action cases . . . in the Northern District of Illinois"); *see also Rohm & Haas*, 658 F.3d at 635 ("'information from other cases'")[3]; and how the (4) risks, (5) quality of lawyering, (6) work required, and (7) stakes would have affected the *ex ante* contingency fee percentage. *See Silverman*, 739 F.3d at 958 (affirming above-average fee percentage because district court could have found that the "suit was unusually risky" and "[t]he greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel"); *Rohm & Haas*, 658 F.3d at 636 (affirming award where district court "assessed the amount of work involved, the risks of nonpayment, and the quality of representation"); *Sutton*, 504 F.3d at 693 ("We have said the market price for legal fees 'depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case.'"); *Taubenfeld*, 415 F.3d at 600 (affirming fee award where "[t]he district court also evaluated other factors," including "the quality of legal services rendered" and "degree of risk").

V. SHOULD THE COURT USE A SLIDING-SCALE PERCENTAGE FORMULA IN THIS CLASS ACTION?

10. Let me address the first question asked by this Court's order: should the Court use a sliding scale fee formula? A so-called "sliding scale" percentage formula pays the lawyer

[3] In years past, the Seventh Circuit also instructed district courts to examine fee contracts that resulted from auctions for class counsel in similar cases. *See Rohm & Haas*, 658 F.3d at 635; *Sutton*, 504 F.3d at 692 n.2; *Taubenfeld*, 415 F.3d at 599; *Synthroid I*, 264 F.3d at 719. Because auctions are not really used anymore (and were never used much even in past years), the Seventh Circuit has since cast doubt on that factor. *See Silverman*, 739 F.3d at 957-58 ("In many markets competition proceeds by auction. But . . . solvent litigants do not select their own lawyers by holding auctions, because auctions do not work well unless a standard unit of quality can be defined and its delivery verified. There is no 'standard quantity' of legal services, and verification is difficult if not impossible.").

different marginal percentages of the client's recovery rather than a flat percentage. For example, an increasing sliding scale might pay the lawyer 33% of the first $10 million recovered, 40% of the next $10 million, and so on; a decreasing sliding scale might pay the lawyer 33% of the first $10 million recovered, 25% of the next $10 million, and so on. In my opinion, none of the circumstantial factors the Seventh Circuit directs district courts to examine to estimate the *ex ante* fee arrangement in this case suggests that a sliding-scale formula based on the size of the recovery would have been used here.

11. Let me begin with factor (1): *ex ante* fee agreements with large-stakes class members in this litigation. According to DPP Class Counsel, the representative class members signed retainer agreements that did not specify a fee percentage; they specified only that any fees would be awarded by the Court. This is not uncommon in litigation that the parties intend to go forward as a class action. Even when such agreements exist, I do not usually give them great weight unless the class representatives qualify as "large scale" class members with significant stakes in the litigation. *See In re Trans Union Corp. Priv. Litig.*, 629 F.3d 741, 744 (7th Cir. 2011). Nonetheless, we have a clear indication that the class members view the fee award as being reasonable: DPP Class Counsel have notified all of the class members—some of whom are very large companies with very large stakes—that they are seeking a flat fee of 33⅓%, and not a single one of them objected. In light of the sophistication of the class members, all of whom are businesses and some of whom are quite large, the conclusion that can be drawn from their decision not to object is that they favor the flat fee proposed by DPPs—not a sliding-scale fee. Although this is technically *ex post* acquiescence rather than *ex ante* affirmative agreement, the Seventh Circuit has said that is probative nonetheless. *See Silverman*, 739 F.3d at 959 (affirming fee award

because "none of the institutional" class members "protested" the fee request even though they have "in-house counsel" who could have earned them a "tidy sum" if the fee had been reduced).

12. I use the word "technically" above because I believe the *ex post* acquiescence in this case is actually equivalent to *ex ante* agreement. The reason is because this litigation is ongoing. Thus, the large class members that did not object have to worry about DPP Class Counsel's incentives against the remaining Defendants; the last thing they would want to do at this point is signal that they will nickel and dime them at the end. Rather, they are telling DPP Class Counsel that they are happy to pay a flat one-third. But if the large class members are willing to pay counsel a flat one-third now, then it is hard to see why they would not have been willing to pay them one-third at the outset of the litigation for the very same reason: they would have been worried about DPP Class Counsel's incentives. Thus, I think this factor fully supports the conclusion that the market rate here would have been a flat 33⅓%—not a sliding scale formula.

13. Consider next factor (2): fee contracts large-stakes plaintiffs sign with attorneys in similar litigation. In a recent article in the Fordham Law Review, I canvassed the data that exists on fee agreements that sophisticated corporations enter into when they hire lawyers on contingency. *See* Fitzpatrick, *A Fiduciary Guide*, *supra*, at 1159-63. There is admittedly not much systematic data, but the data that does exist suggests that they use the same fee arrangements that personal injury plaintiffs use: flat fee percentages of one-third and the like or percentages that escalate even higher based on procedural maturity—not scales that slide based on recovery size. *See id*. The best study comes from patent litigation. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335 (2012). Patent lawsuits can involve billions of dollars and the most sophisticated corporations in the world. Yet, Professor Schwartz found that the two main ways of setting the fees for contingent fee lawyers in these cases

are a flat rate (most cases) or a rate that escalates based on procedural maturity. *Id.* at 360. Of the agreements using a flat fee, the mean rate was 38.6% of the recovery. *Id.* Of the agreements he reviewed that escalated based on procedural maturity, the average percentage upon filing was 28% and the average through appeal was 40.2%. *Id.* No one used a sliding scale based on the size of recovery.

14. It is true that patent litigation is not the same as antitrust litigation. But, in the Fordham article, I also gathered data from a series of antitrust class actions that suggests that large, sophisticated corporations prefer flat fees there as well. *See* Fitzpatrick, *A Fiduciary Guide, supra*, at 1161-62. The class members in these cases were the same two dozen or so drug wholesalers. Many were large companies—several were of Fortune 500 size or bigger—and most or all had in-house or personal counsel monitoring the litigations. The potential damages were enormous. In just one of the cases, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015), the class recovered over $500 million. In the series as a whole—which is still ongoing but spanned almost 20 years in my data—they recovered more than $2 billion. As I show in my article, class counsel requested—and received—a flat 33⅓% in almost every one of these cases. *See* Fitzpatrick, *A Fiduciary Guide*, *supra*, at 1161-62, 1172-78. To the extent I was able to find the *ex ante* fee agreements with the representative plaintiffs, they, too, called for a flat 33⅓%. *See id.* But most tellingly of all in my opinion: *not a single class member ever objected* to the fee request in any of these cases; again, these cases spanned 20 years. It is hard to draw any conclusion from this other than that, even in antitrust cases, sophisticated corporations are happy to play flat fees of 33⅓% and they are happy to do so even in the largest cases. It is true that this is only one set of corporations in one series of antitrust cases, but it is a strong indicator. Thus, I think this factor, too, fully supports the conclusion that the market rate

here would have been a flat 33⅓% (or perhaps a percentage that escalated based on procedural maturity)—not a sliding-scale formula based on the size of recovery.

15. Consider next factor (3): fee awards from other district courts in the Seventh Circuit seeking to calculate the market rate for class action lawyering in similar cases; I focus on the Seventh Circuit because that is the only Circuit where district courts are instructed to approximate the *ex ante* market rate for lawyering when setting fees in class actions. In my empirical study of all class action fee awards in 2006 and 2007, I did not record how often district courts used a sliding scale as opposed to a flat percentage. To my knowledge, no one has ever investigated this matter. But I have been unable to find any data from anyone that suggests even indirectly that the sliding scale is being used frequently in the Seventh Circuit. For example, the mean and median fee percentages in the Seventh Circuit are higher than those of other circuits. *See* Fitzpatrick, *Empirical Study, supra*, at 836 (finding mean and median of 27.4% and 29% in the Seventh Circuit); Eisenberg-Miller 2017, *supra*, at 951 (finding the Seventh Circuit's mean and median from 2009 to 2013 to be 28% and 30%). If sliding scales were common in the Seventh Circuit, I doubt this would be the case—unless they were *increasing* rather than decreasing sliding scales. Moreover, although it is true that nationwide data shows that some courts award lower fee percentages when recoveries are greater, *see Fitzpatrick*, *Empirical Study*, *supra*, at 828 (noting a statistically significant effect nationwide, largely in settlements above $100 million); Eisenberg-Miller 2017, *supra*, at 947 (same), when I separated my Seventh Circuit data from the other Circuits and examined it for this declaration, there was no statistically significant relationship between fee percentage and settlement size in the Seventh Circuit (p = .167);[4] this, too, suggests

[4] The "p value" is the probability that the relationship between fee percentage and recovery size exists by random chance in a given statistical model—in this case, the model is simple least-squares linear regression. "If p is smaller than 5%, the result is said to be 'statistically significant.'" Federal Judicial Center, Reference Manual on Scientific Evidence 168 (2d ed. 2000). When a

sliding scales are not often used in the Seventh Circuit—or that, again, if they are, *increasing* scales are used as frequently as decreasing scales. I am unaware of any study since mine that has found to the contrary. But to whatever extent sliding scales have been used in the Seventh Circuit, neither I nor DPP Class Counsel could find any examples in antitrust cases, which, of course is the particular market that we are trying to assess here.[5] Thus, I think this factor, too, supports the conclusion that the market would not have used a sliding scale in this case.

16. Consider finally factors (4-7), where the Seventh Circuit instructs district courts to assess how the risks, quality, work required, and stakes at issue in this case might have affected the *ex ante* market. None of these factors suggest that a sliding scale would have been used here. Rather, they suggest that the parties would have demanded the same percentages they demand in the *most* complex, *most* risky, *most* significant contingency litigation; as I noted above, the best evidence of what those would have been are a flat 33⅓% (or perhaps percentages that escalate based on procedural maturity).

---

relationship is statistically significant, we can reject the hypothesis that the relationship exists by random chance. In this case, p is larger than .05, so we cannot reject the hypothesis that the relationship between fee percentage and recovery size in the Seventh Circuit exists by random chance.

[5] Indeed, we could barely find any examples in *any* type of case: in the last 20 years, we could find only *seven* sliding-scale fee awards on Westlaw in the entire Seventh Circuit after examining all the cases that cited *Synthroid II* or *Silverman* and using the following searches in the Seventh Circuit database: (fee /4 award & "class action" & "sliding scale" (down! /5 sliding)); (fee /4 award & "class action" "sliding scale" (down! /5 sliding)); (fee /4 award & "class action" & "sliding scale" (increase /5 decrease) (down! /5 sliding)); (attorney /3 fee & "class action" & "sliding scale"); (attorney /3 fee & "class action" & "sliding scale" (increase /5 decrease) or (down! /5 sliding)). Over that same time span, based on my empirical study, I estimate that there have been nearly 800 class action settlements in the Seventh Circuit. *See* ¶ 3, *supra* (finding 79 class action settlements over two years in the Seventh Circuit). Although Westlaw is obviously underinclusive of district court fee orders, I think the most reasonable conclusion to draw from this is that the sliding scale is not just a minority approach in this Circuit, but a very small minority approach at that. *See, e.g.*, *In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 801 (N.D. Ill. 2015) ("*Synthroid II* is the only consumer class action known to this court where the parties (or in this case the court) estimated a downward scaling fee agreement in a consumer class action.").

17. First, this litigation has transpired longer than the typical antitrust class action and this was perfectly predictable from the outset. According to my empirical study, the average length to final approval of a settlement in an antitrust class action case was approximately three years. *See* Fitzpatrick, *Empirical Study*, *supra*, at 820. Yet this case has already transpired for five years and is still not yet fully resolved. In light of the seriousness of the allegations and the resources of the Defendants, this was perfectly predictable. Indeed, the allegations here are so serious they prompted an investigation by the Department of Justice that has led to several criminal indictments and a guilty plea from Pilgrim's. There was little doubt in anyone's mind that the Defendants were going to fight this case long and hard. But the longer a lawyer expects to go unpaid, the higher the percentage the lawyer is likely to charge at the outset.

18. Second, DPP Class Counsel knew this litigation would be riskier than most antitrust cases. Perhaps most importantly, DDP Class Counsel had to undertake this matter without the benefit of a prior government investigation; that obviously made this a riskier and more difficult venture than many antitrust cases. Moreover, even after an extensive—and expensive—investigation, it still was not clear this case would even survive a motion to dismiss; the line between legal "parallel conduct" and illegal "agreement" is a notoriously uncertain one. Indeed, even after surviving the motion to dismiss, it still is not clear this case will survive summary judgment; it will depend on whether DPP Class Counsel were able to find evidence in discovery to support the existence of a conspiracy; it will also depend on the outcome to challenges to their experts. Furthermore, it is not certain that the Court will even certify a litigation class here; victories on the merits questions could be for naught if the Court refuses to do so. But even if DPP Class Counsel prevail on all legal facets of the case, they still must convince a jury to see the facts their way and to award a meaningful amount of damages. And even if DPP Class Counsel do all

of that, all these risks will be multiplied one time over again during any appeal. The riskier the case, the higher the percentage the lawyer is likely to charge at the outset.

19. Third, DPP Class Counsel knew they would have to outlay significant out-of-pocket costs in this case. Indeed, the case isn't even over yet and they have already spent over $5 million. This is an important consideration for the percentage that a lawyer must charge at the outset because, even if a lawyer eventually wins the case, the lawyer cannot recover any multiplier on costs to compensate for the risk of non-recovery. *See generally* Morris A. Ratner & William B. Rubenstein, *Profit for Costs*, 63 DePaul L. Rev. 587 (2014). Rather, the lawyer must make up for the risk of non-payment of costs on the fee side. This means that the greater the cost outlay, the greater the percentage the lawyer must charge at the outset.

20. In short, in light of the substantial length this litigation was expected to take, the substantial risks this litigation involved, and the substantial outlay of expenses this litigation was expected to require, it is my opinion that all these factors, too, fully support the conclusion that the market rate here would have been the same percentages demanded in the most complex, most risky, most significant contingency litigation: a flat 33⅓% (or perhaps percentages that escalate based on procedural maturity)—not a sliding scale based on recovery size.

21. Let me close this section with a few words about the Seventh Circuit opinions authored by Judge Easterbrook that this Court cited in its order. I think it is fair to say that Judge Easterbrook is single-handedly responsible for any interest in the Seventh Circuit in sliding scale formulae based on recovery size in class action cases. He is also a jurist whose work I cite constantly in my own and one who I admire more than perhaps all but the two for whom I clerked. But these opinions must be read carefully. It is true that Judge Easterbrook sometimes made favorable comments about a decreasing sliding scale based on recovery size, *see Synthroid II*, 325

F.3d at 975 ("[T]he market rate, as a percentage of recovery, likely falls as the stakes increase . . . ."); *Silverman*, 739 F.3d at 959 ("[N]egotiated fee agreements regularly provide for a recovery that increases at a decreasing rate."); *see also Synthroid I*, 264 F.3d at 721 ("Both negotiations and auctions often produce diminishing marginal fees when the recovery will not necessarily increase in proportion to the number of hours devoted to the case."). But these opinions are hardly ringing endorsements of the declining sliding scale. Judge Easterbrook only went along with the sliding scale in *Synthroid II* to "stick as close as possible to the district court's approach" in order to avoid "remanding for still a third calculation." 325 F.3d at 980. Moreover, his favorable comments were brief, passing surmises—he said these arrangements occurred "often" and "regularly" or were "likely" in the market without citing anything but a small handful of class action auctions that produced sliding-scale bids, *see Synthroid I*, 264 F.3d at 721 (citing three auctions). Yet, in the very same opinions, he also explained why a sliding scale based on recovery size might not be optimal, *see id.* ("This is not to say that systems with declining marginal percentages are always best. They also create declining marginal returns to legal work, ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client. This feature exacerbates the agency costs inherent in any percentage-of-recovery system."), and cast doubt on the relevance of auctions, *see Silverman*, 739 F.3d at 957-58 ("In many markets competition proceeds by auction. But . . . solvent litigants do not select their own lawyers by holding auctions, because auctions do not work well unless a standard unit of quality can be defined and its delivery verified. There is no 'standard quantity' of legal services, and verification is difficult if not impossible."). Moreover, Judge Easterbrook has affirmed many fee awards despite the fact that they did not use a sliding scale, as *Silverman* itself

attests. In my opinion, sliding scales based on recovery size are not as attractive as Judge Easterbrook sometimes thought.

22. Judge Easterbrook thought sliding scales based on recovery size would be attractive to the market because he believed that litigation often presents economies of scale, and, in a competitive market, marginal price will be driven down to marginal cost; thus, as the marginal cost declines, so should the marginal price (in this case, the fee percentage). *See Silverman*, 739 F.3d at 959 ("Many costs of litigation do not depend on the outcome; it is almost as expensive to conduct discovery in a $100 million case as in a $200 million case."). That is a simple and compelling economic model when we are dealing with a product of fixed quality. But the product here—litigation—is not of fixed quality; the quality depends on how hard the lawyer works, as well as the lawyer's skill and expertise. This is particularly true in antitrust cases in which the complexity and size of the case (and in turn the amount of recovery) require that the attorneys handling the case expend significant effort and have considerable skill.[6]

23. When we assume that quality is not fixed, the economic models become more complicated—as Judge Easterbrook himself acknowledged. *See Synthroid II*, 325 F.3d at 979 ("For legal services, however, it is hard if not impossible to hold the quality dimension constant.").

---

[6] Judge Easterbrook thought a sliding scale based on recovery size would be particularly attractive when the dispute is over liability and the magnitude of damages will not vary with attorney effort. *See Silverman*, 739 F.3d at 959 ("Much of the expense must be devoted to determining liability, which does not depend on the amount of damages; in securities litigation damages often can be calculated mechanically from movements in stock prices."). This may explain the use of sliding scales in the two TCPA cases cited by this Court, *In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d at 804, and *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 237 (N.D. Ill. 2016). TCPA cases are statutory damages cases and statutory damages cases are paradigmatic examples of cases where damages flow from liability without much marginal effort. But, needless to say, damages are *not* likewise automatic in antitrust cases. Indeed, the TCPA cases explicitly recognized that TCPA litigation is very different from antitrust litigation. *See In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d at 801. This is probably why neither I nor DPP Class Counsel could find a single antitrust case in the Seventh Circuit where a sliding scale was used.

Indeed, I examined the contingency fee models in my recent Fordham article. In particular, I examined the models depicting how rational clients would structure contingency fees *ex ante* in order to maximize their take from the litigation. *See* Fitzpatrick, *A Fiduciary Guide, supra*, at 1156-59. The models are indeterminate because they depend on many variables, such as how well the client monitors the lawyer. But almost all of them are devoted to flat percentages and percentages that escalate with procedural maturity. To the extent there is any endorsement of a sliding scale based on recovery size, it is usually an *increasing* scale to mitigate the biggest drawback of paying lawyers a percentage of the recovery: any percentage lower than 100% causes the lawyer to want to underinvest in the case given that they bear all of the investment but only a fraction of the return on investment; the lower the percentage the greater the desire to underinvest. *See id*. at 1158 n.38.

24. The decreasing sliding scale based on recovery size is not popular in the literature because it has one big theoretical drawback and one big practical one. The theoretical drawback is, as Judge Easterbrook himself noted, that it exacerbates rather than mitigates the aforementioned underinvestment problem; this is dangerous if the client is not in a good position to monitor the lawyer well. *See Synthroid I*, 264 F.3d at 721 ("They also create declining marginal returns to legal work, ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client. This feature exacerbates the agency costs inherent in any percentage-of-recovery system."). The practical drawback is that it requires something approaching clairvoyance to implement because the parties need to know where to set the inflection points at the beginning of the case—*i.e.*, before there has been any discovery or other relevant information elicited by the litigation. *See* Fitzpatrick, *A Fiduciary Guide*, *supra*, at 1166. In other words, in a world with imperfect monitoring and

imperfect information—that is, in the real world—decreasing marginal percentages based on recovery size are hard to pull off.

25. All of this is confirmed by the fact that there is very little evidence that sophisticated clients use sliding scales based on recovery size. Judge Easterbrook did not cite any such evidence; instead, he cited three auctions where decreasing marginal bids had been submitted. But, as he himself acknowledged, auctions are very difficult to pull off when quality is variable; it is for this reason that auctions have been all but abandoned in class actions. *See Synthroid II*, 325 F.3d at 979 ("There is, moreover, considerable question just what is being auctioned in bidding to represent a class. Normally an auction specifies the precise product to be sold (a particular painting, a share of stock in a named corporation, or 5,000 cubic yards of concrete having defined attributes). For legal services, however, it is hard if not impossible to hold the quality dimension constant."). Thus, I do not believe the best way to mimic the market is to mimic auctions; large, sophisticated corporations do not auction their contingency legal representation—again, as Judge Easterbrook acknowledged: "Large and sophisticated purchasers of legal services, such as Exxon/Mobile and General Motors, do not acquire legal services at auction . . . ." *See id*.

26. I tried to shine some light on what sophisticated purchasers of legal services do in my Fordham article; in particular, I examined the only systematic data I could find of how these clients choose to pay lawyers on contingency. There was no evidence they used sliding scales based on recovery size. *See* Fitzpatrick, *A Fiduciary Guide*, *supra*, at 1166, 1170. It is true there is *anecdotal* evidence that clients sometimes choose marginally decreasing rates based on recovery size, but there is also anecdotal evidence that clients sometimes choose marginally *increasing* rates. *See, e.g.*, *In re AT & T Corp.*, 455 F.3d 160, 163 (3d Cir. 2006) (describing fee agreement between class counsel and "the lead plaintiff New Hampshire Retirement Systems": "The formula

provided attorneys' fees would equal 15% of any settlement amount up to $25 million, 20% of any settlement amount between $25 million and $50 million, and 25% of any settlement amount over $50 million."). Rather, the systematic data that exists suggests that clients overwhelming prefer flat percentages or percentages that vary (and increase) with litigation maturity—not with recovery size; indeed, Judge Easterbrook himself noted how common the latter are. *See Synthroid I*, 264 F.3d at 722 ("Systems where fees rise based on the stage of litigation rather than the calendar are more common in private agreements (indeed they are the norm for contingent-fee contracts in tort suits)."). In short, with the greatest respect to Judge Easterbrook, I think there is very little reason to believe that clients *anywhere* commonly choose decreasing marginal percentages, let alone reason to believe that the plaintiffs in this case would have wanted to use them.[7]

[7] Judge Easterbrook also suggested that marginally decreasing percentages are consistent with the empirical studies—including my own—showing that some courts award lower fee percentages in bigger class action settlements. *See Silverman*, 739 F.3d at 959 ("The articles we have cited reinforce the observation in the *Synthroid* opinions that negotiated fee agreements regularly provide for a recovery that increases at a decreasing rate."). But these findings are based on fee awards from other Circuits (*see* ¶ 15, *supra*, reporting no such statistically significant effect in the Seventh Circuit) that are not even trying to capture how clients pay lawyers in the market like the Seventh Circuit does. *See Synthroid I*, 264 F.3d at 718 ("The judge did not explain why she decided to follow decisions of district courts in other jurisdictions, rather than decisions of the United States Court of Appeals for the Seventh Circuit. For the approach that these districts take, . . . cannot be reconciled with the approach our opinions adopt. We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services."). Moreover, the lower fee percentages in other Circuits are not even *marginally* declining percentages as required by the sliding scale approach. They are lower *flat* percentage rates when the lawyer recovers more, something that Judge Easterbrook has said are so irrational that no client would structure fees in that way and are therefore forbidden in the Seventh Circuit. *See id.* ("Under the court's ruling, a $40 million settlement would have led to the same aggregate fees as the actual $132 million settlement. Private parties would never contract for such an arrangement, because it would eliminate counsel's incentive to press for more than $74 million from the defendants. Under the district court's approach, no sane lawyer would negotiate a settlement of more than $74 million and less than $225 million; even the higher figure would make sense only if it were no more costly to obtain $225 million for the class than to garner $74 million.").

VI. IF THE COURT DOES USE A SLIDING SCALE, WHAT SHOULD THE SCALE BE?

27. This Court's order also asked what the sliding scale should be if the Court nonetheless decided to use one. In my opinion, it is impossible to answer this question with any degree of confidence. In order to construct the sliding scale that maximized the class's take from this litigation, we would need to know DPP Class Counsel's so-called "production function"—essentially, what the outcome of the litigation would be at each additional unit of time invested by counsel. *See, e.g.*, Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. Legal Stud. 503, 515-23 (1996). No one knows this, including DPP Class Counsel; for one thing, it depends on what the Defendants will do in response to each additional unit of time invested by DPP Class Counsel. Moreover, even if we knew the production function, it would still be complicated to figure out where to set the inflection points to maximize the class's take from the litigation in light of the other variables involved in the calculation. *See id*. The only academic papers to attempt this sort of thing have tried to calculate optimal flat contingency percentages, *see, e.g.*, *id*.; I am unaware of any study that has even attempted to calculate optimal marginal percentages.

28. In light of all this, if the Court wishes to use a variable rather than flat percentage, I recommend a formula based on procedural maturity rather than recovery size; *e.g.*, to increase the percentage if the case goes to trial and then again if the trial verdict is appealed. As I noted above, this is the variable-percentage formula that has the most support in the marketplace and the theoretical models of what clients would choose *ex ante*. *See* Fitzpatrick, *A Fiduciary Guide*, *supra*, at 1166; Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. Legal Stud. 189, 201 (1987).

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

Nashville, TN

September 14, 2021

Brian T. Fitzpatrick