IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

DAVID M. ROGOWSKI, ELIZABETH A. BALLY, KATHY BAUER, KIM BOTTE, JOHN E. JAUNICH, MYLENE MCCLURE *as personal representative of* THE ESTATE OF EARL L. MCCLURE, RONALD K. PAGE, CHANDRA B. SINGH, JOYCE THOMAS, DAVID TOMS, and WILLIAM T. WHITMAN, Individually and On Behalf Of All Others Similarly Situated,

Plaintiffs,

vs.

STATE FARM LIFE INSURANCE COMPANY and STATE FARM LIFE AND ACCIDENT ASSURANCE COMPANY,

Defendants.

Case No. 4:22-cv-00203-RK

CLASS COUNSEL'S MOTION AND SUGGESTIONS IN SUPPORT OF MOTION FOR ATTORNEY'S FEES, COSTS, EXPENSES AND SERVICE AWARDS

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INTRODUCTION

The $325 million cash Settlement[1] secured from Defendants ("State Farm") represents the largest known class-action settlement that State Farm has ever paid; the largest identified cash settlement obtained on claims for allegedly improper cost of insurance ("COI") overcharges; and likely one of the largest such settlements this year. To achieve this historic result, Class Counsel worked for over four years filing and prosecuting ten separate lawsuits pending in ten different jurisdictions. Class Counsel faced extraordinary risk representing the Settlement Class in ten separate cases. They worked on a fully contingent basis, investing over 23,110 hours of labor—with more work to come—and advancing nearly $1.4 million in out-of-pocket costs without any guarantee of success. They did so despite State Farm having already shown that it would risk a significant judgment, try a class action over these claims, suffer a jury defeat, and appeal. Indeed, far from any guarantee that they would be paid for their work or reimbursed their expenses, Class Counsel faced off against a well-funded and entrenched opponent represented by *four* of the top defense firms in the country.

Class Counsel performed a significant amount of legal work to create the Settlement, culminating in dozens of motions and responses, several summary-judgment rulings, and over 20 depositions. One case was within sight of its trial date, another nearly trial ready, and still another already on appeal. Importantly, unlike many large class-action settlements, Class Counsel did not piggyback on a government investigation or rely on defendants' public admissions of culpability. To the contrary, Class Counsel are the nationwide leaders in prosecuting claims for alleged COI overcharges, having completed two successful class-action jury trials, developed the damages

[1] Unless noted, capitalized terms are defined in the Settlement Agreement, attached as Exhibit 1 to Plaintiffs' Motion for Preliminary Approval. Doc. 47.

models here, and settled two prior nationwide cash-based COI settlements. This Settlement therefore represents the culmination of their wholly contingent and considerable work seeking a recovery against State Farm for this Settlement Class, not the work of anyone else.

Under well-established precedent, Class Counsel is entitled to an award of reasonable attorney's fees and reimbursement of the case expenses from the Settlement Fund. As elsewhere, in the Eighth Circuit, a fee based on a percentage of the fund recovered is the favored approach for calculating attorney's fees in contingent representation, including class actions. Such a fee provides an incentive for attorneys like Class Counsel to represent individuals like those in the Settlement Class, whose individual claims might otherwise be too small to justify the costs of litigation. And a percentage-based recovery allows individuals without the means to pay counsel by the hour to nonetheless assert their claims. A percentage-based recovery also aligns Class Counsel's interests with those of their clients because the greater the recovery Class Counsel obtains, the greater fee to which Class Counsel is entitled.

The reasonableness of the requested fee is measured by a multi-factor analysis (the "*Johnson* factors") that importantly includes the results achieved against the risks faced, the risk to Class Counsel in taking the case on a contingent-fee basis, and awards in similar cases. Each of these factors, along with the other *Johnson* factors, support a fee equal to 33⅓ percent of the $325 million Settlement Fund. *First*, 33⅓ percent is a customary percentage in class actions in this Circuit, and it is actually lower than contingent-fee percentages in individual, private litigation, where rules of professional conduct mandate that a fee be reasonable using factors similar to the *Johnson* factors. In the earliest case filed against State Farm by Class Counsel alleging COI overcharges based on the same Policy, theories, and one of the Defendants here, the district court (the Hon. Nannette K. Laughrey) in *Vogt v. State Farm Life Insurance Co.*, awarded class counsel

33⅓ percent of the judgment obtained—the same percentage sought here—using the *Johnson* factors. *Second*, the risk to Class Counsel was extraordinary. Unlike most class actions, Class Counsel tried the claims against State Farm in *Vogt* and then continued to pursue the remaining claims for four more years following that judgment—across ten different jurisdictions. They were opposed by four of the country's top defense firms (two of which State Farm hired after the *Vogt* judgment), and many of the top lawyers at those firms. Class Counsel obtained seven favorable class-certification rulings and several summary-judgment rulings prior to the Settlement. Moreover, the courts in those cases reached varying results on the merits and the meaning of the Policy language, including one complete defense judgment, demonstrating the uncertain and risky nature of the claims. The Settlement was not reached until three cases had been litigated through all discovery and summary judgment, with pretrial matters nearly done, and one of those cases already on appeal. Further demonstrating the ongoing risk in litigating these cases were the mixed results achieved in numerous COI cases involving other defendants brought by other lawyers in parallel to Plaintiffs claims against State Farm. In contrast to the Settlement here, many of those COI cases produced no recovery. To date, Class Counsel has risked over 23,110 hours of labor and advanced nearly $1.4 million in expenses—all contingent on a substantial recovery. *Third*, the results achieved are excellent, especially in light of the overall size of the Settlement and the risks associated with the claims and proving damages. In fact, the Settlement is better than comparable COI overcharge settlements in terms of the percentage of the overcharge recovered, including exceeding a settlement that an earlier court deemed an "excellent" result for the class. *See Spegele v. USAA Life Ins. Co.*, No. 5:17-CV-967-OLG, 2021 WL 4935978, at *6 (W.D. Tex. Aug. 26, 2021).

The requested fee is also reasonable considering *all* of Class Counsel's work and recoveries obtained against State Farm for the alleged COI overcharges. Including the *Vogt* judgment, and if the Settlement is approved, Class Counsel will have obtained over $366.6 million on behalf of the Settlement Class. Class Counsel litigated the *Vogt* case to trial, judgment, two appeals, and ultimately through a denial of certiorari by the United States Supreme Court. Although Class Counsel expended substantial additional time and effort since *Vogt* pursuing the ten remaining cases against State Farm, their work in *Vogt* (which involved an additional 9,654 hours) necessarily contributed to their obtaining the Settlement here. It not only produced favorable precedent, but Class Counsel proved to State Farm its resolve and willingness to try a class action and ability to go toe-to-toe with State Farm's highly credentialed defense team. Recognizing that the claims were legally and factually novel, the work extensive, the risk significant, and the fee justified by comparable awards, the court in *Vogt* awarded a fee equal to 33⅓ percent of the judgment. A fee award using the same percentage across the entire recovery, including the Settlement, is equally justified for the same reasons. But whether the Court considers the work and outcome in *Vogt*, or not, the fee is reasonable under the *Johnson* factors.

This remains true even when assessing the requested fee under a "lodestar crosscheck." Although not required in the Eighth Circuit, this crosscheck compares the percentage-based fee to Class Counsel's "lodestar" (hours expended multiplied by non-contingent hourly rates). Some courts use the crosscheck to assess whether additional scrutiny of the fee is necessary to ensure counsel is not receiving an unfair "windfall" untethered to their legal efforts. Importantly, however, even when applied, courts are clear that this crosscheck does not supplant the percentage-based-*Johnson*-factors analysis. Nonetheless, given the extraordinary investment of time already expended and time that will be spent on post-settlement work, the fee results in a "multiplier" of

the total lodestar between 4.8 and 5.9 (depending on whether *Vogt* is included or excluded in the overall analysis). Any multiplier in this range, and even one larger, is reasonable given the circumstances of this unique case and risks to Class Counsel of the ten-jurisdiction litigation.

Finally, Class Counsel also request reimbursement of expenses in the amount of $1,358,443.06 (to be potentially updated prior to final approval), support for which is provided below, and for the Court to approve service awards of $25,000 to each Class Representative, as provided by the Settlement, to compensate them for their efforts on behalf of the Settlement Class. The Class Representatives were not only victims of the contractual breach, but also provided key support to the litigation, including helping to develop and review the factual allegations in each complaint, sitting for depositions, answering discovery, and providing key guidance with respect to the Settlement.

All the awards are both legally and factually warranted.[2]

FACTUAL BACKGROUND

A detailed history of this multi-state class action (*Rogowski*) and the nine Related Actions (collectively, the "Litigation"),[3] incorporated by reference here, was set forth in Plaintiffs' Motion for Preliminary Approval (Doc. 47) and the supporting Declaration of Norman E. Siegel dated

[2] In support of this motion, Class Counsel rely upon a Declaration of Norman E. Siegel (Ex. 1) ("Siegel Fee Decl."), as well as the Declaration of Professor Robert Klonoff (Ex. 2) ("Klonoff Decl."). Additionally, Class Counsel attach the fee order in *Vogt* (Ex. 3).

[3] *Bally v. State Farm Life Ins. Co.*, No. 3:18-cv-04954-CRB (N.D. Cal.) (California class); *Whitman v. State Farm Life Ins. Co.*, No. 3:19-cv-06025-BJR (W.D. Wash.) (Washington class); *Jaunich v. State Farm Life Ins. Co.*, No. 0:20-cv-01567-PAM-JFD (D. Minn.) (Minnesota class); *Page v. State Farm Life Ins. Co.*, No. 5:20-cv-00617-FB-ESC (W.D. Tex.) (Texas class); *McClure v. State Farm Life Ins. Co.*, No. 2:20-cv-01389-PHX-SMB (D. Ariz.) (Arizona class); *Toms v. State Farm Life Ins. Co.*, No. 8:21-cv-00736-KKM-JSS (M.D. Fla.) (Florida class); *Bauer v. State Farm Life Ins. Co.*, No. 1:21-cv-00464-SDG (N.D. Ga.) (putative Georgia class); *Singh v. State Farm Life Ins. Co.*, No. 3:21-cv-00190-AR (D. Or.) (putative Oregon class); *Botte v. State Farm Life Ins. Co.*, No. 2:22-cv-02842-JMA-JMW (E.D.N.Y.) (putative New York class).

November 22, 2022 (Doc. 47-2) ("Siegel Decl."). Highly summarized, Plaintiffs challenged how State Farm set its COI Charge (Doc. 47 at 13[4]) and whether it was overcharging policyholders under either the COI Charge or Expense Charge provisions of the Policy (*id.* at 14). Specifically, Plaintiffs alleged that the Policy language describing the COI rates did not permit State Farm to include profits or expenses in the COI Charge because those factors were not listed among the mortality-related factors identified as the basis for the COI rates and because the Policy capped expenses at $5 per month. *Id.* at 13-14. Plaintiffs alleged claims for breach of contract, as well as claims for conversion and discrete, related claims through the Litigation—all of which depended on these allegations and the above Policy interpretation.

Class Counsel litigated all ten cases across ten different jurisdictions on behalf of Settlement Class Members. They also represented an earlier class of Missouri policy owners, who are also part of the Settlement Class, on the same claims through trial, judgment, two appeals, and certiorari to the United States Supreme Court, in which State Farm ultimately paid over $41.6 million to satisfy the final judgment. *Vogt v. State Farm Life Ins. Co.*, No. 16-CV-04170-NKL (W.D. Mo.). The culmination of all these efforts is the present Settlement, which if approved will require State Farm to pay an additional non-reversionary sum of $325 million to resolve the claims brought in the Litigation. Siegel Fee Decl. (Ex. 1) ¶ 5.

To achieve this result for the Settlement Class, Class Counsel performed a massive amount of work—more than 23,110 hours—in the Litigation, on a contingent basis, working for more than four years (six years and over 32,750 hours including *Vogt*). Additionally, based on time records from prior COI settlements, Class Counsel estimates they will spend at least another 1,888 hours

[4] Docket citations are to CM/ECF page number unless noted.

administering the Settlement, which does not include any time necessary to obtain final approval or potentially defend any judgment on appeal. Class Counsel thus conservatively expects they will spend over 25,000 hours representing the Settlement Class in this Litigation. *Id.* at ¶ 6.

I. CLASS COUNSEL PERFORMED EXTRAORDINARY WORK AND ASSUMED SIGNIFICANT RISK ON A CONTINGENT BASIS ON BEHALF OF THE SETTLEMENT CLASS TO OBTAIN THE SETTLEMENT.

A. State Farm's Defenses Required An Extraordinary Level of Work by Class Counsel on a Contingent-Fee Basis.

Unlike most class actions, including *Vogt* itself, or even most multi-district litigations, the ten post-*Vogt* cases were entirely multi-jurisdictional. Ordinarily, a class action is venued in one jurisdiction and class counsel need only contend with one set of defenses and persuade one district judge and jury of their position. Also, when multiple class actions raising common questions of fact are filed in multiple jurisdictions, those cases are ordinarily consolidated before a single judge for pre-trial proceedings. *See* 28 U.S.C. § 1407. None of which is true here. To achieve this Settlement, Class Counsel instead prosecuted ten *separate* cases against State Farm, in ten different jurisdictions, presided over by ten different and independently minded judges. That presented unique risks to Class Counsel and required exponentially more effort than a consolidated multi-state class action. Siegel Fee Decl. (Ex. 1) at ¶ 7.

In each case, State Farm mounted a comprehensive and independent defense, requiring an equally forceful prosecution by Class Counsel. State Farm retained and was represented by no less than four of the country's top defense firms during the litigation, all listed in the AMLAW 100. *Id.* at ¶ 8; Klonoff Decl. (Ex. 2) at ¶¶ 71-73 (noting the "powerhouse law firms" brought in by State Farm as "national counsel" and the "highly regarded litigators" picked by State Farm to represent it from those firms). State Farm defended each action independently, requiring Class Counsel to effectively prosecute and manage ten different cases. Siegel Fee Decl. (Ex. 1) at ¶ 8.

Moreover, in undertaking such a substantial commitment on behalf of the Settlement Class, Class Counsel assumed significant risk because the claims were difficult and complex. Klonoff Decl. (Ex. 2) at ¶¶ 44-61. As the district court in *Vogt* put it in awarding attorney's fees from the judgment: "[T]he only appellate case law construing similar language in an insurance provision undermined the position that Class Counsel adopted in this case" and "the interpretation of the Policy and the calculation of damages" were factually and legally "difficult and novel." *Vogt*, Order (Ex. 3) at ¶ 7. The claims in the ten cases that culminated in this Settlement were largely the same claims prosecuted in *Vogt*, and these findings apply equally to the Litigation that continued after *Vogt*. Moreover, the difficulty of the claims is further reflected in the various outcomes in the Litigation: reasonable jurists disagreed on the core issue of Policy interpretation. Klonoff Decl. (Ex. 2) at ¶¶ 45-49. Likewise, damages presented "hotly contested issues under *Daubert*," *id.* at ¶ 50, and there was a "broad array of subject matters" on which expert testimony was proffered, *id.* at ¶ 52. And, Class Counsel "took a serious risk that class certification would be denied or that a previously certified class would later be decertified." *Id.* at ¶ 54.[5] *See also* Siegel Fee Decl. (Ex. 1) at ¶ 9.

Importantly, even after prevailing at trial in *Vogt*, Class Counsel faced significant new risks because State Farm's defenses intensified with the addition of new counsel. State Farm turned to new counsel, including Gibson Dunn and Alston & Bird, and retained four new experts. With this newly augmented team of lawyers and experts, State Farm fought every skirmish anew, including

[5] Also, notably, Class Counsel filed three of the most heavily litigated cases in the Litigation (*Bally*, *Whitman*, and *Page*) before the district court's Policy interpretation and class-certification orders were affirmed in *Vogt* by the Eighth Circuit. *See*, *e.g.*, Siegel Decl. (Doc. 47-2) at ¶¶ 20, 31, 59, 79. Further, nine of the ten cases were filed before the Supreme Court denied State Farm's petition for certiorari in *Vogt* seeking review of the class-certification order. *See*, *e.g.*, *id.* at ¶¶ 23, 31, 59, 79, 90, 110, 134, 142, 161, 171, 179. In other words, Class Counsel put more-and-more at risk over time in an effort to maximize the value of the Litigation and ultimately the Settlement before the Court.

class certification, admissibility of expert testimony, and Policy interpretation in each case, oftentimes with new or evolved arguments. Siegel Fee Decl. (Ex. 1) at ¶ 10. Class Counsel was nonetheless largely successful in their efforts on behalf of the Settlement Class in the Litigation. They obtained six favorable class-certification rulings and four favorable summary-judgment rulings from four separate courts. This required extensive briefing, including 13 summary-judgment briefs under various state and circuit law, 13 *Daubert* briefs, 8 class-certification briefs, and four Rule 12 motions.[6] With exhibits, Class Counsel filed thousands if not over ten thousand pages of briefing. Siegel Fee Decl. (Ex. 1) at ¶ 10.

Discovery in the Litigation was equally intense. Class Counsel served or responded to 385 interrogatories, 727 requests for production, 286 requests for admission, and 56 requests for documents via subpoenas. State Farm produced between 35,603 and 44,609 documents in each case, and Class Counsel isolated and reviewed unique documents, which culminated in the parties marking 289 deposition exhibits. Class Counsel took or defended 24 depositions, *not* including the nine depositions (including one two-day deposition) previously taken in *Vogt*, the use of which Class Counsel negotiated in the Litigation. And the parties made four separate trips to the appellate courts on State Farm's petitions for interlocutory review of substantive rulings and class-certification decisions. Siegel Fee Decl. (Ex. 1) ¶ 11.

Significantly, although Class Counsel expended over 23,110 hours on the continuing Litigation *after* the trial verdict in *Vogt*, Class Counsel was nonetheless efficient. *See* Klonoff Decl.

[6] These figures only include principal briefs and do not include the many replies or supplemental briefing filed by Class Counsel. Moreover, this list is not exhaustive. For example, among others, Class Counsel briefed three oppositions to State Farm's Rule 23(f) petitions for interlocutory review, opposed State Farm's motion for certification for interlocutory appeal under 28 U.S.C. § 1292(b) in *Bally*, briefed various disputed motions to seal, and briefed the form and content of class notice in several cases. Siegel Decl. (Doc. 47-2).

(Ex. 2) at ¶¶ 106-07. In addition to using the fact depositions they took in *Vogt*, Class Counsel retained a single testifying expert, Scott Witt, across all the cases. And they limited the number of times they deposed State Farm's experts in the ten cases that make up the Litigation to once or twice. In contrast, however, State Farm strategically treated each case as a wholly separate litigation. For example, State Farm deposed Mr. Witt eleven separate times. And it took seven individual depositions of the named Plaintiffs. Siegel Fee Decl. (Ex. 1) ¶ 12.

Moreover, although using the same expert produced beneficial efficiencies and consistency, each case nonetheless required individual analysis of millions of data points to produce each class-wide damages model. Class Counsel worked extensively with Mr. Witt, and a separate consulting expert, to prepare each model and subject each to comprehensive testing procedures and analyses, which was crucial to their representation of the Settlement Class. Although State Farm filed ten *Daubert* motions against Mr. Witt, none were granted, and the model developed by Class Counsel and their expert stood up to extensive scrutiny. Siegel Fee Decl. (Ex. 1) at ¶ 13.

Novel and complex litigation, especially against such well-recognized defense counsel, takes extra skill and effort, and that was true here. Klonoff Decl. (Ex. 2) at ¶¶ 65-75. The *Bally* court found the issue of Policy interpretation difficult enough to certify it for immediate interlocutory appeal. *Bally*, No. 3:18-cv-04954-CRB, Doc. 99 (finding that the question of Policy interpretation was subject to "substantial ground for difference of opinion"). And State Farm's legal arguments and strategies were constantly evolving, particularly after the *Vogt* trial and the Eighth Circuit ruling affirming the trial verdict based on the ambiguous Policy language. Siegel Fee Decl. (Ex. 1) at ¶ 14.

For example, in the Litigation that continued after *Vogt*, State Farm obtained declarations from its sales agents describing the sales process and urging the courts to consider extrinsic evidence, including substantial document productions concerning marketing materials and individual policyholder communications. *E.g.*, *Bally*, Doc. 170 at 43. State Farm retained four new experts not disclosed in *Vogt*, whose opinions covered distinct subject matters and were directed at both liability and damages. One expert was a former state insurance commissioner and executive at the National Association of Insurance Commissioners who opined that the Policy as interpreted by Plaintiffs could not have obtained approval for sale under state insurance regulatory standards. *E.g.*, *Bally*, Doc. 170 at 19, 25. A second witness was a consumer-expectations expert who opined that prospective policyholders would have expected State Farm to include profit and expenses in its COI charge. *E.g.*, *id.* at 25; Siegel Fee Decl. (Ex. 1) at ¶14. A third witness was an actuary who accused Mr. Witt of failing to follow actuarial standards. *E.g.*, *Bally*, Doc. 170 at 25. And the fourth witness was a highly credentialed economist who opined on, *inter alia*, alleged intraclass conflicts, the absence of any injury to any policyholder, and damages. *E.g.*, *id. See* Siegel Fee Decl. (Ex. 1) at ¶ 14. Class Counsel developed individual strategies for responding to each expert and deposed all four at least once. Siegel Fee Decl. (Ex. 1) at ¶ 14. After extensive briefing and oral argument, several courts rejected the arguments raised by the experts including as a basis to grant State Farm's various motions for summary judgment. *E.g.*, *Bally v. State Farm Life Ins. Co.*, 335 F.R.D. 288, 300-01 (N.D. Cal. 2020); *McClure v. State Farm Life Ins. Co.*, No. CV-20-01389-PHX-SMB, --- F. Supp. 3d ---, 2022 WL 2275665, at *5 (D. Ariz. June 23, 2022). ; *Jaunich v. State Farm Life Ins. Co.*, 569 F. Supp. 3d 912, 916-17 (D. Minn. 2021). Nonetheless, courts appeared willing to let these experts testify at trial. *Bally v. State Farm Life Ins. Co.*, No. 18-cv-04954-CRB, 2022 WL 594559, at *1 (N.D. Cal. Feb. 24, 2022) (denying Plaintiff's motion to

strike State Farm's actuary and regulatory expert, concluding that their opinions were "relevant for determining damages").

Moreover, State Farm's approach to damages evolved dramatically following the *Vogt* trial. State Farm's economist, Dr. Lauren Stiroh, offered several new opinions not at issue in *Vogt*. She testified that no class member suffered economic damages due to the alleged breaches of the Policy. And, in the event there were damages, she offered numerous alternative damages figures that were significantly less than Mr. Witt's damages calculation. No court, however, agreed that Mr. Witt's opinions were unreliable based on these opinions after considering Class Counsel's opposing arguments, leaving the disagreement for trial. *See, e.g.*, *Bally*, 335 F.R.D. at (denying motion to strike Mr. Witt's testimony based on Dr. Stiroh's criticisms). Siegel Fee Decl. (Ex. 1) at ¶ 15.

Despite the work required and mounting risk in light of State Farm's escalating, multi-jurisdiction defense, Class Counsel did not waver in their efforts on behalf of the Settlement Class. Class Counsel pushed State Farm for the best possible settlement, which included two unsuccessful mediations with a former federal district judge. During settlement negotiations, Class Counsel had completed most pretrial work and was preparing three of the cases (*Whitman*, *Jaunich*, and *Bally*) for trial. Trial dates were only months away in *Whitman* and *Bally*; in fact, in *Whitman*, the parties were in the process of making pretrial disclosures, including having already filed motions in limine, during settlement negotiations. Even after the adverse ruling against the Washington class in *Whitman*, Class Counsel appealed, and ultimately the Settlement was reached through the efforts of another former federal district judge well known to lawyers on both sides—the Hon. Layn Phillips—who is widely regarded as one of the most respected mediators in the country. Siegel Fee Decl. (Ex. 1) at ¶ 16.

B. The Litigation Itself Proves the Risk to Class Counsel in Representing the Settlement Class on a Contingent-Fee Basis.

Risk is an especially salient factor in assessing a fee request. Klonoff Decl. (Ex. 2) at ¶ 40. Class Counsel's extraordinary investment of labor and expenses necessarily "hampered … their ability to take on significant other work." *Id.* at ¶ 76. It was a "huge resource drain on the two principal plaintiffs' law firms[,]" as Class Counsel faced off against much larger defense teams. *Id.* at ¶ 76. Excluding *Vogt*, the four years of sustained litigation has already required more than 23,110 hours of work, which is approximately equivalent to devoting three full-time attorneys and a paralegal solely to these cases for four straight years (billing 1,800 hours a year for all four years). Siegel Fee Decl. (Ex. 1) at ¶ 17. That was time spent and invested on behalf of the Settlement Class that could have been spent on less risky cases, where liability or damages were more certain, or where the claims had been advanced by a government investigation or public admissions—none of which was present here. *Id.* at ¶ 17; Klonoff Decl. (Ex. 2) at ¶¶ 58-60.

Indeed, the disagreement among jurists over the central issue of Policy interpretation places a clear emphasis on the risks to Class Counsel here. When Class Counsel started the Litigation, the meaning of the COI provision had been allegedly resolved in favor of insurance company defendants by the only precedential federal appellate court decision on the meaning of COI rate provisions. *See Norem v. Lincoln Benefit Life Insurance Co.*, 737 F.3d 1145, 1150 (7th Cir. 2013) ("neither the dictionary definitions nor the common understanding of the phrase 'based on' suggest that [the insurer] is prohibited from considering factors beyond sex, issue age, policy year, and payment class when calculating its COI rates."). Even after obtaining contrary precedent from the Eighth Circuit in *Vogt*, Class Counsel faced disagreement among the subsequent courts to consider the issue because of State Farm's alternative Policy interpretations. Siegel Fee Decl. (Ex. 1) at ¶ 18.

For example, in *Bally*, the court agreed with the district court's interpretation in *Vogt* and denied State Farm's first summary judgment motion. After the Eighth Circuit ruling, however, it paradoxically adopted State Farm's new (or revised) argument that the phrase "applicable rate class" was broad enough to permit State Farm to include non-mortality factors like profits and expenses in setting its COI rates and granted State Farm summary judgment on the COI Charge claim (although the court denied State Farm's motion as to the Expense Charge claim).[7] Importantly, the *Bally* court did not view its ruling as inconsistent with the *Vogt* interpretation, concluding that "[n]either the district court nor the Eighth Circuit in *Vogt* meaningfully considered the meaning of the phrase" applicable rate class, which left in play the risk that subsequent courts would broadly adopt the *Bally* interpretation. *Bally v. State Farm Life Ins. Co.*, 536 F. Supp. 3d 495, 504 (N.D. Cal. 2021). Thus, even after *Vogt*, Class Counsel had to contend with significant new risks on the core issue of Policy interpretation. *Accord Whitman v. State Farm Ins. Co*., No. 3:19-CV-06025-BJR, 2022 WL 4081916, at *4 (W.D. Wash. Sept. 6, 2022) (agreeing with *Bally* and going further to grant State Farm summary judgment on the Expense Charge and all other claims).[8]

Moreover, Policy interpretation was far from the only risk that Class Counsel faced. State Farm levied every conceivable challenge at class certification, expert testimony, and damages. As to class certification, State Farm also raised new arguments following *Vogt*. *See, e.g.*, *Bally*, State Farm's Opp. to Pl. Mot. for Class Cert., Doc. 108 (arguing individualized sales conversations with

[7] The court also granted summary judgment in favor of State Farm on Bally's conversion claim.

[8] The *Whitman* court also held that "even if the Policy requires the COI to be limited to age, sex, and applicable rate class [as *Vogt* held] the rate classes themselves are based on non-mortality factors," permitting State Farm's deductions. *Whitman*, 2022 WL 4081916, at *4. In contrast, the Magistrate Judge in *Page* disagreed with *Bally's* interpretation, although the District Judge had not completed de novo review when the parties settled. Thus, the proper Policy interpretation remained highly uncertain at the time of Settlement.

policyholders revealed individualized issues; arguing the damages model was unreliable and not tethered to Plaintiffs' theory of breach; arguing Bally was not an adequate class representative); *Bally*, Doc. 266 (seeking decertification of the California class under Plaintiffs' new Count II damages model); Siegel Fee Decl. (Ex. 1) at ¶ 19.

As to experts, while State Farm did not file a *Daubert* motion challenging Mr. Witt's damages opinions in *Vogt*, it made ten such challenges in the cases after *Vogt*. *Id*. Moreover, much of the alleged damages in each case occurred outside the nominal limitations period, requiring application of a tolling or accrual rule, another issue on which the courts split. *Compare Bally v. State Farm Life Ins. Co.*, 536 F. Supp. 3d at 515 (granting summary judgment to the Plaintiffs on State Farm's statute-of-limitations defense) and *McClure*, 2022 WL 2275665, at *9 (denying summary judgment to State Farm on the defense) *with Jaunich v. State Farm Life Ins. Co*., No. CV 20-1567 (PAM/JFD), 2022 WL 2318560, at *4 (D. Minn. June 28, 2022) (holding that "any claim arising before July 2014 is time-barred"). Siegel Fee Decl. (Ex. 1) at ¶ 20.

In short, the record confirms that these were "challenging and risky case[s] with extremely complex legal and factual issues" but they were "prosecuted … skillfully over the course of several years in multiple jurisdictions without assistance from any official investigation." Klonoff Decl. (Ex. 2) at ¶ 131.

II. DISTINGUISHED ATTORNEY'S FEE EXPERT CONFIRMS THE REQUESTS ARE REASONABLE.

Class Counsel recognizes that a Settlement of the size at issue here is not commonplace and therefore asked a well-known fee expert—Professor Robert Klonoff—to analyze the requested attorney's fees, expenses, and service awards. Klonoff Decl. (Ex. 2).

Professor Klonoff is the current Jordan D. Shnitzer Professor of Law at Lewis & Clark Law School, an endowed, tenured position. Klonoff Decl. (Ex. 2) at ¶ 2. He graduated from Yale

Law School and clerked for the Honorable John R. Brown on the United States Court of Appeals for the Fifth Circuit before serving as an Assistant United States Attorney and Assistant to the Solicitor General. *Id.* at ¶¶ 2. Before entering academia, he worked for over twelve years at Jones Day, where he handled more than 100 class actions, mostly representing defendants. *Id.* at ¶¶ 2, 6.

He has taught classes in class actions, complex litigation, civil procedure, federal courts, and federal appellate procedure. *Id.* at ¶ 3. In 2011, the Chief Justice of the United States appointed him to the Judicial Conference Advisory Committee on the Rules of Civil Procedure. He served two, three-year terms, where he worked on proposed amendments to Rule 23. *Id.* at ¶ 4. He served for five years as a reporter for the ALI's *Principles of the Law of Aggregate Litigation*, in which he was the principal author of the chapter addressing class-action settlements and attorneys' fees. *Id.* at ¶ 5. He is also the sole current author of FEDERAL PRACTICE AND PROCEDURE (Wright & Miller)'s three chapters on class actions, including the discussion of class-action attorney's fees. *Id.* at ¶ 3. Numerous courts have relied on Professor Klonoff's insights in making fee awards in class actions. *Id*. at ¶ 9 (collecting cases)

Here, Professor Klonoff conducted an extensive review of the record, including class Counsel's time records. He offers a 119-page report containing numerous opinions and sub-opinions. In summary, he concludes as follows.

A. The Fee Request Is Reasonable Under the Facts of this Case.

On his review of the record and in view of his experience in academia and defending over 100 class actions, Professor Klonoff offers several important insights regarding the Litigation and Class Counsel's work, skill, and contributions. First, this was "an unusually complicated case, with difficult legal and factual issues" in which Class Counsel performed exceptionally well, and "achieved an enormous and historic $325 million settlement," *id.* at ¶ 132. Class Counsel achieved "no assistance of any kind" from government investigations but instead "bore the entire burden of

investigating and proving State Farm's alleged breach of contract[.]" *Id.* at ¶ 60. "State Farm vigorously contested liability prior to entering into the class settlement," *id.* at ¶ 61, had no public "pressures that compelled State Farm to settle[,]" *id.* at ¶ 62, and Class Counsel "faced numerous difficult challenges that favor a substantial fee award." *Id.* at ¶ 60.

Second, he concludes that "[a] high level of skill was necessary to litigate and settle these cases[,]" *id.* at ¶ 64, and Class Counsel "needed to be at the top of their game in trial skills, legal research and analysis, knowledge of technical and complicated insurance issues, and appellate practice." *Id.* at ¶ 65. "In terms of sheer resources [available to State Farm], this was truly a David versus Goliath scenario" given the large and prominent firms representing State Farm, *id.* at ¶ 72, and, here, the Class had "some of the country's premier complex litigation attorneys" representing it. *Id.* at ¶ 66. And "[g]iven State Farm's no-holds-barred defense and the risks faced by class counsel, the percentage of the overcharges recovered here is exceptional," above the percentage of damages achieved in a similar COI overcharge settlement. *Id.* at ¶ 84. Nonetheless, State Farm "was obviously prepared to spend whatever it took to win this litigation, even if that meant simultaneously hiring multiple law firms and individual superstars within those firms. The fact that class counsel achieved such an impressive settlement against a multitude of top-flight defense law firms is a testament to class counsel's skill." *Id.* at ¶ 74.

Furthermore, Professor Klonoff also offers insight on contingent attorney's fees generally in class actions and in light of the case-specific facts here. "Contingent fee agreements of 33% or more are common[,]" and it is no surprise many class representatives signed "contingent fee contracts at the 40 percent level." *Id.* at ¶ 77. In this case, "the market rate … was clearly at or above 33⅓ percent." *Id.* at ¶ 78. "'A fee award totaling a third of the common fund' is 'in line with other awards in [the Eighth] [C]ircuit" and "is reasonable" "based on the applicable [case-specific]

criteria." *Id.* at ¶ 39 (citing *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019)). After assessing each of the *Johnson* factors, Professor Klonoff concludes that "taken as a whole, [each factor] strongly support[s] the reasonableness of the 33⅓ percent fee award requested in this case." *Id.* at 42.

B. The Fee Percentage is Appropriate Given the Size of the Settlement Fund.

Next, Professor Klonoff reviewed fee awards in other large settlements (so-called "mega-fund" settlements), and whether the size of the settlement here justifies using a lower percentage.

First, he explains that, courts outside the Eighth Circuit, in some circumstances, have applied declining percentages based on the size of the fund; but importantly, he identifies that this approach has been "roundly criticized by a number of courts," *id.* at ¶ 92, and that "numerous scholars agree that fee percentages should *not* necessarily be lower in mega-fund cases." *Id.* at ¶ 93 (emphasis added). These courts and scholars have, as he opines, "correctly criticized the notion that fee percentages should necessarily decline with the size of the fund," *id.*, as it fails to provide the proper incentive for counsel and is fundamentally at odds with the percentage-of-the-fund approach, *id.* at ¶ 94.

Second, and in any event, he finds that "there are numerous mega-fund cases with percentage-based fee awards equal to or greater than those sought here," *id.* at ¶ 95, including at least "48 mega-fund cases that involved fee awards of 30 percent or greater (twenty-five of which awarded 33 percent or more")." *Id.* at ¶ 96. "These cases show that, even in mega-fund cases, there is nothing unprecedented about awards in the range requested here." *Id.* at ¶ 97. In his opinion, the "critical takeaway from the case law is that attorneys' fee awards should bear a relationship to the degree of risk involved," *id.* at ¶ 100, and the fee requested here "fits comfortably within the case law, given the particular facts and circumstances of this case." *Id.* at ¶ 102.

C. A Lodestar Crosscheck is Unnecessary But Supports the Requested Fee.

Next, Professor Klonoff discusses the concept of a "lodestar crosscheck" against any percentage-based fee award. A crosscheck is where class counsel's hours expended on the case are multiplied by their non-contingent hourly rate and the resulting lodestar is divided into the requested fee to calculate a "multiplier." *Id.* at ¶ 122. A positive multiplier on the lodestar is expected "to compensate for the risk of [the] litigation" having been taken on a contingent basis. *Id.* at 123 (quoting *Been v. O.K. Industries, Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *10 (E.D. Okla Aug. 16, 2011).

As an initial matter, his survey of Eighth Circuit law reveals that a lodestar crosscheck is not required because measuring the fee based on hours worked "can lead to the very harmful consequences that the percentage method is designed to avoid." *Id.* at ¶ 103. Nonetheless, if a crosscheck is performed, it "would not cast doubt on the reasonableness of the fees requested by class counsel." *Id.* at ¶ 104.

Class Counsel's lodestar for the Litigation (excluding *Vogt*), including a conservative estimate of anticipated future work, is $18,364,930. *Id.* at ¶ 122.[9] After reviewing Class Counsel's detailed time records and extensively assessing their non-contingent hourly rates as compared *inter alia* to State Farm's defense firms, *id.* at ¶¶ 111-20, he concludes that the resulting multiplier of 5.9 "is fully justified here." *Id.* at ¶ 122. "Importantly … the multiplier here can be explained in large part by class counsel's lean and efficient staffing of the case….Counsel could have ensured a higher lodestar (and thus a lower multiplier) by adding attorneys even when additional assistance

[9] Professor Klonoff explains that "courts routinely take into account hours that class counsel reasonably anticipate spending on the matter after final approval (*e.g.*, hours to be spent on claims administration issues.)" *Id.* at ¶ 121.

was not essential or by duplicating work already performed in *Vogt*. But they should be commended—not penalized—for taking a lean staffing approach." *Id.* at ¶ 128.

Professor Klonoff also explains that "[a]nother appropriate way to measure the multiplier is to look at the results obtained in *Vogt* and the total attorney's fee, including what was awarded in *Vogt*[,]" similar to how formal MDL courts look at total fee awards when earlier trials precede a global settlement. *Id.* at ¶ 129. Here, "[t]here is no doubt that the rulings in *Vogt* [including the trial and appeals] contributed substantially to class counsel's ability to obtain this settlement for the settlement class." *Id.* at ¶ 17. Combining the fees paid and fund recovered in *Vogt* with the Settlement, results in a multiplier of 4.9, which Professor Klonoff explains "is easily justified by the precedent." *Id.* at ¶¶ 129-132 (stating that in his view the multipliers are "confirmed by [t]he *Johnson* factors" because this was a particularly "complicated case" with "substantial risk" and citing thirteen settlements over $100 million in which a multiplier above five was awarded).

D. The Requested Expenses and Service Awards are Reasonable.

Lastly, Professor Klonoff reviewed the requested expenses and service awards. These requests are reasonable, as he noted that the "expenses represent only 0.42 percent of the fund" which is "well within—indeed below—the norm for major class actions." *Id.* at ¶ 136. And a $25,000 service award to each of the class representatives is justified by the awards in other cases and falls well within the bounds of reasonableness, particularly in the Eighth Circuit, of a settlement this size. *Id.* at ¶¶ 137-45.

ARGUMENT

I. THE REQUESTED ATTORNEY'S FEES ARE REASONABLE UNDER THE FACTS AND CIRCUMSTANCES PRESENTED HERE.

Pursuant to applicable law, Class Counsel are entitled to a reasonable attorney's fee for their work representing the Settlement Class and achieving this $325 million settlement. Upon analysis of the applicable factors endorsed in this Circuit, a fee equal to one-third of the Settlement Fund is appropriate and reasonable and should therefore be approved.

A. Contingent Fees Are Customarily Awarded Using the Percentage-of-the-Fund Approach.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h) "Under the 'common fund' doctrine" the law authorizes the Court to award "attorneys' fees from the settlement proceeds." *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (citing Fed. R. Civ. P. 23(h)); *accord Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also* Klonoff Decl. (Ex. 2) at ¶¶ 35-39.

Courts typically use the "percentage-of-the-fund method" to award attorney's fees from a common fund. *See, e.g., Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019). Indeed, "[i]n the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established,'" *In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)), or even "preferable,'" *Barfield v. Sho-Me Power Elec. Co-op.*, No. 2:11-CV-4321-NKL, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015) (quoting *West v. PSS World Med., Inc.*, No. 4:13 CV 574 CDP, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014)). The percentage method aligns the interests of the attorneys and the class members by incentivizing counsel to maximize the class's recovery. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241,

245 (8th Cir. 1996) ("[T]he Task Force [established by the Third Circuit] recommended that the percentage of the benefit method be employed in common fund situations." (citing *Court Awarded Attorneys Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (3rd Cir. 1985))).[10] *See also* Klonoff Decl. (Ex. 2) at ¶¶ 35-39. The Court should therefore use the percentage approach to award fees in this case.

B. A Fee Equal to 33⅓ Percent of the Fund is Reasonable Under the Applicable Factors.

Selecting a reasonable percentage depends on "considering relevant factors from the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719–20 (5th Cir. 1974)." *In re Target Corp. Customer Data Security Breach Litig.*, 892 F.3d 968, 977 (8th Cir. 2018) (cleaned up). The following are the *Johnson* factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In re Target, 892 F.3d at 977 n.7. To be sure, "[m]any of the *Johnson* factors are related to one another and lend themselves to being analyzed in tandem." *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 886 (S.D. Iowa 2020). Therefore, courts in the Eighth Circuit often focus on the most relevant *Johnson* factors in evaluating fee requests. *See In re Xcel*, 364 F. Supp. 2d at 993;

[10] In contrast, undue focus on hours or hourly rates "creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (cleaned up). While "a percentage approach may raise some potential concerns when a class settlement involves a reversionary fund … and the claims process is a complicated one," the "proposed settlement [here] does not create" those concerns because nothing will revert to State Farm and there is no claims filings required. Klonoff Decl. (Ex. 2) ¶ 37.

Tussey, 2019 WL 3859763, at *2; *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010); *see also Hardman v. Bd. Of Educ. Of Dollarway, Arkansas Sch. Dist.*, 714 F.2d 823, 825 (8th Cir. 1983).[11] These are discussed in more detail below. *See also* Klonoff Decl. (Ex. 2) at ¶¶ 40-42.

Notably, the court in *Vogt* analyzed the *Johnson* factors and determined that a fee of one-third was reasonable there. *Vogt*, Order (Ex. 3) at ¶ 2. Specifically, after expressly acknowledging its "obligation to determine if the request [was] justified," the court found that the claims in that case—which were the same claims asserted in the rest of the Litigation—were hard-fought by both sides; Class Counsel took the case on a contingent-fee basis, bearing a risk of recovering nothing; the only appellate case law construing similar language in an insurance provision undermined the position that Class Counsel adopted in this case; the case presented some difficult and novel factual and legal issues, including with respect to interpretation of the Policy and the calculation of damages; the attorneys on both sides were skilled and experienced [and] Class Counsel prevailed despite being opposed by very skilled lawyers from multiple national law firms; and, Class Counsel spent over 8,600 hours prosecuting the claims and defending them on appeal. *Id.* at ¶¶ 2, 6, 7, 8, 9, 10.

Noting that "[c]ourts in this Circuit and this District have frequently awarded attorney fees of 33⅓ - 36% of a common fund[,]" the district court found that the requested fee award of 33⅓ percent of the fund was appropriate. *Id.* at ¶ 12 (quoting *Tussey*, 2019 WL 3859763, at *4); *id.* at ¶ 14 ("Because this case was vigorously litigated, from class certification, to summary judgment motions, to motions in limine, through trial, post-trial motions, and multiple appeal attempts, and

[11] The nature of the attorney-client relationship does not apply and thus can be disregarded or treated as neutral in considering the fee.

given the considerations discussed above, the Court finds that one-third of the common fund is a reasonable fee for Class Counsel.").

Although after *Vogt* the cases that continued as part of the Litigation and ultimately the Settlement were resolved just short of another trial and with a compromise of full overcharges, the Settlement was far from guaranteed and required over 23,110 hours of additional work (and therefore risk). Class Counsel was opposed by the same top-flight defense firms from *Vogt* plus *two even larger defense firms*. Class Counsel was no longer litigating just one case in one jurisdiction, or even one appellate circuit, *but litigating ten cases before ten different judges spread across five different appellate circuits*. The multiple class-certification and summary-judgment rulings that were required after the *Vogt* trial confirm that Class Counsel undertook at least the same risk and performed the same high level of work here that they did in *Vogt*. And the *Johnson* factors confirm that a fee equal to 33⅓ percent of the Fund, as set forth below, is reasonable.

1. The amount involved and results obtained for the Settlement Class given the risks of the Litigation support the percentage requested. (Factor 8)

In common fund cases, the size of the fund itself reflects "the measure of success and represents the benchmark from which a reasonable fee will be awarded." *Manual For Complex Litigation* 4th § 14:121 (2004) (cleaned up); *see also In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104 (D. Minn. 2009) ("In considering a fee award, the 'most critical factor' is 'the degree of success obtained.'" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

The requested fee represents one-third of the common fund. Here, the Fund is pure cash and non-reversionary; so, the $325 million cash settlement, plus interest earned until its distribution, requires no further valuation. So, in requesting a fee as a percentage of the Fund, Class Counsel necessarily seeks a fee proportionate to the degree of success obtained.

Furthermore, this factor supports a contingency percentage of one-third, particularly given the benefits achieved. Importantly, success—including "exceptional success"—is not measured solely by the maximum damages alleged but must be evaluated against any "unusually difficult or risky circumstances and the size of plaintiffs' recovery." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1204-05 (S.D. Fla. 2006). Here, the request is supported by both the size of the recovery and the results obtained as compared to the risk of a lesser recovery at trial.

a. A $325 million settlement is an exceptional result, particularly against a defendant like State Farm.

The size of the Fund itself is exceptional. Class Counsel have not found any cash-based COI settlement larger than this one. And they have not identified any class settlement by State Farm larger than $325 million. Using publicly disclosed settlements from 2022, this Settlement would rank among the top ten largest class action settlements in the country.[12] Siegel Fee Decl. (Ex. 1) at ¶ 3. These results are even more exceptional given State Farm's "reputation for engaging in a vigorous defense" of its conduct. *Sos v. State Farm Mut. Auto. Ins*. Co., No. 617CV890ORL40LRH, 2021 WL 1185685, at *23 (M.D. Fla. Jan. 26, 2021), report and recommendation adopted in part, rejected in part, No. 6:17-CV-890-PGB-LRH, 2021 WL 1186811 (M.D. Fla. Mar. 19, 2021) (agreeing with that finding, *id.* at *7). No one can doubt that State Farm lived up to its reputation here, as reflected by the four national defense firms and accomplished lawyers at those firms representing State Farm throughout the Litigation.

Achieving the Settlement required Class Counsel to prosecute ten separate actions in addition to a successful jury verdict and two appeals in *Vogt*. Not including *Vogt*, six judges certified or recommended certification of classes over State Farm's objection and seven summary

[12] https://topclassactions.com/lawsuit-settlements/class-action-news/top-10-largest-class-action-settlements-of-2022 (Dec. 30, 2022), last visited Feb. 13, 2023.

judgment rulings were entered. When the settlement negotiations began, two cases were within a month or two of trial and in another the parties were waiting for a trial date with summary judgment complete. Interlocutory appellate review had been defeated at least four times and one case was on appeal at the time of Settlement. Siegel Fee Decl. (Ex. 1) at ¶ 16.

Achieving any significant settlement, much less one of the largest class settlements in the country, against such an entrenched, well-funded, and ably represented defendant is, therefore, an exceptional result by any measure.

b. The results are also exceptional after considering the likely trial outcomes, including the possibility of no recovery.

The results are also excellent relative to the potential trial outcomes. Klonoff Decl. (Ex. 2) at ¶¶ 84, 87. *See Landrum v. Meadows Credit Union*, No. 08-441-CV-W-DW, 2012 WL 12957387, at *3 (W.D. Mo. Mar. 16, 2012) (awarding fee where the "results obtained for the Class were extraordinary and exceptional in light of the risks posed by the assertions of the Defendant to the Class Members' claims."); *Shaw v. Interthinx, Inc.*, No. 13-CV-01229-REB-NYW, 2015 WL 1867861, at *7 (D. Colo. Apr. 22, 2015) (in awarding fees, concluding settlement delivering portion of damages was an "excellent" result "in light of the numerous risks").

First, the Settlement Fund represents all or nearly all overcharges for State Farm's alleged breach of the Policy's Expense clause. Yet, the risk of no recovery on the Expense claim is self-evident from the *Whitman* court's order granting State Farm summary judgment.[13] *See also Norem*, 737 F.3d at 1153 (holding that expense provision in a universal life policy "does not in fact tether certain expenses to the specific listed charges within the policy"). Furthermore, recovering

[13] Notably, also, Plaintiffs' damages methodology for the Expense Charge claim was untested at trial. The court in *Vogt* granted State Farm a directed verdict on the Expense claim but the plaintiff there was using a different damages methodology. The new damages methodology was deemed admissible by the *Bally* court but untested at trial. Siegel Fee Decl. (Ex. 1) at ¶ 21.

approximately all the overcharges *on any claim* is also an excellent result given the statute-of-limitations risk, as evidenced by the summary-judgment ruling in *Jaunich*. Siegel Fee Decl. (Ex. 1) at ¶ 21.

Second, the Settlement represents an excellent outcome of the overcharges under the COI Charge claim, even if less than full damages. That claim did not survive summary judgment in either *Whitman* or *Bally*, and recoverable damages were substantially reduced in *Jaunich*. Nonetheless, the Settlement Fund represents approximately a third of the total overcharges under Mr. Witt's full damages model, *id.*, which is an excellent result "under unusually difficult or risky circumstances[.]" *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1204-05; *accord In re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *9 (C.D. Cal. June 10, 2005) (awarding one-third of the settlement fund where fund represented "36% of the class's total net loss" and collecting cases awarding one-third of the recovery in which counsel recovered between ten and seventeen percent of damages).

Even setting aside the significant risks on the issue of Policy interpretation, proving and recovering the entire overcharge was highly uncertain because of the broad range of potential recoveries at trial. State Farm had four expert witnesses, including a highly qualified economist who found zero damages and alternatively critiqued Mr. Witt's damages model such that even if a jury awarded damages, the amount could have been as little as 60 percent of what Mr. Witt determined. If Plaintiffs had gone to trial even with a favorable Policy interpretation, they could have recovered nothing or even just a modest amount more than the Settlement provides. And they still would have faced significant appellate risk on key issues of class certification, Policy interpretation, and admissibility—where any adverse ruling could have eliminated their claims entirely. Siegel Fee Decl. (Ex. 1) ¶ 21.

Third, the results here exceed those in similar COI settlements. For example, in *Spegele v. USAA Life Insurance Co.*, the district court found that a $90 million cash settlement of similar COI overcharge claims was an "excellent result" for the class. 2021 WL 4935978, at *6. That fund represented between 20-25 percent of the alleged overcharges. *Spegele*, Doc. 103-2 at ¶ 19 (estimating percent of overcharge). Likewise, in *Larson v. John Hancock Life Insurance Co.*, the trial court held that the $59.75 million settlement was an "excellent result" in awarding fees to class counsel, No. RG16813803, 2018 WL 8016973, at *6 (Cal. Super. May 08, 2018), and the average overcharge recovered there was slightly over 20 percent (Siegel Fee Decl. (Ex. 1) at ¶ 22). Here, Class Counsel obtained a better overall result for the Settlement Class after expending more work in more cases against greater odds and a more entrenched adversary.

2. Class Counsel represented the Settlement Class, on a contingent basis, despite numerous and substantial risks, and performed extraordinary labor precluding other employment, even though the cases were undesirable to other lawyers. (Factors 1, 4, 6-7 and 10)

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *Yarrington*, 697 F. Supp. 2d at 1062 (quoting *In re Xcel*, 364 F. Supp. 2d at 994). "[T]he critical takeaway from the case law is that attorneys' fee awards should bear a relationship to the degree of risk involved." Klonoff Dec. (Ex. 3) at ¶ 100 (citing Theodore Eisenberg & Geoffrey Miller, ATTORNEY FEES IN CLASS ACTION SETTLEMENTS: AN EMPIRICAL STUDY, 1 J. Emp. L. Studies 27, 38 (2004) ("[f]ees are … correlated with risk: the presence of high risk is associated with a higher fee, while low-risk cases generate lower fees…[This] is widely accepted in the literature.")). "Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this." *Tussey*, 2019 WL 3859763, at *3. "Courts agree that a larger fee is appropriate in contingent matters where payment depends on the attorney's success." *Been*, 2011 WL 4478766,

at *9.[14] And critically, "[t]he risks plaintiffs' counsel faced must be assessed as they existed in the morning of the action, not in light of the settlement ultimately achieved at the end of the day." *In re Xcel*, 364 F. Supp. 2d at 994.

Here, Class Counsel's time and labor invested were extraordinary and necessarily precluded other work. Siegel Fee Decl. (Ex. 1) at ¶ 18. Prosecuting the Litigation that continued after *Vogt* required 23,110 hours with an expectation of at least 1,888 hours more to come administering the Settlement.[15] *Id.* at ¶ 24. Class Counsel uniquely bore all the risk of prosecuting the claims, including advancing nearly $1.4 million in out-of-pocket expenses. They did not tag along on a government investigation or widespread, public condemnation of State Farm's practices. *Id.* at ¶ 4; Klonoff Decl. (Ex. 2) at ¶¶ 58-60. Nor did they have favorable appellate precedent to rely upon when the Litigation started. Siegel Fee Decl. (Ex. 1) at ¶ 4; *Vogt*, Order

[14] *Accord, In re: Checking Account Overdraft Litig.*, No. 1:09-MD-02836-JLK, 2014 WL 11370115, at *17 (risk embodied by "contingency fee arrangement often justifies an increase in the award of attorney's fees.") (quoting *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1335 (S.D. Fla. 2001)); *see also id*. ("Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee here."); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, No. 8:10ML 02151 JVS (FMOx), 2013 WL 12327929, at *32 (C.D. Cal. July 24, 2013) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for contingency cases. This ensures competent representation for plaintiffs who may not otherwise be able to afford it." (cleaned up)); *Barrera v. Nat'l Crane Corp.*, No. SA-10-CV-0196 NN, 2012 WL 242828, at *4 (W.D. Tex. Jan. 25, 2012) ("The legal profession accepts contingent fees that exceed the market value of the services if rendered on a non-contingent basis as a legitimate way of assuring competent representation for plaintiffs who cannot afford to pay on an hourly basis regardless of whether they win or lose"); *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1217 ("Class Counsel has risked millions of dollars in un-reimbursed attorneys' time and additional millions in out-of-pocket costs. Unless that risk is compensated with a commensurate reward, few firms, no matter how large or well financed, will have any incentive to represent the small stake holders in class actions against corporate America, no matter how worthy the cause or wrongful the defendant's conduct.").

[15] The anticipated hours are calculated based on an average of the time spent per-policy in two other nationwide COI settlements reached by Class Counsel. The time spent includes responding to class member questions about the settlement, supervising the administrator, making updates to the court, overseeing check reissuances and distribution of benefits to deceased class member's estates and beneficiaries, and ensuring that the distribution runs smoothly. Siegel Fee Decl. (Ex. 1) at ¶ 24.

(Ex. 3) at ¶ 7. They pioneered the theory of liability, created the favorable precedent (in *Vogt*), and designed the first classwide-damages model. Siegel Fee Decl. (Ex. 1) at ¶ 4. All that work, which precluded other less-risky employment, was the result of their extraordinary efforts undertaken without any guarantee of payment.

Moreover, these cases were undesirable because of the high risk of recovery. Often cases involving large potential damages produce competing counsel offering to represent the class. That was not the case here. The contractual violations alleged started in 1994 when the Policies went on sale. There have been over 760,000 Policies sold in nearly all fifty states. If these were *not* high-risk cases, contingent lawyers have had nearly three decades to offer to represent the Settlement Class, or a portion thereof. In that time, however, Class Counsel and their affiliates were the first and only lawyers to pursue litigation against State Farm for these claims. Further evidence of the high risk involved here is seen in the fact that State Farm took the *Vogt* class action to trial (a rare occurrence for class actions), through two appeals, and up to the United States Supreme Court on a petition for certiorari. And State Farm's defense did not diminish in the ten the remaining cases, where it litigated three cases up to trial, six cases to class certification, and several cases through *Daubert* and summary judgment. Siegel Fee Decl. (Ex. 1) at ¶ 23.

Also, this risk was disproportionately borne "by two relatively small firms" with just 31 lawyers total. Klonoff Decl. (Ex. 2) ¶ 72. This was "truly a David versus Goliath scenario," *id.*, and not an instance in which several national plaintiffs' firms shared the risk of non-payment. Stueve Siegel and Miller Schirger bore nearly 90 percent of the contingent risk in terms of uncompensated labor and almost all the out-of-pocket costs. Under these circumstances, there is hardly a better example of Class Counsel undertaking extreme risk to represent a class on a contingent basis. *See also Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017)

(affirming fee award where lower court reasoned, in part, that "[p]laintiffs' counsel, in taking this case on a contingent fee basis, was exposed to significant risk"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT, 2020 WL 256132, at *33 (N.D. Ga. Mar. 17, 2020) ("This action was prosecuted on a contingent basis and thus a larger fee is justified.").

3. The claims were novel and difficult to prosecute. (Factor 2)

As the district court in *Vogt* found, the claims here certainly presented "some difficult and novel factual and legal issues," including with respect to interpretation of the Policy and the calculation of damages. *Vogt*, Order (Ex. 3) at ¶ 8. All that was true in the cases that remained after or followed *Vogt*, and as other courts have noted, such factors "created significant risk for Class Counsel." *George v. Academy Mortgage Corporation (UT)*, 369 F. Supp. 3d 1356, 1378 (N.D. Ga. 2019). Other courts awarding 33⅓ percent of a fund have "relied heavily on the fact that it 'was an extremely difficult and complex case . . . with significant disputed issues arising at [various stages of the litigation],'" including where "'[l]iability on these claims was far from certain, and thus the case presented a great deal of risk'" to class counsel. Klonoff Decl. ¶ 44 (quoting *In re: Urethane Antitrust Litigation*, No. 04-1616-JWL 2016 WL 4060156, at *5 (D. Kan. Jul. 29, 2016)).

As noted, even after *Vogt*, liability was continually challenged both by adverse rulings within the Litigation and in other COI cases prosecuted against defendants other than State Farm. *Norem*, 737 F.3d at 1150; *Slam Dunk I, LLC v. Conn. Gen. Life Ins. Co.*, 853 F. App'x 451, 455 (11th Cir. 2021); *Maxon v. Sentry Life Ins. Co.*, 18-cv-254-jdp, 2019 WL 4540057, at *1 (W.D. Wis. Sep. 19, 2019); *West v. Wilco Life Ins. Co.*, No. 1:20-cv-2961-RLM-DLP, 2021 WL 5827019, at *7 (S.D. In. Dec. 8, 2021). *See also* Klonoff Decl. (Ex. 2) ¶¶ 45-49. The cases also presented difficult expert issues as evidenced by the ten *Daubert* challenges State Farm filed and the three challenges filed by Plaintiffs. *See In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 106 (E.D. Pa. 2013)

(awarding 33⅓ percent of the settlement fund as attorneys' fees in which court relied upon the fact that class counsel had litigated a number of hotly contested *Daubert* challenges). *See also* Klonoff Decl. at ¶ 50-52. As noted, State Farm itself disclosed four experts with different expertise, all of which heavily critiqued Plaintiffs' liability theory and Mr. Witt's damages methodology. Finally, class certification also presented difficult legal issues. Even though Plaintiffs prevailed in all six fully briefed class-certification rulings issued prior to Settlement, it was clear State Farm saw unsettled issues in the propriety of class certification that it intended to aggressively pursue on appeal. It sought interlocutory appellate review of class certification three times (twice in the Ninth Circuit). It cross-appealed the certification ruling in *Whitman*. It retained a leading Supreme Court lawyer, Theodore Boutrous, who "briefed and argued the seminal [class action] case, *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011)," to prepare and file its petition for certiorari in *Vogt.* Klonoff Decl. (Ex. 2) at ¶ 73(b). And it recruited two other "powerhouse appellate attorneys to submit amicus briefs." *Id.* No defendant undertakes such efforts if class certification did not present novel or difficult questions.

4. Class Counsel's reputation and skillful resolution of the Litigation supports the award. (Factors 3 and 9)

Courts often judge class counsel's skill against the "quality and vigor of opposing counsel." *In re Charter Communications, Inc.*, MDL No. 1506 All Cases, No. 4:02-CV-1186 CAS, 2005 WL 4045741, at *29 (E.D. Mo. June 30, 2005) (citing *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004)). *See* Klonoff Decl. (Ex. 2 at ¶ 71). As the district court in *Vogt* found in awarding a fee equal to one-third of the judgment, "the attorneys on both sides were skilled and experienced. Class Counsel prevailed despite being opposed by very skilled lawyers from multiple national law firms." *Vogt*, Order (Ex. 3) at ¶ 9. Professor Klonoff, who has litigated over 100 class

actions mostly on behalf of defendants, concurs in that "[a] high level of skill was necessary to litigate and settle these cases." Klonoff Decl. (Ex. 2) at ¶ 64.

Here, Class Counsel faced off against no-less-than *four* national law firms. Although Class Counsel's team "included some of the country's most accomplished class action plaintiff lawyers," *id.* at ¶ 66, "State Farm hired some of the country's most prominent and respected defense attorneys." *Id.* at ¶ 72. Professor Klonoff details some of their accomplishments, which speak for themselves. *Id.* at ¶ 73. Nonetheless, in Professor Klonoff's experienced judgment, against this "formidable multi-firm team, [C]lass [C]ounsel performed exceptionally well," including obtaining six favorable class-certification opinions, defeating Rule 23(f) review three times, defeating § 1291(b) interlocutory review in *Bally*, not losing a single *Daubert* motion filed against Mr. Witt, and defeating summary judgment in several cases. *Id.* at ¶ 75.[16]

5. The Setlement Class's reaction is neutral at this stage.

As of this filing, no Settlement Class Member has objected to the fee request. If any objections are filed, Class Counsel will respond following the objection deadline.

6. The percentage requested is a customary fee for contingent litigation and supported by other awards under the facts and circumstances of this Litigation. (Factors 5 and 12)

a. A fee equal to 33⅓ percent is customary in class and non-class, contingent representation.

The Rules of Professional Conduct require that any attorney's fee, including a contingent one, be reasonable under many of the same factors as the *Johnson* factors. Mo. R. Prof. Conduct.

[16] In addition to the results in the Litigation that continued after *Vogt*, Class Counsel's success in *Vogt* further evidenced their skill. They obtained a class-wide verdict after a jury trial that represented almost full damages requested, defeated State Farm's appeal in its entirety, obtained reversal of the district court's denial of their request for pre-judgment interest, and successfully opposed certiorari despite the State Farm's highly experienced Supreme Court team. *See* Klonoff Decl. (Ex. 2) at ¶ 75.

4-1.5. Nonetheless, "[c]ontingent fee arrangements of 33 percent or more are common." Klonoff Decl. (Ex. 2) at ¶ 77 (citing, among other authorities, Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47, DEPAUL L. REV. 267, 284–86 (1998) (noting that 33⅓ percent "is the standard contingency fee figure" and finding, in a study of Wisconsin attorneys, that "a contingency fee of 33% was by far the most common, accounting for 92% of those cases")). And the Class Representatives agreed to contingent fee percentages of between 33⅓ and 40 percent. Klonoff Decl. (Ex. 2) at ¶ 78.

In class actions, the requested fee is in line with—or lower than—cases with similarly impressive results. In assessing this factor, Eighth Circuit courts look to similar fee awards in class actions within the Eighth Circuit generally, as well as to fee awards in similar litigation in other circuits. *See In re Xcel*, 364 F. Supp. 2d at 998.

In the Eighth Circuit, courts have "frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017).[17] Also, as noted, the requested fee here is consistent with the two most recent COI overcharge settlements (*Spegele* and *Larson*) in which the courts awarded class counsel the 30 percent of the fund they requested. *Spegele*, 2021 WL 4935978, at *6; *Larson*, 2018 WL 8016973, at *6. Importantly, here, the *Johnson* factors warrant a percentage modestly higher than *Spegele* and *Larson*: the results obtained are greater both in aggregate and as a percentage of each class member's overall average

[17] *E.g.*, *Caligiuri*, 855 F.3d at 865-66 (33.33% of $60,000,000 common fund); *Custom Hair Designs by Sandy, LLC v. Central Payment Co.*, Case No. 8:17CV310, 2022 WL 3445763, at *5 (D. Neb. Aug. 17, 2022) (33.33% of $84,000,000 common fund); *In re Airline Ticket Commission Antitrust Litig.*, 953 F. Supp. 280, 285–86 (D. Minn. 1997) (awarding 33.3% of $86,892,000 common fund); *In re Monosodium Glutamate Antitrust Litig.*, No. Civ. 00MDL1328PAM, 2003 WL 297276, at *3 (D. Minn. Feb. 6, 2003) (30% of $81,400,000); *In re Xcel*, 364 F. Supp. 2d at 999 (awarding 25% of $80,000,000 common fund and noting "courts in this circuit and this district have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions").

overcharge recovered, Class Counsel performed more work,[18] and the Litigation against State Farm, which sprawled ten jurisdictions, necessarily entailed more risk. Likewise, in *Vogt*, the district court awarded one-third of the judgment on the same claims, relying on many of the same *Johnson* factors advocated here. *See Vogt*, Order (Ex. 3). This precedent supports the percentage requested here.

b. A fee of 33⅓ percent is supported by awards in other cases of this size.

As shown above, the fee-percentage requested here is among the customary percentages awarded in class action settlements generally in this Circuit. In some jurisdictions *outside* of the Eighth Circuit, courts separately consider percentages awarded in other cases of similarly sized recoveries (including so called "megafund" settlements typically defined as over $100 million). *See* Klonoff Decl. (Ex. 2) at ¶¶ 92-94. But even in those instances, "courts nationwide have repeatedly awarded fees of 30 percent or higher in so-called 'megafund' settlements." *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011). And "there are numerous mega-fund cases with percentage-based fee awards equal to or greater than those sought here." Klonoff Decl. (Ex. 2) at ¶ 95 (collecting "48 mega-fund cases that involved fee awards of 30 percent or greater (twenty-nine of which awarded 33 percent or more")). Thus, the fee requested

[18] In *Spegele*, class counsel reported 7,356.2 hours on the litigation, which settled prior to a ruling on summary judgment or trial. No. 5:17-cv-00967-OLG, Doc. 108 at 15, 30 (W.D. Tex. June 14, 2021). In *Larson*, counsel reported 11,727 hours of work and that case also settled prior to any ruling on summary judgment or trial. Siegel Fee Decl. (Ex. 1) at ¶ 22. And, of course, neither case involved litigation across ten different jurisdictions.

here is supported by awards in other similarly sized settlements, particularly given that each *Johnson* factor supports such an award here.[19]

C. The Requested Fee Is Reasonable Under a Lodestar Crosscheck.

Although a lodestar crosscheck is "not required" in the Eighth Circuit, *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017)—and, as explained below should be *disfavored* (*infra* note 21)—doing so here confirms that the requested fee is reasonable and should be approved. As noted above, Class Counsel have spent over 23,110 hours through preliminary approval on this Litigation, and they conservatively anticipate spending at least 1,888 additional hours if the Settlement is approved.[20] These hours result in an overall lodestar of $18,364,930 at current rates. Siegel Fee Decl. (Ex. 1) at ¶¶ 24-26. The resulting multiplier on this lodestar would be 5.90 if the requested fee is approved. Although Eighth Circuit courts have made clear that the lodestar cross-check "does not trump the court's primary reliance on the percentage of common fund method,"

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[19] Professor Klonoff discusses in some depth why *decreasing* fee percentages when class counsel recovers *more* for the class has been criticized as bad policy by courts and academics. In the end, he reaches the same conclusion other courts who have carefully considered this issue have reached, which is that the percentage awarded in other megafund settlements were "decided on their particular facts, just as this case must be decided by application of the *Johnson* factors to its particular circumstances." Klonoff Decl. (Ex. 2) at ¶ 94 (quoting *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1114 (D. Kan. 2018) (awarding 33⅓ percent of $1.5 billion based on case-specific facts)); *In re Xcel*, 364 F. Supp. 2d at 997 ("To the extent that the Fund Objectors imply that the courts 'traditionally accounted for economies of scale by awarding lower fees as the size of the fund increases' or set a multiplier cap … the court reads the precedent otherwise."). Here, "even as a mega-fund case…[the facts and circumstances of the Litigation] justifies an award of 33⅓ percent, given the difficult factual, legal, and expert issues, contested class certification issues, formidable opposing counsel, multi-jurisdictional nature, and the significant risk of no recovery." *Id.* at ¶ 98.

[20] It is appropriate to include reasonably anticipated future hours in conducting a lodestar crosscheck. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig*., MDL No. 2672 CRB, 2017 WL 1047834, at *5 (N.D. Cal. Mar 17, 2017) (calculating over 20,000 hours for future reasonably anticipated work in conducting lodestar crosscheck); *Tennille v. Western Union Co*., No. 09-cv-00938-MSK-KMT, 2013 WL 6920449, at *3 (D. Colo. Dec. 31, 2013) (instructing plaintiffs to include in their lodestar calculation "an estimate of the future hours that will be necessary to carry the case to completion under the Settlement Agreement"); *Reyes v. Bakery & Confectionery Union*, 281 F. Supp. 3d 833, 853, 856–57 (N.D. Cal. 2017) (including estimated hours for "future work" related to, *inter alia*, "managing class members' claims").

In re Xcel, 364 F. Supp. 2d at 999 (citing *In re Rite Aid*, 396 F.3d 294, 307 (3d Cir. 2005), *as amended* (Feb. 25, 2005) and *Petrovic,* 200 F.3d at 1157), that multiplier is not unreasonably high.[21] *See* Klonoff Decl. (Ex. 2) at ¶¶ 122-132.[22]

Specifically, the Eighth Circuit has held that a multiplier of 5.3 "does not exceed the bounds of reasonableness." *Rawa*, 934 F.3d at 870 (quoting approvingly district court decision "finding reasonable a 5.61 cross-check multiplier"). Here, the higher multiplier "can be explained in large part by class counsel's lean and efficient staffing of the case. Counsel could have ensured a higher lodestar (and thus a lower multiplier) by adding attorneys even when additional assistance was not essential or by duplicating work already performed in *Vogt*. But they should be commended—not penalized—for taking a lean staffing approach. As the Eighth Circuit has cogently recognized, it would be unfair to 'penalize counsel' for acting efficiently." Klonoff Decl. (Ex. 2) at ¶ 128 (quoting *Rawa*, 934 F.3d at 870).

Moreover, courts have awarded fees resulting in far larger multipliers in many other cases. *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012) (66 multiplier); *In re*

[21] Courts have "caution[ed] against setting fees in a 'formulaic way.'" *In re Charter Commc'ns*, 2005 WL 4045741, at *22 (quoting *In re Rite Aid*, 396 F.3d at 301). "'[T]o overly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys' services.'" *Rawa*, 934 F.3d at 870 (quoting *In re Charter Commc'ns*, 2005 WL 4045741, at *18). Although this was not an early settlement, it would make little sense to have incentivized Class Counsel—who utilized efficiency across the Related Actions—to take unnecessary depositions, unnecessarily repeat discovery obtained in *Vogt*, or load the case with additional attorneys, particularly given the outcome obtained with relative efficiently here.

[22] Class Counsel have provided summaries of the time spent on the Litigation (Appendix A to the Siegel Fee Decl. (Ex. 1)), which is generally considered sufficient for performing a lodestar crosscheck. *See In re Enron*, 586 F. Supp. 2d at 752–53 (quoting authority stating that the "lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records."). Nonetheless, Professor Klonoff has reviewed Stueve Siegel and Miller Schirger's detailed time entries and found nothing to indicate overbilling. Klonoff Decl. (Ex. 2) at ¶¶ 106-07. And Class Counsel are prepared to submit their detailed billing entries *in camera* upon the Court's request.

Merry-Go-Round Enters. Inc., 244 B.R. 327, 335 (Bankr. D. Md. 2000) (19.6 multiplier); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ. A. 03–4578, 2005 WL 1213926, at *16–18 (E.D. Pa. May 19, 2005) (15.6 multiplier); *In re Doral Fin. Corp. Sec. Litig.*, No. 1:05-cv-04014-RO, at ¶ 9(f) (S.D.N.Y. Jul. 20 17, 2007) (Doc. 65) (10.26 multiplier); *Farrell v. Bank of Am. Corp.*, N.A., 827 F. App'x 628, 630, 636 (9th Cir. 2020) (10.15 multiplier). Professor Klonoff offers additional examples. Klonoff Decl. (Ex. 2) at ¶ 130. And the multiplier here is below the top-end of a range in a case cited by the *Vogt* court approvingly as "collecting cases approving percentage-based fees that totaled between 1.47 and 6.85 of the lodestar amount." *Vogt*, Order (Ex. 3) at ¶ 13 (citing *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 949–51 (D. Minn. 2016)). Thus, a lodestar crosscheck—if performed—does not undermine the fee requested here.

Even so, a 5.9 multiplier overstates Class Counsel's overall award here. Class Counsel performed significant work in *Vogt* that also contributed to the Settlement (although, as noted, even more significant additional work was required to achieve it). And the *Vogt* judgment—especially the favorable appellate rulings before the Eighth Circuit and denial of certiorari—obtained by Class Counsel significantly contributed to the Settlement. Klonoff Decl. (Ex. 2) at ¶ 17. It is therefore appropriate to consider the overall results, attorney's fees, and lodestar of the Litigation, including *Vogt*, in conducting any crosscheck. Klonoff Decl. (Ex. 2) at ¶ 129.

With the *Vogt* judgment, Class Counsel has recovered about $366.6 million for the Settlement Class. Siegel Fee Decl. (Ex. 1) at ¶ 26. And Class Counsel's lodestar including *Vogt* is $24,877,826. *Id.* Thus, the overall multiplier (including the fee awarded in *Vogt*) is 4.9, which is below what the Eighth Circuit has expressly approved. *Rawa*, 934 F.3d at 870. That multiplier is more representative of Class Counsel's total efforts, including its overall risk in securing the recoveries against State Farm, and it is lower than many fee awards in similarly sized recoveries.

Klonoff Decl. (Ex. 2) at ¶ 130 (collecting mega-fund settlements resulting in multipliers above 5); *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F. Supp. 2d 732, 798 (S.D. Tex. 2008) (approving fee producing 5.2 multiplier and quoting expert analysis finding that is "only marginally higher than the 4.50 average multiplier in settlements over $100 million[.]").

Given the high-level of risk, difficulty of the claims, complex nature of the 10-jurisdictional litigation, class-action trial, and three appeals, seven class-certification rulings, and seven summary-judgment rulings, a multiplier of 4.9 does not reflect a "windfall" or unearned contingent-fee award.

* * *

For these reasons, Class Counsel respectfully requests that the Court award fees equal to one-third of the Settlement Fund.

II. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF REASONABLY INCURRED EXPENSES.

"Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement.'" *Yarrington*, 697 F. Supp. 2d at 1067 (quoting *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996)). Under the Settlement, Class Counsel may seek up to $1.5 million in actual expense reimbursement. As the date of the preparation of this motion, Class Counsel has incurred $1,358,443.06 in reimbursable expenses. Siegel Fee Decl. (Ex. 1) at ¶ 27. The largest components of these costs are for experts, online legal research, and class notice and administration. *See Tussey*, 2019 WL 3859763, at *5 ("Reimbursable expenses include many litigation expenses beyond those narrowly defined 'costs' recoverable from an opposing party under Rule 54(d), and includes: expert fees; travel; long-distance and conference telephone; postage; delivery services; and computerized legal research." (citing Alba Conte, 1 Attorney Fee

Awards § 2:19 (3d ed.))). Class Counsel kept costs at a reasonable level, particularly in light of the size of the Settlement, Klonoff Decl. (Ex. 2) at ¶¶ 134-136. The Court should thus approve Class Counsel's expense reimbursement request.

III. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS.

Courts routinely approve service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class. The factors for deciding whether the service awards are warranted are: "(1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefited from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d at 867.

Here, the Settlement Class Representatives performed important work on the case, including time-consuming gathering of facts and documents, assisting Class Counsel with the specifics of their Policy, preparing for and sitting for depositions, and reviewing the Settlement Agreement. Siegel Fee Decl. (Ex. 1) at ¶ 28. That work materially advanced the litigation and protected the Settlement Class's interests. *Id.* Indeed, their time and effort made this historic Settlement possible.

Finally, the requested service awards are consistent with other awards approved in the Eighth Circuit. *Tussey*, 850 F.3d 951, 961 (8th Cir. 2017) (approving $25,000 service awards).

And they are consistent, or lower, than awards in similarly sized settlements. Klonoff Decl. (Ex. 2) at ¶¶ 137-145.[23]

The Court should therefore approve the requested service awards of $25,000 for each Settlement Class Representative.

CONCLUSION

Accordingly, Class Counsel respectfully requests that the Court approve the requested fee of one-third of the Settlement Fund, reimbursement of current expenses in the amount of $1,358,443.06 (subject to being updated before the final approval hearing), and service awards of $25,000 to each of the Settlement Class Representatives.

Date: February 13, 2023

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[23] In *Vogt*, the district court approved a $15,000 service award following trial. *Vogt*, Order (Ex. 3) at ¶ 22. In so ordering, the court concluded that the case was not particularly fact-intensive given that it granted summary judgment on liability prior to trial. *Id.* Respectfully, Class Counsel submits that this analysis undervalues two of the three factors relevant to determining the propriety of a service award: (1) actions the plaintiffs took to protect the class's interests, and (2) the degree to which the class has benefited from those actions. *Caligiuri*, 855 F.3d at 867. Here, without the Class Representatives, the interests of the class could not have been pursued. To file a case in a state, Class Counsel needed Plaintiffs who purchased Policies in that state. Each Class Representative added significant value in giving Class Counsel a new forum to litigate against State Farm on behalf of another state-wide putative class. And, the class benefited significantly from the efforts of these Plaintiffs, who responded to written discovery, produced documents, sat for a deposition, placed the class's interest over their own in settlement negotiations, and approved the Settlement. In total, the $275,000 in service awards requested represents a *de minimis* portion (only .085 percent) of each individual Settlement Class Member's recovery. To put the figure in perspective, a Settlement Class Member entitled to $10,000, would pay less than $9 to the Class Representatives if each received $25,000. Someone entitled to $1,000 would pay less than 9 cents. No rational Settlement Class Member would have agreed to undertake the burdens of the Class Representative for such a *de minimis* cost to themselves. In this light, the modest awards are appropriate.

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

DAVID M. ROGOWSKI, ELIZABETH A. BALLY, KATHY BAUER, KIM BOTTE, JOHN E. JAUNICH, MYLENE MCCLURE *as personal representative of* THE ESTATE OF EARL L. MCCLURE, RONALD K. PAGE, CHANDRA B. SINGH, JOYCE THOMAS, DAVID TOMS, and WILLIAM T. WHITMAN, Individually and On Behalf Of All Others Similarly Situated, Plaintiffs, vs. STATE FARM LIFE INSURANCE COMPANY and STATE FARM LIFE AND ACCIDENT ASSURANCE COMPANY, Defendants.	Case No. 4:22-cv-00203-RK

DECLARATION OF NORMAN E. SIEGEL IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEY'S FEES, COSTS, EXPENSES AND SERVICE AWARDS

I, Norman E. Siegel, hereby declare as follows:

1. I am a founder and partner at the law firm of Stueve Siegel Hanson LLP, and since the beginning of this litigation have been the senior partner at Stueve Siegel Hanson responsible for this case against Defendants State Farm Life Insurance Company and State Farm Life and Accident Assurance Company (collectively, "State Farm"). I make this declaration based on my personal knowledge and if called to testify to the contents hereof, I could and would competently do so.

2. I filed a Declaration setting forth the resume of Stueve Siegel Hanson and the background of this litigation in support of Plaintiffs' Motion for Preliminary Approval (Doc. 47-2), which I incorporate herein by reference. I make this Declaration in support of Class Counsel's Motion and Suggestions in Support of Motion for Attorney's Fees, Costs, Expenses and Service Awards ("Fee Motion").

3. Based on our experience prosecuting Cost of Insurance ("COI") overcharge cases and our research, this Settlement represents the largest known class settlement that State Farm has ever paid and the largest identified cash settlement obtained on claims for allegedly improper COI overcharges. Based on the historical size of the top ten class action settlements reported each year, I also believe it will likely be one of the largest such settlements this year.

4. Stueve Siegel Hanson and Miller Schirger, and the team of attorneys working on this case, are among the national leaders in representing policy owners who have suffered allegedly improper overcharges through COI charges in their universal life insurance policies. We began filing these cases nearly ten years ago when the theory of liability was nascent and developed the legal claims and theories related to improper rate setting. To my knowledge, there has been no government or regulatory investigation into the claims at issue here, certainly none which is public. And there has been no public admission of liability or culpability by State Farm or any other life insurer. All have taken the position that their COI charges are consistent with the terms of their policy and industry standard and custom. As set forth in my prior Declaration, we have reached three large settlements, including two all cash settlements, with other insurance companies. We have also tried two class-action cases on behalf of policy owners alleging improper COI charges to successful outcomes before two juries, including *Karr v. Kansas City Life Ins. Co.*, 1916-CV26645 (Mo. Cir.) in December 2022.

5. We[1] litigated the nine Related Actions and this case across ten different jurisdictions on behalf of Settlement Class Members. We also represented an earlier class of Missouri policy owners, who are also part of the Settlement Class, on the same claims through trial, judgment, two appeals, and certiorari to the United States Supreme Court, in which State Farm ultimately paid over $41.6 million to satisfy the final judgment. *Vogt v. State Farm Life Ins. Co.*, No. 16-CV-04170-NKL (W.D. Mo.). The culmination of all these efforts is the present Settlement, which if approved will require State Farm to pay an additional non-reversionary sum of $325 million to resolve the claims brought in the Litigation.

6. As discussed in greater detail below, to achieve this result for the Settlement Class, we performed a massive amount of work—more than 23,110 hours—in the Litigation, on a contingent basis, working for more than four years (six years and over 32,750 hours including *Vogt*). Additionally, based on our post-approval time records from two prior and similar COI settlements, we estimate that we will spend at least another 1,888 hours administering the Settlement, which does not include any time necessary to obtain final approval or potentially defend any judgment on appeal. We thus conservatively expect we will spend over 25,000 hours representing the Settlement Class in this Litigation alone, excluding *Vogt*.

7. Based on my two decades of experience prosecuting class actions and being appointed lead counsel in several large, multi-district litigations ("MDLs"), I can say confidentiality that this Litigation was unlike most class actions, including *Vogt* itself, or even most multi-district litigations. The ten post-*Vogt* cases were entirely multi-jurisdictional.

[1] For purposes of this declaration, I used the term "we" to refer to Class Counsel and the firms who we collaborated with on the Litigation. Capitalized terms have the same meaning as capitalized terms in the Settlement and as defined in the Fee Motion.

Ordinarily, a class action is venued in one jurisdiction and class counsel need only contend with one set of defenses and persuade one district judge and jury of their position. Also, when multiple class actions raising common questions of fact are filed in multiple jurisdictions, those cases are ordinarily consolidated before a single judge for pre-trial proceedings. *See* 28 U.S.C. § 1407. None of this was true here. To achieve this Settlement, we instead prosecuted ten separate cases against State Farm, in ten different jurisdictions, presided over by ten different and independently minded judges. That presented unique risks to Class Counsel and required exponentially more effort than a consolidated multi-state class action.

8. In each case State Farm mounted a comprehensive and independent defense, requiring us to give an equally forceful prosecution. State Farm retained and was represented by no less than four of the country's top defense firms during the litigation, all listed in the AMLAW 100. State Farm defended each action independently, requiring us to effectively prosecute and manage ten different cases. While we tried to be as efficient as possible, which I explain in greater detail below, there is no question that we were prosecuting individual actions and that we had to marshal our case to each independent judge.

9. In undertaking such a substantial commitment on behalf of the Settlement Class, we assumed significant risk because the claims were difficult and complex. The *Vogt* court specifically found that that case presented issues which were difficult and novel, and the claims in the ten cases that culminated in this Settlement were largely the same claims prosecuted in *Vogt*. Moreover, the difficulty of the claims is further reflected in the various outcomes in the Litigation: reasonable jurists disagreed on the core issue of Policy interpretation. Damages was a hotly contested issue. Expert testimony covered a broad array of subject matters, and while we were highly successful in achieving class certification, we recognized that there was serious

risk to class certification based on State Farm's continued attacks at both the trial and appellate levels.

10. Even after prevailing at trial in *Vogt*, State Farm presented new, significant challenges. In fact, State Farm's defenses only intensified with the addition of new counsel, including those at Gibson Dunn and Alston & Bird, and with its retainer of four new experts. With this newly augmented team of lawyers and experts, State Farm fought every skirmish anew, including class certification, admissibility of expert testimony, and Policy interpretation in each case, oftentimes with new or evolved arguments. Nonetheless, we were largely successful in our efforts on behalf of the Settlement Class in the Litigation. We obtained seven favorable class-certification rulings (including one order denying State Farm's motion for decertification) from six separate courts and four favorable summary-judgment rulings from four different courts. This required extensive briefing, including 13 summary-judgment briefs (not including replies) under various state and circuit law, 13 *Daubert* briefs, eight class-certification briefs, and four Rule 12 motions. With exhibits, Class Counsel filed thousands of, if not over ten thousand, pages of briefing.

11. Discovery in the Litigation was equally intense. We served or responded to 385 interrogatories, 727 requests for production, 286 requests for admission, and 56 requests for documents via subpoenas. State Farm produced between 35,603 and 44,609 documents in each case, and we isolated and reviewed unique documents, which culminated in the parties marking 289 deposition exhibits. We took or defended 24 depositions, *not* including the nine depositions (one of which was two days) previously taken in *Vogt*. We negotiated for the use of the deposition taken in *Vogt* in this Litigation. And the parties made four separate trips to the

appellate courts on State Farm's petitions for interlocutory review of substantive rulings and class-certification decisions.

12. As noted, we endeavored to be and were efficient where possible. We used all of the fact depositions we took in *Vogt* in the Litigation to avoid re-taking depositions of State Farm witnesses. This was not only efficient but strategic because we did not want to give these witnesses an opportunity to retract or muddy the testimony that produced a favorable outcome in *Vogt*. We also worked with the same testifying expert, Scott Witt, across all the cases. We strategically limited the number of times we deposed State Farm's experts. We deposed two of those witnesses only once in all of the cases. And we only deposed the other two witnesses twice with the second depositions being shorter in length. Our efforts at efficiency can be put in contrast to how State Farm strategically treated each case as a wholly separate litigation. For example, State Farm deposed Mr. Witt eleven separate times. And it took seven individual depositions of the named Plaintiffs.

13. Nonetheless, even with these efficiencies, we expended an extraordinary amount of time on the Litigation. For example, although using the same expert produced beneficial efficiencies and consistency, each case nonetheless required individual analysis of millions of data points to produce each class-wide damages model. We worked extensively with Mr. Witt, and a separate consulting expert, to prepare each model and subject each to comprehensive testing procedures and analyses. That work was crucial to our representation of the Settlement Class—although State Farm filed ten *Daubert* motions against Mr. Witt, none were granted, and the model we developed with Mr. Witt stood up to extensive scrutiny.

14. Despite all of this work, these cases, like all complex litigation, presented challenges and setbacks. In my experience, the litigation here was novel and complex. The

Bally court found the issue of Policy interpretation difficult enough to certify it for immediate interlocutory appeal. And, as I noted, State Farm's legal arguments and strategies were constantly evolving, particularly after the *Vogt* trial and the Eighth Circuit ruling affirming the trial verdict based on the ambiguous Policy language. Some examples of these new defenses include that after the Eighth Circuit affirmed the Policy interpretation as ambiguous in *Vogt*, State Farm obtained declarations from its sales agents describing the sales process and urging the courts to consider extrinsic evidence, including substantial document productions concerning marketing materials and individual policyholder communications. As I also noted above, State Farm retained four new experts not disclosed in *Vogt*, whose opinions covered distinct subject matters and were directed at both liability and damages. One expert was a former state insurance commissioner and executive at the National Association of Insurance Commissioners who opined that the Policy as interpreted by Plaintiffs could not have obtained approval for sale under state insurance regulatory standards. A second witness was a consumer-expectations expert who opined that prospective policyholders would have expected State Farm to include profit and expenses in its COI charge. A third witness was an actuary who accused Mr. Witt of failing to follow actuarial standards. And the fourth witness was a highly credentialed economist who opined on, *inter alia*, alleged intraclass conflicts, the absence of any injury to any policyholder, and damages. We developed individual strategies for responding to each expert and deposed all four at least once. We didn't know how the courts would view this testimony or even if it would be considered relevant but we recognized the significant risk that the Policy ambiguity left open on these issues following *Vogt*. Consequently, we developed individual legal and factual strategies to address these defenses. After extensive briefing and oral argument, several courts rejected the opinions raised by the experts as a basis to grant State Farm's various motions for

summary judgment, although at least some of the courts made clear that these issues would be present at any trial on damages.

15. Perhaps not surprisingly after the *Vogt* verdict, State Farm's approach to damages also evolved dramatically in the Litigation. State Farm's economist, Dr. Lauren Stiroh, offered several new opinions not at issue in *Vogt*. She testified that no class member suffered economic damages by any of the alleged breaches of the Policy. And, in the event there were damages, she offered numerous alternative damages figures tied to fact issues in the case that were significantly less than Mr. Witt's damages calculation. This was a significant departure from *Vogt* where State Farm offered no alternative damages figure to the jury. While no court agreed that Mr. Witt's opinions were unreliable based on State Farm's experts' opinions after considering Class Counsel's opposing arguments, this presented significant new trial risks not present in *Vogt*.

16. The work required in filing and prosecuting these cases resulted in mounting risk in light of State Farm's escalating, multi-jurisdiction defense. We did not waver, however. As clients retained us in states where litigation was not ongoing, we continued to file and prosecute new cases against State Farm, even after the partly unfavorable rulings in *Bally*. We pushed for the best possible settlement, including rejecting proposals from State Farm at two earlier, unsuccessful mediations with a former federal district judge. Prior to and during settlement negotiations, Class Counsel had completed most pretrial work and prepared three of the cases (*Whitman*, *Jaunich*, and *Bally*) for trial. Trial dates were only months away in *Whitman* and *Bally*; in fact, in *Whitman*, the parties were in the process of making pretrial disclosures, including having already filed motions in limine, during settlement negotiations. Even after the adverse ruling against the Washington class in *Whitman*, we appealed prior to reaching the

Settlement, and ultimately the Settlement was reached through the efforts of another former federal district judge well known to lawyers on both sides—the Hon. Layn Phillips—who is widely regarded as the most respected and accomplished mediators in the country.

17. Our investment of labor and expenses certainly limited significantly the other work we were able to take on during the four years following *Vogt*. We confronted a much larger defense team with a near endless amount of resources. The 23,110 hours of work we have performed so far is equivalent of three full-time attorneys and a paralegal dedicated solely to these cases for four years (billing an average of 1,800 hours a year for all four years). Given the size of our firms, that was a significant risk for us to take on a purely contingent basis. There were certainly less risky cases we could have devoted those resources to, where either liability or damages or both were more certain or where the claims had been advanced by a government investigation or public admissions. We nonetheless dedicated our resources to these cases because we believed in the claims and representation of these clients.

18. I believe it is also salient that we undertook to represent State Farm policyholders when these cases were not only risky, but legally precarious. When we filed *Vogt* and even when we filed many of the other cases against State Farm, there was no favorable controlling or federal appellate precedent on the issue of Policy interpretation. In fact, in 2013, the meaning of a similar COI rates provision had resulted in a federal appellate ruling in favor of the insurance company. *See Norem v. Lincoln Benefit Life Insurance Co.*, 737 F.3d 1145, 1150 (7th Cir. 2013) ("neither the dictionary definitions nor the common understanding of the phrase 'based on' suggest that [the insurer] is prohibited from considering factors beyond sex, issue age, policy year, and payment class when calculating its COI rates."). We represented the policyholders in that case, and in another Seventh Circuit case, all on a contingent basis, through class

certification, summary judgment, and two full appeals. The Seventh Circuit affirmed summary judgment in both cases and we ultimately recovered nothing despite thousands of hours of work. Many firms might have given up on the Policy theory here after such a stinging defeat. We did not. We filed the case against State Farm in *Vogt* and then continued to file cases against State Farm even before ultimately obtaining the favorable appellate decision in the Eighth Circuit. Moreover, even after the Eighth Circuit's ruling, we faced disagreement among the subsequent courts to consider the issue because of State Farm's alternative Policy interpretations.

19. Policy interpretation was also far from the only risk we faced. It was critical to prevail on that point but hardly sufficient to obtain a significant recovery. State Farm levied every conceivable challenge at class certification, expert testimony, and damages. As to class certification, State Farm also raised new arguments following *Vogt*. *See, e.g.*, *Bally*, State Farm's Opp. to Pl. Mot. for Class Cert., Doc. 108 (arguing individualized sales conversations with policyholders revealed individualized issues; arguing the damages model was unreliable and not tethered to Plaintiffs' theory of breach; arguing Bally was not an adequate class representative); *Bally*, Doc. 266 (seeking decertification of the California class under Plaintiffs' new Count II damages model). As noted, it hired new experts and continually renewed its attacks on Mr. Witt, making ten *Daubert* challenges.

20. We also had to contend with the statute of limitations in each case. The Policy violations started when the Policies were first sold decades ago in 1994. All putative class members faced a limitations defense and we had to rely on a tolling or accrual rule to avoid losing all or most of the class-wide damages in each case. The courts split on whether that was a triable issue. Thus, the limitations defense presented a particularly acute risk in that even if

we made a recovery following trial and all the additional work that would entail, the recovery could be materially reduced from that secured in *Vogt*.

21. As noted in my prior Declaration, I believe the Settlement is in the best interests of the Settlement Class given the risks and delay of further litigation. Based on our estimates, the Settlement Fund represents all or nearly all overcharges for State Farm's alleged breach of the Policy's Expense clause under Mr. Witt's revised damages methodology, as accepted by several courts including *Bally*. In my experience, it is unusual in any settlement to recover full damages on any claim, much less when full damages requires the defendant to pay $325 million. The Settlement also represents an excellent outcome of the overcharges under the COI Charge claim, even if less than full damages. That claim did not survive summary judgment in either *Whitman* or *Bally*, and recoverable damages were substantially reduced in *Jaunich* because of that court's statute of limitations rulings. Nonetheless, we estimate that the Settlement Fund represents approximately a third of the total overcharges under the COI Charge claim. Even setting aside the significant risks on the issue of Policy interpretation, proving and recovering the entire overcharge was highly uncertain because of the broad range of potential recoveries at trial. State Farm had four expert witnesses, including a highly qualified economist who found zero damages and alternatively critiqued Mr. Witt's damages model such that even if a jury awarded damages, we estimate the amount could have been 60 percent or less of what Mr. Witt determined. If Plaintiffs had gone to trial even with a favorable Policy interpretation, they could have recovered nothing or even just a modest amount more than the Settlement provides. And they still would have faced significant appellate risk on key issues of class certification, Policy interpretation, and admissibility where any one adverse ruling could have eliminated their claims entirely.

22. The amount of the overcharge recovered here also compares favorably to other COI settlements making similar allegations under similar policy language. In *Spegele v. USAA Life Insurance Co.*, we estimated that a $90 million cash settlement represented between 20-25 percent of the alleged COI overcharges, which the court found was an "excellent result" for the class. In *Larson v. John Hancock Life Insurance Co.*, No. RG16813803 (Alameda Co., Cal.), we estimated the $59.75 million settlement represented an average of just over 20 percent of the estimated overcharges. Importantly, neither case was as complex, risky, or difficult as the cases against State Farm.[2] Neither case involved multi-jurisdictional litigation, much less did they require us to prosecute ten separate cases. Also, neither case proceeded as far into litigation as a ruling on summary judgment or to preparing for trial. The defendants in those cases certainly fought hard, but not as hard as State Farm. The courts in both cases awarded fees equal to 30 percent of the funds, which was the amount we requested in those cases.

23. I am also familiar with the overall landscape of COI overcharge litigation, particularly the more challenging cases attacking the initial rate setting by insurance companies (as compared to challenges to later rate increases). It is not unusual in potential large damages cases for litigation to produce competing counsel offering to represent the putative class. But that was not the case here. Even though the claims here existed in 1994 when the first alleged overcharges occurred and over 760,000 Policies have been sold in nearly all fifty states, our firms and our co-counsel are the *only* lawyers I am aware of who have sued State Farm for these claims. It is also extremely rare for a class action to go to trial. Nonetheless we tried the *Vogt* case as a class action, through two appeals, and up to the United States Supreme Court on a

[2] In *Larson*, we reported 11,727 hours of work.

petition for certiorari, and we were on the precipice of three more class trials at the time of the Settlement or when negotiations began. As noted, State Farm's defense never diminished during the ongoing litigation, and I have little doubt that the high risk and complex, technical nature of the claims deterred other lawyers from filing claims.

24. Stueve Siegel Hanson and Miller Schirger kept contemporaneous track of the time spent on *Vogt* and the Litigation. We also collected time and expense summaries from local and affiliated counsel for the Litigation. In total, we have spent over 23,110 hours on the Litigation through approximately January 18, 2022. We also conservatively expect to spend at least 1,888 hours on settlement administration if the Settlement is approved, including responding to class member questions about the Settlement, supervising the administrator, making updates to the Court, overseeing check reissuances and distribution of benefits to deceased class members' estates, and ensuring that the distribution runs smoothly. To estimate the amount of future anticipated work, we reviewed our post-approval time in two similar COI settlements (the *USAA* and *John Hancock* cases discussed above). We averaged the amount of post-settlement time spent across the number of policies at issue in those settlements and applied that average to the (much larger) number of policies at issue here, which produced our estimate of 1,888 hours.

25. Nearly 90 percent of the work in these cases was performed by our firms (with the remaining time submitted by co-counsel and local counsel around the country). Our firms track and set hourly rates on a non-contingent basis and attest that the rates reflected in Appendix 1 charged by the lawyers and staff in their firms are reasonable, based on each person's position, and experience level. We further affirm that (1) the rates submitted with this Declaration are

based on rate scales, as annually adjusted, submitted and approved by other courts,[3] and (2) although Stueve Siegel Hanson infrequently accepts non-contingent work, the rates reported here track the rates charged by Stueve Siegel Hanson to hourly-paying clients that retain us for hourly work.

26. Using these hourly rates and the hourly rates reported by co-counsel, the lodestar for the work performed as of approximately January 18, 2023 and anticipated future work is $18,364,930 (24,998 hours). In addition, our final lodestar in *Vogt* after completing work on the two appeals and distributing the judgment was over $6,513,961 (9,654 hours). The final amount recovered in *Vogt*, after post-judgment interest was added to the fund, was approximately $41.6 million; thus, in total, if the Settlement is approved, we will have recovered, $366.6 million on behalf of the Settlement Class based on a total lodestar of $24,878,890.96 (34,652 hours). The attorney's fees awarded in *Vogt* ultimately totaled one-third of the $41.6 million judgment, or approximately $13.9 million.

[3] *See, e.g.*, *Hays v. Nissan N. Am. Inc.*, No. 4:17-CV-0353-BCW (W.D. Mo. Sept. 30, 2022) ($1,125 for partners, $695 for associates, $340 for paralegals); *Jackson County v. Trinity Industries*, No. 1516-CV23684, at *4 (Cir. Ct. Mo. 2022) (approving blended hourly rate of $662 for Stueve Siegel and Miller Schirger); *In re Equifax Customer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS 118209, at *259 (N.D. Ga. Mar. 17, 2020) (approving, *inter alia*, partner rates ranging from $935 (for Mr. Siegel) to 1050 per hour), *aff'd in relevant part*, 999 F.3d 1247 (11th Cir. 2021); *Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, slip op. at 3 (D. Kan. Feb. 15, 2018), *available at* https://ecf.ksd.uscourts.gov/doc1/07914925572 (citing Pls.' Mem. in Support of Mot. for an Award of Attorneys' Fees, Expenses, & Costs to Class Counsel & a Class Representative Service Award at 13–20 (filed Dec. 8, 2017)); *Criddell v. Premier Healthcare Services, LLC*, No. 16-cv-05842-R-KS (C.D. Cal. Jan. 16, 2018) (Dkt. No. 64) (approving hourly partner rate of $825 and hourly associate rate of $395); *Spangler v. Nat'l Coll. of Tech. Instruction*, No. 14-cv-03005-DMS (RBB), 2018 WL 846930, at *2 (S.D. Cal. Jan. 5, 2018) (approving Stueve Siegel Hanson's 2016 rates of $795 to $825 per hour for partners and $315 to $525 per hour for associates).

27. As of mid-January, our firms have advanced over $1,358,443.06 in expenses on behalf of the Settlement Class. These were reasonably and necessarily incurred to prosecute the Litigation. Appendix B contains a summary of the expenses by category.

28. The Class Representatives invested significant time and effort on behalf of the class. For most, their work on this case took them away from their families and their work. A summary of each representative's contributions are identified below:

A. David M. Rogowski assisted on behalf of the Missouri and the nationwide class. He regularly consulted with counsel regarding the claims and strategies and provided a copy of his policy documents for class counsel to review. He also was actively involved in reviewing and approving the settlement.

B. Elizabeth A. Bally assisted on behalf of the California class and the nationwide class. She regularly consulted with counsel regarding the claims and strategies and provided a copy of her policy documents for class counsel to review. She responded to numerous interrogatories and document requests served by State Farm. In addition, she was deposed and spent several days preparing with counsel by phone and in person for her deposition. She also was active in trial preparation. Moreover, she was actively involved in reviewing and approving the settlement.

C. Kathy Bauer assisted on behalf of the Georgia class and the nationwide class. She regularly consulted with counsel regarding the claims and strategies and provided a copy of her policy documents for class counsel to review. She responded to numerous interrogatories, document requests, and

requests for admission served by State Farm. She also was actively involved in reviewing and approving the settlement.

D. Kim Botte assisted on behalf of the New York class and the nationwide class. She regularly consulted with counsel regarding the claims and strategies and provided a copy of her policy documents for class counsel to review. She also was actively involved in reviewing and approving the settlement.

E. John Jaunich assisted on behalf of the Minnesota class and the nationwide class. He regularly consulted with counsel regarding the claims and strategies and provided a copy of his policy documents for class counsel to review. He responded to numerous interrogatories and document requests served by State Farm. In addition, he was deposed and spent several days preparing with counsel by phone and in person for her deposition. He also was active in trial preparation. Moreover, he was actively involved in reviewing and approving the settlement.

F. Mylene McClure is the personal representative of the Estate of Earl L. McClure. Both Ms. McClure and her husband, Earl McClure, assisted on behalf of the Arizona class and the nationwide class. The McClures regularly consulted with counsel regarding the claims and strategies and provided a copy of policy documents for class counsel to review. The McClures responded to numerous interrogatories and document requests served by State Farm. In addition, Mr. McClure was deposed and spent several days preparing with counsel by phone and in person for his deposition. Moreover,

Ms. McClure was actively involved in reviewing and approving the settlement.

G. Ronald K. Page assisted on behalf of the Texas class and the nationwide class. Mr. Page regularly consulted with counsel regarding the claims and strategies and provided a copy of policy documents for class counsel to review. Mr. Page responded to numerous interrogatories and document requests served by State Farm. In addition, Mr. Page was deposed and spent several days preparing with counsel by phone and in person for his deposition. He also was active in trial preparation. Moreover, he was actively involved in reviewing and approving the settlement.

H. Chandra B. Singh assisted on behalf of the Oregon class and the nationwide class. Mr. Singh regularly consulted with counsel regarding the claims and strategies and provided a copy of policy documents for class counsel to review. Mr. Singh responded to numerous interrogatories and document requests served by State Farm. In addition, Mr. Singh was deposed and spent several days preparing with counsel by phone and in person for his deposition. Moreover, he was actively involved in reviewing and approving the settlement.

I. Joyce Thomas assisted on behalf of the Missouri and the nationwide class. She regularly consulted with counsel regarding the claims and strategies and provided a copy of his policy documents for class counsel to review. She also was actively involved in reviewing and approving the settlement.

J. David Toms assisted on behalf of the Florida class and the nationwide class. Mr. Toms regularly consulted with counsel regarding the claims and strategies and provided a copy of policy documents for class counsel to review. Mr. Toms responded to numerous interrogatories, document requests, and requests for admission served by State Farm. In addition, Mr. Toms was deposed and spent several days preparing with counsel by phone and in person for his deposition. He also was active in trial preparation. Moreover, he was actively involved in reviewing and approving the settlement.

K. William T. Whitman assisted on behalf of the Washington class and the nationwide class. Mr. Whitman regularly consulted with counsel regarding the claims and strategies and provided a copy of policy documents for class counsel to review. Mr. Whitman responded to numerous interrogatories, document requests, and requests for admission served by State Farm. In addition, Mr. Whitman was deposed and spent several days preparing with counsel by phone and in person for his deposition. He also was active in preparation for trial prior. Moreover, he was actively involved in reviewing and approving the settlement.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 13th day of February, 2023.

Norman E. Siegel

APPENDIX A

Stueve Siegel Hanson LLP

State Farm Timekeeper Summary (All Cases Except *Vogt*) As of January 18, 2023					
Timekeeper		**Position**	**Hours**	**Rate ($)**	**Total**
SLB	Barry, Sherry	Paralegal	26.8	275	$7,370.00
JTC	Calabro, Toji	Of Counsel	1.6	695	$1,112.00
MRC	Campbell, Michelle	Paralegal	2.2	340	$748.00
KMC	Cervantes, Katrina	Paralegal	67.6	300	$20,280.00
BLD	Davis, Bria	Associate	85.8	500	$42,900.00
TJE	Edwards, Tanner	Associate	2.2	575	$1,265.00
DAH	Hickey, David	Associate	1,758.0	700	$1,230,600.00
JAK1	Kane, Jordan	Associate	1.6	500	$800.00
EML	Lange, Ethan	Partner	1,746.5	775	$1,353,537.50
MRM	Marquart, Mary Rose	Paralegal	318.3	340	$108,222.00
JAO	Olivas, Julie	Staff	30.5	250	$7,625.00
CMP	Perez, Cheri	Staff	50	300	$15,000.00
LTP	Perkins, Lindsay	Partner	2,523.0	825	$2,081,475.00
VXP	Phommachanh, Vong	Paralegal	89.6	315	$28,224.00
NES	Siegel, Norman	Partner	999.5	1,125	$1,124,437.50
BSS	Spates, Brandi	Associate	2.5	475	$1,187.50
BJS	Stueve, Benjamin	Associate	132.1	575	$75,957.50
PJS	Stueve, Patrick	Partner	15.3	1,125	$17,212.50
BJV	Vahle, Barrett	Partner	1.1	950	$1,045.00
SAW	Walters, Stephanie	ESI Director	67.1	750	$50,325.00
BTW	Wilders, Bradley	Partner	740.9	950	$703,855.00
SLW	Williams, Sheri	Staff	17.6	300	$5,280.00
		Totals:	**8,679.8**	**792.47**	**$6,878,458.50**

Miller Schirger LLC

	Timekeeper Hours and Value - All Matters				
	Includes All State Matters (Except *Vogt*)				
Timekeeper		**Position**	**Hours**	**Rate ($)**	**Total**
SRM	Stephen R. Miller	Partner	.9	895	$805.50
DAH	Deborah A. Ham	Paralegal	2.1	225	$472.50
MMS	Molley Stainbrook	Paralegal	289.8	225	$63,742.50
CED	Cara E. Duryea	Paralegal	483.7	225	$108,832.50
MWL	Matthew W. Lytle	Partner	3,179.6	775	$2,464,190.00
JJS	John J. Schirger	Partner	3,000.5	895	$2,685,447.50
JMF	Joseph M. Feierabend	Partner	3,946.6	675	$2,663,955.00
ANB	Alex Buckert	Law Clerk	30.5	225	$6,862.50
TCH	Toby Hausner	Partner	14.9	450	$6,705.00
SNS	Sam N. Sherman	Associate	737.7	395	$293,575.00
CMH	Corbin Healy	Law Clerk	63.3	225	$14,242.50
ALL	Amanda Lytle	Staff	6.0	225	$1,350.00
		Totals:	**11,755.6**		**$ 8,310,180.5**

Summary of Additional Firms (Local Counsel)

Firm	Case	Hours	Lodestar
Girard Sharp	Bally	280.1	$228,182.50
The Barnes Group	Bauer	124.5	$64,695.00
Mitchell DeClerk	Bauer	868.8	$364,290.00
Hausfeld LLP	Bauer	653.9	$462,126.00
Van Winkle	Bauer	100.7	$77,167.50
Kaliel Gold	Bauer	101.9	$69,565.00
Joel Smith	Botte		$31,295.00
Lockridge Grindal	Jaunich	97.9	$67,077.50
Miller Pitt Feldman & McAnally PC	McClure	78.5	$28,815.00
Branscomb Law	Page	40.7	$11,909.50
Sugermann Dehab	Singh	9.90	$3,148.50
Morgan and Morgan	Toms/Jaunich	110.85	$92,666.40
Barrack Rodos & Bacine	Whitman	67.1	$53,215.50
Tousley Brain Stephens	Whitman	110.6	$93,646.50
Sarraf Gentile	Whitman	153.9	$141,434.10
Total			**$1,789,234.00**

APPENDIX B

Stueve Siegel Hanson LLP

Expense Units and Value Summary Summary

by Client
1/1/1970 to 12/31/2059
Including Client(s) 0128;Including Matter(s) 0009 0010 0011 0012 0013 0014 0015 0016 0017 0018 0019;

Expense Code	and Description	Units	Rate	Total
E101	Outside Duplicating -	0	0.00	$3,398.90
E102	Internal Print & Copy -	33,416	0.20	$6,683.20
E107	Delivery Service -	0	0.00	$268.90
E108	Postage -	9	2.75	$24.78
E111	Meals -	0	0.00	$3,711.28
E112	Court fees -	0	0.00	$4,924.50
E115	Transcript/Video -	0	0.00	$29,005.28
E119	Experts/Consultants	0	0.00	$216,583.61
E120	Process Servers -	0	0.00	$150.00
E121	Arbitrators/mediators -	0	0.00	$23,250.00
E124	Misc/Other	0	0.00	$205.30
E125	Online Research (Bloomberg) -	0	0.00	$5.00
E126	Online Research (PACER) -	66	4.18	$275.70
E127	Online Research (Westlaw) - excluded -	0	0.00	$259.00
E128	Online Research (Westlaw) -	2,700,112	0.07	$189,007.84
E129	Hosting/Data Storage -	9	5,086.70	$45,780.26
E301	Airfare -	0	0.00	$21,826.28
E302	Class Notice/Class Communication -	0	0.00	$104,467.32
E304	Costs Split -	0	0.00	$27,210.00
E305	Federal Express/UPS -	0	0.00	$1,966.97
E306	Ground Transportation -	0	0.00	$4,086.67
E308	Lodging -	0	0.00	$18,695.93
Report Total		**2,733,612**		**$701,786.72**

NOTE: Includes Expenses in WIP and Billed Expenses

State Farm COI Litigation
Expense Summary - All Matters

Includes Matters: 2441.01 (Bally); 2531.01 (Bauer); 2548.01 (Botte); 2510.01 (Jaunich); 2513.01 (Lech); 2512.01 (McClure); 2498.01 (Page); 2532.01 (Rogowski); 2528.01 (Singh); 2516.01 (Toms); 2469.01 (Whitman)

Expense Code	Description		Amount
51	Photocopy charges	$	3,566.90
54	Travel Expense	$	59,161.15
56	Expert Fees	$	243,066.50
57	Cash Advance	$	2,254.52
70	Filiing Fees	$	5,425.00
73	Outside Professional Fees	$	792.00
76	Online Legal Research	$	189,874.10
77	Transcription Fees	$	24,966.69
80	FedEx	$	402.32
81	Meals	$	1,519.84
83	Conference Service	$	543.24
257	Class Administration Fees	$	77,463.59
258	Mediation Fees	$	23,250.00
	TOTALS:	**$**	**632,285.85**

Additional Firms (Local Counsel)

Firm	Case	Expenses
Girard Sharp	Bally	$0
The Barnes Group	Bauer	$2,611.58
Mitchell DeClerk	Bauer	$10,773.70
Hausfeld LLP	Bauer	$4,367.10
Van Winkle	Bauer	$150.00
Kaliel Gold	Bauer	$0
Joel Smith	Botte	$717.50
Lockridge Grindal	Jaunich	$1,713.32
Miller Pitt Feldman & McAnally PC	McClure	$47.00
Branscomb Law	Page	$521.00
Sugermann Dehab	Singh	$402.00
Morgan and Morgan	Toms/Jaunich	$967.43
Barrack Rodos & Bacine	Whitman	$1,351.27
Tousley Brain Stephens	Whitman	$746.59
Sarraf Gentile	Whitman	$0
Total		**$24,368.49**

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
MISSOURI CENTRAL DIVISION

DAVID M. ROGOWSKI, ELIZABETH A. BALLY, KATHY BAUER, KIM BOTTE, JOHN E. JAUNICH, MYLENE MCCLURE *as personal representative of* THE ESTATE OF EARL L. MCCLURE, RONALD K. PAGE, CHANDRA B. SINGH, JOYCE THOMAS, DAVID TOMS, and WILLIAM T. WHITMAN, Individually and On Behalf Of All Others Similarly Situated, **Plaintiffs,** **vs.** **STATE FARM LIFE INSURANCE COMPANY and STATE FARM LIFE AND ACCIDENT ASSURANCE COMPANY,** **Defendants.**	**Case No. 4:22-cv-00203-RK**

DECLARATION OF PROFESSOR ROBERT H. KLONOFF RELATING TO ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

TABLE OF CONTENTS

ROBERT H. KLONOFF, under penalty of perjury, declares as follows:

I. INTRODUCTION

1. I have been asked by class counsel to opine on the reasonableness of: (1) their requested attorneys' fees; (2) their requested out-of-pocket costs; and (3) their proposed service awards to the class representatives. I offer my opinions for the Court's consideration based on my background and experience. Because the attorneys' fees sought here exceed $108 million, I have tried to be especially thorough in my analysis. I recognize, of course, that my role is limited and that this Court will make the ultimate decision.

II. QUALIFICATIONS

2. I have served as an expert in numerous class action cases and have opined on attorneys' fees, costs, and service award issues in many of those cases. I am currently the Jordan D. Schnitzer Professor of Law at Lewis & Clark Law School and have held that position since June 1, 2014. This is an endowed, tenured position at the rank of full professor. From July 1, 2007, to May 31, 2014, I served as the Dean of Lewis & Clark Law School, and I was also a full professor at Lewis & Clark during that time. Immediately prior to assuming the deanship at Lewis & Clark, I served for four years as the Douglas Stripp/Missouri Professor of Law at the University of Missouri-Kansas City School of Law (UMKC). That appointment was an endowed, tenured position at the rank of full professor. Before joining the academy in a full-time capacity, I served for more than a dozen years as an attorney with the international law firm of Jones Day, working in the firm's Washington, D.C. office. I was an equity partner at the firm for most of that time. (I continued to work for Jones Day while I was employed at UMKC; my status with the firm during that period changed from partner to of counsel.). While working at Jones Day (before joining the

UMKC faculty), I also served for many years as an adjunct professor of law at Georgetown University Law Center. Before joining Jones Day, I served as an Assistant United States Attorney and as an Assistant to the Solicitor General of the United States. Immediately after graduating from law school, I served as a law clerk for Chief Judge John R. Brown of the U.S. Court of Appeals for the Fifth Circuit. I received my law degree from Yale Law School.

3. In my various academic positions, I have taught (among other subjects) complex litigation, class actions, civil procedure, federal courts, and federal appellate procedure. With respect to my scholarship, since 2022, I have been a co-author of the Wright & Miller treatise, *Federal Practice and Procedure.* I have sole responsibility for the three volumes of the treatise focusing on class actions (including attorneys' fees in class actions). In addition, I co-authored the first casebook devoted specifically to class actions, and I am now the sole author of that book: *Class Actions and Other Multi-Party Litigation: Cases and Materials* (West 4th ed. 2017). I am also the sole author of the Nutshell on class actions: *Class Actions and Other Multi-Party Litigation in a Nutshell* (West 6th ed. 2021), and the Nutshell on federal multidistrict litigation, *Federal Multidistrict Litigation in a Nutshell* (West 2020). These texts are used at law schools throughout the United States and have been cited by many courts and commentators.[1] I have also

[1] *See, e.g.*, *Soileau v. Churchill Downs Louisiana Horseracing Co., L.L.C.*, 2021-0022 (La. App 4th Cir. 12/22/21), 2021 La. App. LEXIS 2022, at *83 (*citing* casebook); *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 468 (1st Cir. 2013) (*citing Class Action Nutshell*); *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (*citing Class Action Nutshell*); *LaRocque ex rel. Spang v. TRS Recovery Servs., Inc.*, 285 F.R.D. 139, 151 (D. Me. 2012) (*citing Class Action Nutshell)*; *Adams v. United Services Automobile Ass'n*, No. 2:14-CV-02013, 2016 WL 1465433, at *7 (W.D. Ark. Apr. 14, 2016) (*citing Class Action Nutshell*), *rev'd on other grounds*, 863 F.3d 1069 (8th Cir. 2017); Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447 (2022) (*citing Federal Multidistrict Litigation Nutshell)*; Brian T. Fitzpatrick, *Many Minds, Many*

authored or co-authored numerous scholarly articles on class actions and other topics.[2] In October 2014, I was elected to membership in the International Association of Procedural Law (IAPL), an

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MDL Judges, 84 LAW & CONTEMP. PROBS. 107 (2021) (*citing Federal Multidistrict Litigation Nutshell)*; Judge Stephen R. Bough & Anne E. Case-Halferty, *A Judicial Perspective on Approaches to Mdl Settlement*, 89 UMKC L. Rev. 971, 973-974 (2021) (*citing Federal Multidistrict Litigation Nutshell*); Libby Jelinek, *The Applicability of the Federal Rules of Evidence at Class Certification*, 65 UCLA L. REV. 280, 286 n.27, 291 n.65, 316 n.206 (2018) (*citing* casebook and *Class Action Nutshell*); Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 337 n.12 (2014) (*citing* casebook); Vaughn R. Walker, *Class Actions Along the Path of Federal Rule Making*, 44 LOY. U. CHI. L.J. 445, 449 n. 17 (2012) (*citing Class Action Nutshell*); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 151 n.5 (2003) (*citing* casebook); Kenneth S. Rivlin & Jamaica D. Potts, *Proposed Rule Changes to Federal Civil Procedure May Introduce New Challenges in Environmental Class Action Litigation*, 27 HARV. ENVTL. L. REV. 519, 521 n.10 (2003) (*citing Class Action Nutshell*).

[2] My articles have been frequently cited. For example, my 2013 article, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013), has been cited dozens of times by courts and commentators. *See, e.g.*, *In re Baby Boy Doe*, 975 N.W.2d 486, 491, (McCormack, C.J., concurring in part), *reconsideration denied*, 979 N.W.2d 324 (Mich. 2022), *cert. denied*, *Kruithoff v. Cath. Charities of W. Michigan*, 2022 WL 17408187 (U.S. Dec. 5, 2022); *Roland v. Annett Holdings, Inc.*, 940 N.W.2d 752, 769 (Iowa 2020); *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 484 & n.18 (3d Cir. 2018); *In re National Football League Players' Concussion Injury Litig.*, 775 F.3d 570, 576 (3d Cir. 2014); *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014) (Posner, J.); *In re Johnson*, 760 F.3d 66, 75 (D.C. Cir. 2014); *Shupe v. Rocket Companies, Inc.*, 2022 WL 1421493 at *3 (E.D. Mich. May 5, 2022); *McCreary v. Federal Bureau of Prisons*, 2020 U.S. Dist. LEXIS 15310, at *46 (M.D. Pa. Jan. 29, 2020); *Wendell H. Stone Co., Inc. v. PC Shield Inc.*, No. 18-cv-001135, 2018 WL 6065408, at *2 (W.D. Pa. Nov. 19, 2018); *In re Aetna UCR Litig.*, No. 07-cv-03541-KSH-CLW, 2018 U.S. Dist. LEXIS 111130, at *43 n.15 (D.N.J. June 30, 2018); *Dickens v. GC Services Limited Partnership*, 220 F. Supp. 3d 1312, 1324 (M.D. Fla. 2016), *vacated on other grounds*, 706 F. App'x 529 (11th Cir. 2017); *In re Kosmos Energy Ltd. Sec. Litig.*, No. 3:12-cv-373-B, 2014 WL 1095326, at *2 n.20 (N.D. Tex. Mar. 19, 2014); *LaRocque ex rel. Spang v. TRS Recovery Servs., Inc.*, 285 F.R.D. 139, 152 (D. Me. 2012); Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 Ind. L.J. 1315, 1317 (2022); Joshua P. Davis, *Of Robolawyers and Robojudges*, 73 Hastings L.J. 1173, 1191 (2022); Alix Valenti, *Class Actions Ten Years after* Wal-Mart Stores, Inc. v. Dukes*: Difficult but Not Impossible*, 24 ATL. L.J. 2 (2022); J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022); Andrew D. Bradt, et. al., *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309 (2022); R. Andrew Grindstaff, *Article III Standing, the Sword and the Shield: Resolving a Circuit Split in Favor of Data Breach Plaintiffs*, 29 WM. & MARY BILL RTS.

J. 851 (2021); Stephen B. Burbank & Sean Farhang, *Class Certification in the US Courts of Appeals: A Longitudinal Study*, 84 Law & Contemp. Prob. 73, 82 (2021); Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 Law & Contemp. Prob. 161, 172 (2021); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 60 (2021); Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 Duke L.J. 497, 538 (2020); Elysa M. Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas*, 96 Notre Dame L. Rev. 291, 311 (2020); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. Rev. 758, 800 (2020); Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 Minn. L. Rev. 2257, 2262 (2020); Anne E. Ralph, *The Story of A Class: Uses of Narrative in Public Interest Class Actions Before Certification*, 95 Wash. L. Rev. 259, 278-79 (2020); Colin Crawford, *Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory*, 27 Ind. J. Global Legal Stud. 59, 79 (2020); D. Brooks Smith, *Class Action and Aggregate Litigation: A Comparative International Analysis*, 124 Penn St. L. Rev. 303, 326-27 (2020); Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 Yale L.J. Forum 205, 206 (2019); Pamela K. Bookman, *The Arbitration–Litigation Paradox*, 72 VAND. L. REV. 1119, 1143 n.146 (2019); David C. Miller, *Abuse of Discretion and the Sliding Scale of Difference: Restoring the Balance of Power Between Circuit Courts and District Courts for Rule 23 Class Certification Decisions in Oil and Gas Royalty Litigation*, 103 IOWA L. REV. 1811 *passim* (2018); Libby Jelinek, *The Applicability of the Federal Rules of Evidence at Class Certification*, 65 UCLA L. REV. 280, 297 n.101 (2018); Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1261 n.39, 1266 n.78, 1286 n.196 (2018); Joseph A. Seiner, *Tailoring Class Actions to the On-Demand Economy*, 78 OHIO ST. L.J. 21, 25 n.14, 32 n.54 (2017); Brian T. Fitzpatrick, *Justice Scalia and Class Actions: A Loving Critique*, 92 NOTRE DAME L. REV. 1977, 1979 (2017); Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 KAN. L. REV. 965, 965 n.2 (2017); Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 497 & n.2 (2016); Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 846 n.8, 876–78 & nn.181, 183 & 190–93, 881 nn.211 & 213, 883 n.225 (2016); Claire E. Bourque, Note, *Liability Only, Please—Hold the Damages: The Supreme Court's New Order for Class Certification*, 22 GEO. MASON L. REV. 695, 698 n.29 (2015); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 n.2 (2015); Robert G. Bone, *The Misguided Search For Class Unity*, 82 GEO. WASH. L. REV. 651, 654 n.6 (2014); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons From Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1920 n.17 (2014); Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 WASH. U. L. REV. 951, 956 n.20 (2014); Arthur R. Miller, Keynote Address, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 n.7 (2014); Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 403 n.14 (2014); Stephen R. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1853 n.80 (2014); Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2775 n. 38

organization of preeminent civil procedure scholars from around the world. I was selected in a competitive process to present a scholarly article on class actions at the May 2015 Congress of the IAPL, an event held once every four years.

4. In September 2011, the Chief Justice of the United States appointed me to serve a three-year term as the academic voting member of the Judicial Conference Advisory Committee on Rules of Civil Procedure ("Advisory Committee"). The Advisory Committee considers and recommends amendments to the Federal Rules of Civil Procedure. Only one professor in the United States is selected by the Chief Justice to serve in that role during any three-year term. In May 2014, the Chief Justice reappointed me to serve a second three-year term on the Advisory Committee. I completed that service in May 2017. (The maximum period of service on the Advisory Committee is six years.) I also served on the Advisory Committee's Class Action Subcommittee, which took the lead for the full Advisory Committee on proposed amendments to the federal class action rule, Federal Rule of Civil Procedure 23. Those proposed amendments became effective on December 1, 2018.

(2013); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 314 n.105 (2013); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1186 n.5 (2013); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 610 n.82 (2012); Richard Marcus, *Still Confronting the Consolidation Conundrum*, 88 NOTRE DAME L. REV. 557, 560 n.17, 589 n.154 (2012); *Hearing on "The State of Class Actions Ten Years after the Class Action Fairness Act" Before the Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice* (U.S. House of Representatives, Feb. 27, 2015) (statement of Prof. Patricia W. Moore), at 2 n.4.

5. I served as an Associate Reporter for the American Law Institute's class action (and other multi-party litigation) project, *Principles of the Law of Aggregate Litigation*. I was the principal author of Chapter 3, which addresses class action settlements and attorneys' fees. The ALI project was unanimously approved by the membership of the American Law Institute at its annual meeting in May 2009 and was published by the American Law Institute in May 2010. It has been frequently cited by courts and commentators.[3]

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[3] *See, e.g.*, *Smith v. Bayer Corp.*, 564 U.S. 299, 316 (2011) n.11 (2011); *In re Google Inc. St. View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1122–23 (9th Cir. 2021) (Bade, J., concurring), *cert. denied*. 143 S. Ct. 107 (2022); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 421 F. Supp. 3d 12, 71 (E.D. Pa. 2019), *aff'd sub nom. In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264 (3d Cir. 2020); In *re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 331 (3d Cir. 2019); *Keepseagle v. Perdue*, 856 F.3d 1039, 1069–70 (D.C. Cir. 2017) (Brown, J., dissenting); *In re Google Referrer Header Privacy Litig*., 869 F.3d 737, 744, 749 (9th Cir. 2017); *Baker v. Microsoft Corp.*, 797 F.3d 607, 615 n. 5 (9th Cir. 2015), *rev'd on other grounds*, 137 S. Ct. 1702 (2017); *Hill v. State Street Corp*., 794 F.3d 227, 229, 231 (1st Cir. 2015); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060, 1063–67 (8th Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19–20 (1st Cir. 2015); *In re Trans Union Corp. Privacy Litig.*, 741 F.3d 811, 813 (7th Cir. 2014); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 171–72 (3d Cir. 2013); *Ira Holtzman, CPA v. Turza*, 728 F.3d 682, 689–90 (7th Cir. 2013); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32–33 (1st Cir. 2012); *Klier v. Elf Atochem N.A., Inc.*, 658 F.3d 468, 474–75 nn.14–16 (5th Cir. 2011); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 n.2 (9th Cir. 2011); *In re Chesapeake Energy Corp.*, 567 F. Supp. 3d 754, 776 (S.D. Tex. 2021); *Cabiness v. Educ. Fin. Solutions, LLC*, No. 16-cv-01109-JST, 2018 WL 3108991, at *8 n.4 (N.D. Cal. June 25, 2018); *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 116 (D.D.C. 2015); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1355–56 (S.D. Fla. 2011); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 30 (2021); Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U. L. Rev. 133, 139-140 (2021); Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129, 2121-22 (2020); Brian T. Fitzpatrick, *Why Class Actions Are Something Both Liberals and Conservatives Can Love*, 73 Vand. L. Rev. 1147, 1153 (2020); Robert G. Bone, *In Defense of the Cy-Pres-Only Class Action*, 24 Lewis & Clark L. Rev. 571, 575 (2020); David L. Noll, *MDL As Public Administration*, 118 Mich. L. Rev. 403, 457 (2019); Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 99 (2019); Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903,

6. I have more than 40 years of experience as a practicing lawyer. I have had eight oral arguments before the U.S. Supreme Court, and numerous oral arguments in other federal and state appellate courts throughout the country, including oral arguments in eight federal circuits. As an attorney at Jones Day, I personally handled more than 100 class action cases, mostly (but not entirely) on the defense side. I have also served as co-counsel in numerous class actions post-Jones Day.

7. I have lectured and taught on class actions and other litigation topics throughout the United States and abroad, including presentations at law schools in Cambodia, Canada, China, Colombia, Croatia, Ecuador, Germany, India, Israel, Italy, Japan, the Philippines, Russia, South Korea, Taiwan, and Turkey. Over the years, I have frequently appeared as an invited speaker at class action symposia, conferences, and continuing legal education programs.[4]

8. I have testified as an expert in numerous class action cases and in other cases raising civil procedure issues. Between 2011 and the present, I testified in the following cases:

- *In re Marjory Stoneman Douglas High School Shooting FTCA Litigation*, No. 01:18-62758-WPD (S.D. Fla.) (*Parkland*) (submitted expert declaration, dated 02/08/22, on a motion to terminate lead counsel;

927–28, 933 n.161, (2018); Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1063 (2012); Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 66 (2011); Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 111 (2014); Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right to Sue*, 115 COLUM. L. REV. 599, 649–50 (2015).

[4] Examples of those courses and speaking engagements are contained in my attached curriculum vitae (Appendix A).

submitted supplemental expert declaration, dated 10/28/22, on attorneys' fees issues);

- *Githieya v. Global Tel Link Corp.*, No. 1:15-cv-00986-AT (N.D. Ga.) (submitted expert declaration, dated 04/01/22, on attorneys' fees issues; submitted expert declaration, dated 07/22/22, on class certification and fairness issues in connection with a proposed class settlement);

- *Rosie D. v. Baker*, C.A. No. 01-30199-RGS (D. Mass.) (submitted expert declaration, dated 11/23/21, on attorneys' fees issues);

- *Bahn v. American Honda Motor Co.*, No. 2:19-cv-5984 RGK (C.D. Cal.) (submitted expert declaration, dated 11/22/21, on attorneys' fees issues);

- *In re Broiler Chicken Antitrust Litig.*, No. 1:16-CV-08637 (N.D. Ill.) (submitted expert declaration, dated 09/15/21, on attorneys' fees issues raised by the court);

- *Pinon v. Daimler AG.*, No. 1:18-cv-03984 (N.D. Ga.) (submitted expert declaration, dated 7/24/21, opining on the fairness of the settlement to members of the class under Fed. R. Civ. P. 23(e) and the adequacy of the class counsel and class representatives);

- *Rosas v. Sarbanand Farms, LLC.*, No. 2:18-CV-0112-JCC (W.D. Wa.) (submitted expert declaration, dated 4/19/20, opining that a final fairness hearing under Fed. R. Civ. P. 23(e) can be conducted telephonically);

- *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132 (N.D. Ga. Mar. 17, 2020) (submitted expert declaration on attorneys' fees on 10/29/19; submitted supplemental expert declaration on class settlement terms on 12/15/19), *aff'd in relevant part, In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247 (11th Cir. June 3, 2021);

- *In re Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices &Products Liability Litigation*, No. 3:17-md-02777-EMC (N.D. Cal.) (submitted expert declaration on settlement fairness, dated 4/25/19);

- *The Doan v. State Farm General Insurance Co.*, No. 1-08-CV-129264 (Cal. Sup. Ct. Santa Clara Cnty.) (submitted expert declaration on settlement fairness, attorneys' fees, expenses, and incentive payments, dated 1/16/19);

- *In re Syngenta AG MIR162 Corn Litigation*, No. 2:14-MD-02591-JWL-JPO (D. Kan.) (submitted expert declaration on attorneys' fees, expenses, and incentive payments, dated 7/10/18; submitted supplemental declaration on attorneys' fees, dated, 8/17/18);

- *In re Chinese-Manufactured Drywall Litigation*, MDL No. 2047 (E.D. La.) (submitted expert declarations on attorneys' fees issues, dated 05/04/17 and 08/01/18);

- *Jabbari v. Wells Fargo & Co.*, No. 15-cv-02159-VC (N.D. Cal.) (submitted expert declaration on class certification, settlement fairness, attorneys' fees, costs, and incentive payments in unauthorized accounts litigation, dated 1/19/18; submitted supplemental declaration on 5/21/18);

- *Lynch v. Lynch*, No. F.D. 14-6239-006 (Pa. Ct. Comm. Pl., Allegheny Cnty.) (submitted expert declaration on the nature of class action law practice in the context of a divorce proceeding involving a class action attorney) (dated 9/05/17);

- *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, No. 3:15-md-02672-CRB (N.D. Cal.) (submitted expert declaration addressing objections by class members to proposed 3.0-liter and Bosch settlements) (dated 4/28/17);

- *State of Louisiana & Vermilion Parish School Board v. Louisiana Land and Exploration Co., et al.*, No. 82162 (15th Judicial Court, Parish of

Vermilion) (submitted expert declaration on attorneys' fees issues) (dated 3/9/17);

- *Thacker v. Farmers Insurance Exchange*, Case No. 2006CV342 (Dist. Ct. Boulder County, Colo.) (submitted expert declaration on class certification issues) (dated 1/24/17);

- *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, No. 3:15-md-02672-CRB (N.D. Cal.) (submitted expert declaration addressing objections by class members to proposed 2.0-liter settlement) (dated 9/30/16);

- *In the Matter of Gosselin Group*, No. 15/3925/B (Antwerp Court of First Instance, Belgium) (submitted expert declaration discussing the role of U.S. federal appellate courts in the factfinding process) (dated 9/27/16);

- *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, Nos. 12-970, 15-4143, 15-4146, and 15-4645 (E.D. La.) (submitted expert declaration on class certification, settlement fairness, and attorneys' fees relating to proposed Halliburton/Transocean class settlement) (dated 8/5/16);

- *Ben-Hamo v. Facebook, Inc. and Facebook Ireland Limited*, No. 46065-09-14 (Central District Court, Israel) (submitted expert declaration on Sept. 3, 2015, on behalf of Facebook, Inc. and Facebook Ireland Limited addressing various issues of U.S. civil procedure and class action law);

- *Skold v. Intel Corp.*, Case No. 1-05-CV-039231 (Super. Ct. of Cal., Santa Clara County) (submitted expert declaration on class settlement approval, attorneys' fees, and incentive payments to class representatives) (dated 12/30/14);

- *In re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB (E.D. Pa.) (submitted expert declaration on class certification, class notice, and settlement fairness) (dated 11/12/14);

- *MBA Surety Agency, Inc. v. AT&T Mobility, LLC*, Case No. 1222-CC09746 (Mo. 22d Dist.) (submitted expert declaration on class certification and settlement fairness on 2/13/13; submitted a supplemental expert declaration on 2/19/13; and testified in court on 2/20/13);

- *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, No. 2:10-md-02179-CJB-SS (E.D. La.) ("Deepwater Horizon") (submitted expert declarations on class certification, fairness, and attorneys' fees for the economic and property damages settlement (Doc. No. 7104-3) and class certification, fairness, and attorneys' fees for the personal injuries settlement (Doc. No. 7111-4) (both dated 08/13/12), and submitted supplemental expert declarations for both class settlements (Doc. No. 7727-4) (economic), (Doc. No. 7728-2) (medical) (both dated 10/22/12));

- *Robichaux v. State of Louisiana, et. al.* (No. 55,127) (18th Judicial Dist. Ct., Iberville Parish, La.) (submitted written report on attorneys' fees on February 20, 2012, gave deposition testimony on March 7, 2012, and testified in court on April 11, 2012); and

- *In re AT&T Mobility Wireless Data Services Sales Tax Litig.*, MDL No. 2147, Case No. 1:10-cv-02278 (N.D. Ill.) (submitted expert declarations on the fairness of a proposed class action settlement (Doc. No. 163-3) and on attorneys' fees and incentive payments (Doc. 164-1) (both dated 03/08/11), and testified in court on March 10, 2011).

9. Courts reviewing class settlements and attorneys' fees issues have relied extensively on my testimony. For example, in *Githieya v. Global Tel Link Corp.*, Judge Amy Totenberg cited and quoted my declaration several times in awarding attorneys' fees to class

counsel.[5] In *In re Broiler Chicken Antitrust Litig.*, Judge Thomas Durkin cited and quoted my declaration numerous times in awarding attorneys' fees of over $55 million, and he specifically stated that he found my declaration to be "very helpful[.]"[6] In the *Syngenta MIR 162 Corn* MDL litigation, Judge John Lungstrum cited my two declarations on attorneys' fees issues numerous times in his two opinions.[7] Indeed, Judge Lungstrum credited my opinions on attorneys' fees over the contrary opinions of five law professor experts retained by various objectors.[8] In the *Deepwater Horizon* MDL litigation, Judge Carl Barbier cited and quoted my declarations (relating to a proposed settlement with British Petroleum) more than 60 times in his two opinions analyzing class certification and fairness.[9] In a later order in that MDL, Judge Barbier repeatedly cited another declaration of mine—which I filed in connection with a class settlement involving Transocean and Halliburton.[10] In the *Volkswagen Clean Diesel* MDL litigation, Judge Charles

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[5] *Githieya v. Global Tel Link Corp.*, No. 1:15-cv-00986-AT (N.D. Ga. Aug. 30, 2022) (Doc. 369).

[6] 2021 U.S. Dist. LEXIS 228367, at *47 n.4, *49-50 & n.5 (N.D. Ill. Nov. 30, 2021).

[7] *See In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1112 (D. Kan. 2018) (granting final approval of class settlement and awarding total attorneys' fees); *In re Syngenta AG MIR 162 Corn Litig*., No. 14-MD-2591-JWL, 2018 WL 6839380 (D. Kan. Dec. 31, 2018) (allocating attorneys' fees among common benefit counsel and individually retained private attorneys).

[8] *In re Syngenta*, 2018 WL 6839380 at *4.

[9] *See In re Deepwater Horizon*, 910 F. Supp. 2d 891, 903, 914–16, 918–21, 923–24, 926, 929–33, 938, 941, 947, 953, 955, 960, 962 (E.D. La. 2012) (approving economic and property damages settlement), *aff'd*, 739 F.3d 790 (5th Cir. 2014); *In re Deepwater Horizon*, 295 F.R.D. 112, 133–34, 136, 138–41, 144–45, 147 (E.D. La. 2013) (approving medical benefits settlement).

[10] *See* Order and Reasons, Case No. 2:10-md-02179-CJB-JCW (Doc. No. 22252) (E.D. La. 02/15/17); *available at* http://www.laed.uscourts.gov/sites/default/files/OilSpill/2152017OrderAndReasons%28HESI%26TOsettlement%29.pdf (last visited Feb. 12, 2023).

Breyer repeatedly cited and quoted my two declarations in his three opinions—relating to the 2.0-liter VW class settlement, the 3.0-liter VW class settlement, and the class settlement with VW's co-defendant, Bosch.[11] In the *AT&T Mobility* MDL litigation, then-District Judge Amy St. Eve (now a Judge on the Seventh Circuit) cited and quoted my declarations more than 20 times in approving a class settlement and awarding attorneys' fees.[12] In the *Equifax Data Breach* case, Judge Thrash considered various expert reports relating to a class settlement and proposed attorneys' fees; he noted that, although he exercised his own independent judgment, he found my declaration to be "particularly helpful."[13] In the *Wells Fargo Unauthorized Accounts* litigation, Judge Vince Chhabria cited my declaration in ordering that objectors to a class settlement post an appeal bond.[14] In *Skold v. Intel Corp.*, Judge Peter Kirwan cited my declaration in approving a class settlement and awarding attorneys' fees.[15]

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[11] *See In re Volkswagen "Clean Diesel" Marketing, Sales Practices & Prods Liab. Litig.*, No. 3:15-md-02672-CRB, 2016 WL 6248426, at *18, *19, *20 (N.D. Cal. Oct. 25, 2016), *appeal filed*, No. 16-17185 (9th Cir. Nov. 29, 2016); Order Granting Final Approval of the Consumer and Reseller Dealership 3.0-Liter Class Action Settlement, Case No. 3:15-md-02672-CRB (Doc. No. 3229) (filed 05/17/17), at 34, 35, 38; Order Granting Final Approval of the Bosch Class Action Settlement, Case No. 3:15-md-02672-CRB (Doc. No.. 3230) (filed 05/17/17), at 18.

[12] *See In re AT&T Mobility Wireless Data Svcs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 956–59, 961, 963–65 (N.D. Ill. 2011) (approving class settlement); *In re AT&T Mobility Wireless Data Svcs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1032 n.3, 1034–35, 1037, 1040, 1042 (N.D. Ill. 2011) (awarding attorneys' fees).

[13] *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132 (N.D. Ga. Mar. 17, 2020), *aff'd in relevant part*, No. 20-10249, 2021 WL 2250845 (11th Cir. June 3, 2021).

[14] *See Jabbari v. Wells Fargo & Co.*, No. 15-cv-02159-VC, slip op. at 14 (N.D. Cal. June 14, 2018) (Doc. No. 271), available at

[15] *See Skold v. Intel Corp.*, No. 1-05-CV-039231 (Cal. Super. Ct. Santa Clara County) (Jan. 29, 2015), at 7, available at http://lawzilla.com/blog/janet-skold-et-al-vs-intel-corporation/.

10. In this case, I am being compensated at my standard hourly rate of $985.00 ($1,075.00 as of January 1, 2023).

11. Additional information regarding my qualifications and experience—including a list of my publications—can be found in my curriculum vitae (attached hereto as Appendix A).

III. MATERIALS RELIED UPON

12. In addition to reviewing cases and materials in other class action settlements, I reviewed numerous documents in the instant case:

(1) Lodestar data provided by class counsel;

(2) Attorney and paralegal time records provided by class counsel;

(3) Expense summaries provided by class counsel;

(4) Various complaints and judicial rulings in the *Vogt v. State Farm* case, which went to trial, and the 10 cases that were active at the time the nationwide class settlement was reached;

(5) Bullet points from class counsel regarding the roles played by the class representatives;

(6) *Rogowski et al.* Motion for Preliminary Approval and attachments; and,

(7) Near-final Declaration of Norman Siegel in Support of Class Counsel's Motion for Attorney's Fees, Costs, Expenses and Service Awards (hereafter referred to as "Siegel Att. Fees Decl.").

IV. BACKGROUND OF THIS LITIGATION AND SETTLEMENT

A. Overview of the Litigation

13. This Court is thoroughly familiar with the details of the litigation, which has resulted in a nationwide class settlement. Thus, I focus solely on those facts that are critical to my expert opinions.[16]

14. The class members are owners of one or more universal life insurance policies (Forms 94030/A94030 and 94080/A94080, hereinafter "the Policy" or "the Policies"). The Policies contain both a death benefit and an investment component (an interest-bearing savings account). The monthly value of each Policy ("the Account Value") is subject to monthly charges against the savings accounts: (1) the cost of insurance charge ("COI Charge"), and (2) the monthly expense charge ("Expense Charge"). Plaintiffs allege that State Farm has violated the Policies' authorized mortality charges and has deducted non-mortality expenses in calculating the COI Charge. In addition, plaintiffs allege that State Farm has failed to comply with the Policies' $5 Expense Charge limit and instead charges both the $5 Expense Charge and the additional unauthorized COI Charge. Thus, plaintiffs assert a breach of contract claim with respect to the COI charge and another breach of contract claim with respect to the Expense Charge. In addition, plaintiffs seek recovery for conversion. Finally, plaintiffs seek declaratory relief regarding the

[16] For the facts set forth in the Declaration, I rely on the numerous district court and appellate rulings in this litigation, as well as on the Motion for Preliminary Approval. I also rely on lodestar data, attorney and paralegal time records, and other information provided by class counsel. *See* ¶ 12.

parties' rights and duties and injunctive relief barring State Farm from collecting inflated charges in violation of the Policies.

15. Before reaching a global, nationwide class settlement, both sides litigated vigorously in numerous lawsuits across the country, including filing and opposing multiple summary judgment and *Daubert* motions, litigating class certification motions, litigating a full-blown Missouri class trial, and litigating multiple appeals and attempted appeals. As discussed below, a Missouri class won a decisive trial victory, and plaintiffs in the various cases have obtained multiple favorable rulings on summary judgment and class certification. State Farm, however, has also won some significant legal rulings, revealing that both sides faced serious risks from continuing on a litigation path.

B. Individual Lawsuits

16. Class counsel filed and litigated 11 separate cases, with State Farm adopting a vigorous, "take-no-prisoners" defense in each. As described by class counsel (Doc. 47-2 at 4-41; Siegel Att. Fees Decl. ¶ 5), statewide putative class suits were filed in the Western District of Missouri, the Northern District of California, the Western District of Washington, the Southern District of Texas (later transferred to the Western District of Texas), the District of Minnesota, the District of Arizona, the District of Oregon, the Middle District of Florida, the Northern District of Georgia, the Eastern District of New York, and another in the Western District of Missouri. As noted, the rulings were mixed; plaintiffs prevailed on some or all summary judgment motions in several cases (as well as in a contested class trial) but had less success in others. Courts have been receptive to plaintiffs' motions for class certification, although State Farm has argued aggressively against class certification, both at the trial and appellate levels. State Farm has also

repeatedly (but unsuccessfully) sought exclusion of plaintiffs' damages expert. The litigation overall demonstrated that both sides were facing significant risks going forward.

17. Before delving into the merits of class counsel's request, I believe it is important to address a novel procedural point. Although this settlement is independent of the now resolved case in Missouri (*Vogt v. State Farm Life Ins. Co.* (W.D. Mo.)), there is a substantial relationship between *Vogt* and class counsel's work in this case. Class counsel obtained a $38,844,089 judgment, plus post-judgment interest, for Missouri policyholders on the same claims that are being settled now for the rest of the policyholders in the country. Class counsel was paid in *Vogt*, and the district court awarded fees using the same methodology I employ here—reaching the conclusion that 33⅓ percent of the judgment was appropriate. It cannot be reasonably disputed that the work in *Vogt* contributed to this nationwide settlement. Class counsel obtained favorable discovery and favorable precedent in *Vogt* that were used in the 10 other cases. Importantly, they successfully defended *Vogt* through several appeals that could have produced unfavorable precedent and jeopardized the claims of the settlement class here. There is no doubt that the rulings in *Vogt* contributed substantially to class counsel's ability to obtain this settlement for the settlement class. As a result, in various parts of this Declaration, I comment on and cite to rulings in *Vogt*. Nonetheless, even if *Vogt* were removed from the equation, my opinion that the fees requested here are reasonable would not change; class counsel conducted an extraordinary amount of additional work, undertaking significant additional risk, for four years after *Vogt* on behalf of the class to obtain this settlement. In other words, while class counsel's work in *Vogt* absolutely contributed to the settlement, it was the extraordinary work conducted *after Vogt* that secured this monumental recovery.

18. Rather than discussing the details of all 11 lawsuits, which are set forth in the Siegel declaration attached to the Motion for Preliminary approval, I describe herein two markedly different case scenarios to illustrate the successes and challenges faced by each side: *Vogt v. State Farm Life Ins. Co.* (W.D. Mo.), and *Whitman v. State Farm Life Ins. Co.* (W.D. Wa.).

Vogt v. State Farm Life Ins.

19. As noted (¶ 17), I believe that *Vogt* is instructive even though it is not part of the present settlement. *Vogt* was the first case brought by class counsel against State Farm involving the claims at issue. It was filed in the Western District of Missouri on June 15, 2016, on behalf of a class of over 25,000 current and former policyholders whose policies were issued in Missouri. Following an extensive discovery process, in April 2018, the district court denied State Farm's motion for summary judgment, rejecting State Farm's challenges to the breach of contract claims and finding that the claims were not barred by the statute of limitations. That same month, the court granted plaintiff's motion for class certification. State Farm attempted without success to obtain Eighth Circuit interlocutory review of the class certification order under Rule 23(f).

20. Prior to trial, the class successfully obtained partial summary judgment on its breach of contract claims, leaving only damages for trial. A classwide trial commenced on June 1, 2018. At the close of the class's case, State Farm was unsuccessful in seeking judgment as a matter of law. State Farm presented its case and then renewed its motion for judgment as a matter of law, which the court took under advisement. At the conclusion of the four-day trial, and after just over two hours of deliberations, the jury announced its verdict in favor of the class on breach of contract and conversion, awarding damages of more than $34.33 million. As the jury found,

State Farm had been overcharging its policyholders for 23 years. State Farm attempted without success to obtain decertification of the class and sought (again unsuccessfully) judgment as a matter of law or, in the alternative, a new trial. The court rejected all of State Farm's challenges but denied plaintiff's request for prejudgment interest.

21. State Farm appealed the jury verdict and class certification ruling to the Eighth Circuit, and plaintiff cross-appealed the denial of prejudgment interest. State Farm's appeal was supported by amicus briefs from the Chamber of Commerce, the American Council of Life Insurers, and the Washington Legal Foundation, while Public Citizen filed an amicus brief in support of the class solely on the issue of class certification. In June 2020—after full briefing (including State Farm's submission of a 32-volume record of material) and oral argument—the Eighth Circuit rejected all of State Farm's challenges.[17] Thus, it rejected State Farm's breach of contract, statute of limitations, and conversion arguments, as well as State Farm's challenges to class certification, plaintiff's damages models, and various other evidentiary rulings. On the cross appeal, the Eighth Circuit agreed with the plaintiff that prejudgment interest was warranted. Nonetheless, despite the Eighth Circuit's ruling, the parties continued to dispute the prejudgment interest issue. On remand, the district court awarded prejudgment interest. During this same period, State Farm also sought certiorari from the U.S. Supreme Court with respect to class certification, arguing that, for several reasons, the district court erred in certifying (and refusing to decertify) the class. State Farm was supported in its certiorari petition by amicus briefs from the Chamber of Commerce and the American Council of Life Insurers. The Supreme Court denied

[17] *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753 (8th Cir. 2020).

certiorari in April 2021. Subsequently, the parties argued a second appeal to the Eighth Circuit filed by State Farm on the issue of prejudgment interest. On December 8, 2021, the Eighth Circuit affirmed the district court's award of prejudgment interest.[18] Later that month, State Farm paid the judgment, including prejudgment and post-judgment interest.

Whitman v. State Farm Life Insurance Co.

22. *Whitman* was filed against State Farm in October 2019 in the Western District of Washington on behalf of a class of Washington policyholders. In September 2021, following discovery, the court granted plaintiff's motion for class certification and rejected challenges to plaintiff's damages expert, Scott Witt. State Farm sought Rule 23(f) review from the Ninth Circuit, but that court denied review in December 2021. In May 2022, State Farm filed summary judgment motions challenging all of plaintiff's claims and also arguing that the class's claims were barred by the statute of limitations. In September 2022, about a month before the trial was scheduled to begin—and after the parties had already begun exchanging pre-trial submissions, including deposition designations, and filing motions *in limine*—the court granted summary judgment in State Farm's favor on all of plaintiff's claims, ending the litigation in the trial court. Later that month, plaintiff filed an appeal to the Ninth Circuit, and State Farm filed a conditional cross appeal challenging the district court's certification of the class. Plaintiff's opening brief was due on November 25, 2022, but the briefing deadlines were stayed in light of the nationwide class settlement.

[18] *Vogt v. State Farm Life Ins. Co.*, 19 F.4th 1071 (8th Cir. 2021).

23. At the same time they were prosecuting *Whitman* (W.D. Wa.), class counsel were prosecuting nine other cases again State Farm. Not surprisingly, State Farm defended those cases as vigorously as it defended *Vogt* and *Whitman*. The parties engaged in discovery in each of the cases. Even excluding the extensive discovery and briefing undertaken by class counsel in *Vogt*, class counsel sought, obtained, and reviewed between 35,603 and 44,609 documents in the cases that followed. They took or defended 24 depositions (not including the 10 days of depositions taken in *Vogt*), resulting in 289 deposition exhibits. They served or responded to 385 interrogatories, 727 requests for production, 286 requests for admission, and 56 requests for documents via subpoena. State Farm made four separate attempts to obtain interlocutory appellate review. And there was extensive legal briefing in the cases, including 13 separate summary judgment motions, eight class certification or decertification motions, 13 *Daubert* motions, and four Rule 12 motions. Siegel Att. Fees Decl. ¶ ¶ 10-11. At the time of settlement, the case in Minnesota (*Jaunich*) was largely ready for trial, and the case in California (*Bally*) had a trial date looming. Furthermore, in the present case, this Court had denied State Farm's motion to strike and/or dismiss the multi-state class actions, giving class counsel a potential pathway to certify a litigation class against State Farm that encompassed policyholders who resided in states other than the states where cases were presently pending. Put another way, that ruling gave class counsel the potential for nationwide relief on behalf of the policyholders across multiple jurisdictions.

Recap

24. As the above discussion makes clear, State Farm and plaintiffs litigated all of the cases vigorously, including dispositive motions, motions for class certification, and motions to exclude expert testimony. A global settlement became possible only because of class counsel's

persistence in all of the cases, and only after class counsel won a Missouri classwide judgment in *Vogt* of more than $38 million, plus post-judgment interest, and successfully defended that judgment on appeal. But in light of various adverse rulings, including those in *Whitman*, ultimate success for the nationwide class as a whole was not assured, and class counsel thus had to be willing to compromise.

C. The Settlement

25. During June, August, and September 2022, the parties conducted three full-day mediations. Retired U.S. District Judge John Bonner was the mediator for the first two sessions, and retired U.S. District Judge Layn Phillips was the mediator for the third session. During the third session, the parties reached the material terms of the current nationwide class settlement.

26. The settlement creates a $325 million non-reversionary cash settlement fund. From that fund, class counsel are seeking: (1) attorneys' fees of one-third of the fund, (2) expenses of up to $1.5 million, and (3) service awards of $25,000 for each of the 11 class representatives. Instead of setting up a claims process, the settlement provides for a distribution plan based on (1) a minimum payment of $10 per class member, and (2) a pro-rata portion of the net settlement fund according to the COI Charges and Expense Charges paid by each class member. The agreement provides for equitable adjustments for current policy owners and Missouri class members who received proceeds under the *Vogt* judgment.

27. The settlement fund represents virtually 100 percent of the claimed damages for Count II (the Expense Charge claim), as analyzed by plaintiffs' expert, and a significant portion of the claimed damages for Count I (the COI Charge claim).[19]

V. SUMMARY OF OPINIONS

28. **Reasonableness of Fees.** The first issue is whether the fees sought (33⅓ percent) are reasonable. In my view, those fees are reasonable. Under the percentage-of-the-fund method, which I believe is the preferable method here to calculate fees in a common fund case, a 33⅓ percent fee is justified by the so-called *Johnson* factors. Excluding the work they performed in *Vogt* (which I will discuss later), class counsel devoted more than 23,000 hours to this litigation; the legal, factual, expert, and class certification issues were complex and challenging; great skill was required to litigate these cases; the plaintiff firms were hampered in their ability to take on other major matters; a 33⅓ percent fee is customary; individual plaintiffs entered into 33⅓ to 40 percent contingent fee agreements; the cases imposed significant time challenges; the results obtained were extraordinary; class counsel are highly regarded; and the fees sought are supported by awards in other cases. Although the Eighth Circuit has not endorsed a separate approach for mega-fund cases ($100 million+ settlements), the percentage sought is supported under such an analysis, given the challenges posed and the results obtained. I understand that the $325 million settlement is likely the largest all-cash cost-of-insurance insurance settlement in U.S. history, and it is the largest known class action settlement paid by State Farm. Siegel Att. Fees Decl. ¶ 3.

[19] Doc. 47 at 40.

29. I do not believe that a lodestar cross-check is necessary or appropriate. In any event, I have done a lodestar cross-check. That cross-check is calculated based on 23,110 hours spent by class counsel (11,756 hours spent by Miller Schirger; 8,680 hours spent by Stueve Siegel Hanson, and 2,674 hours spent by other firms) and separately by adding another 1,888 hours representing the time that class counsel expect to incur going forward in the administration of the settlement. These figures do not include the hours spent litigating *Vogt*. Stueve Siegel Hanson's blended hourly rate is $792.47; Miller Schirger's blended hourly rate is $706; and the other firms' blended hourly rate is $669.06. The total lodestar is $16,977,873. The expected future lodestar is conservatively estimated to be $1,387,056.96 (for the 1,888 hours) based on class counsel's experience in post-settlement work in other cost of insurance litigation. Based on the total lodestar figure and the requested fee of 33⅓ percent of the $325 million settlement (approximately $108,333,333), the resulting multiplier is 5.9.

30. Without taking into account the 1,888 hours of anticipated future work, the multiplier is 6.4. In my opinion, a multiplier of either 5.9 or 6.4 is fully justified based on the unique risks and challenges in this litigation.

31. In addition, if the Court considers both the judgment obtained and the fee already awarded to class counsel in *Vogt*, as courts in multi-district litigation would ordinarily do, in combination with the settlement, the resulting multiplier is 4.9, which is well within ordinary standards for less complex and challenging cases. In all events, courts have awarded fees in a number of cases with multipliers exceeding 6.4, and it would be entirely appropriate for this Court to do so here.

32. **Out-of-Pocket Costs.** In my opinion, the out-of-pocket costs sought, $1,366,155.21, are reasonable given the complexity and multi-jurisdictional nature of the litigation.

33. **Service Awards.** Plaintiffs' request for $25,000 in service awards for each class representative is reasonable and in line with service awards in other cases. The class representatives performed critical functions throughout the litigation.

VI. DETAILED DISCUSSION OF OPINIONS: OVERVIEW

34. In the remaining sections of this Declaration, I explain in detail my opinions on the reasonableness of: (1) the proposed attorneys' fees, (2) the out-of-pocket costs requested by the class counsel, and (3) the proposed service awards to the class representatives.

VII. ATTORNEYS' FEES

A. The Attorneys' Fees Requested by Class Counsel Are Reasonable

35. Class counsel are seeking, as attorneys' fees, 33⅓ percent of the $325 million settlement fund, *i.e.*, approximately $108,333,333. In this section of the Declaration, I offer my opinions on the reasonableness of that request.

1. This Court Should Use the Percentage-of-the-Fund Method

36. As an initial matter, this Court must decide whether to use the percentage-of-the-fund method (the percentage method) or the lodestar method. Courts in the Eighth Circuit have

discretion in common fund cases to choose either the percentage method or the lodestar method.[20] Nonetheless, in the Eighth Circuit and elsewhere, courts strongly prefer to use the percentage method in common fund cases.[21] This preference for the percentage method—which I wholeheartedly support—stems primarily from the fact that the percentage method "most closely aligns the interests of the lawyers with the class, since the more recovered for the class, the more

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[20] *See, e.g.*, *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996); *In re IBP, Inc. Secs. Litigation*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004) (noting that courts have "discretion to use either the lodestar method or the percentage of the benefit method").

[21] *See, e.g.*, *Campbell v. Transgenomic, Inc.*, 4:17-CV-3021, at *7 (D. Neb. June 3, 2020) (noting that "[t]he percentage-of-the-benefit method is recommended in common-fund cases") (*citing Johnston*, 83 F.3d at 244–45); *Anderson v. Travelex Ins. Servs.*, 8:18-CV-362 , 2021 WL 4307093 *3 (D. Neb. Sep. 22, 2021) (courts have discretion to apply either the percentage of the fund or lodestar method) (*citing Johnston*, 83 F.3d at 245–46); *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) ("in common fund cases, the percentage of the benefit approach is generally recommended"); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980 (D. Minn. 2005) (percentage test is "well established" in the Eighth Circuit) (*quoting Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)); *Gottlieb v. Barry*, 43 F.3d 474, 483, 487–88 (10th Cir. 1994) (preference for the percentage of the fund method); *In re Southeastern Milk Antitrust Litig.*, No. 2:07-CV208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013) (noting that the "percentage-of-the-fund method clearly appears to have become the preferred method in common fund cases"); *Jones v. Dominion Resources Services, Inc.*, 601 F. Supp. 2d 756, 758 (S.D. W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases."); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 (2004) (noting that the "vast majority" of courts apply the percentage method); Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. REV. 937, 963 (2017) (noting that the lodestar method "was used in only 6.29 [percent] of cases during the 2009–2013 period"); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 832–33 (2010) (noting that district courts "employed the lodestar method in only 12 percent of settlements" from 2006–2007); Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 267 (2010) (lodestar method was used in only 9.6 percent of settlements from 2003–2008); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(b) (2010) (noting that the "percentage-of-the-fund approach is the method [that should be] utilized in most common fund cases"); *Report of the Third Circuit Task Force on Court Awarded Attorney Fees*, 108 F.R.D. 237, 246–49 (1985) (concluding that courts should generally use the percentage method in common fund cases).

the attorneys stand to be paid."[22] Moreover, "one of the primary advantages of the percentage of recovery method is that it is thought to equate the interests of class counsel with those of the class members and encourage class counsel to prosecute the case in an efficient manner."[23] By contrast, the lodestar method arguably gives class counsel an incentive to work more hours than are necessary and to avoid early settlement.[24] Under the percentage method, by contrast, class

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[22] *In re Charter Communications, Inc.*, MDL No. 1506 All Cases, Consolidated Case No. 4:02-CV-1186 CAS, at *22 (E.D. Mo. June 30, 2005); *accord, e.g., Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1241 (D.N.M. 2016) (same); *In re U.S. Bancorp Litigation*, 276 F.3d 1008, 1010 (8th Cir. 2002) (concluding that a fee award of 36% was not improper because class counsel had helped "obtain[] significant monetary relief" for the class); *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (noting that the percentage method "provides a powerful incentive for the efficient prosecution and early resolution of litigation"); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) ("It matters little to the class how much the attorney spends in time or money to reach a successful result."); *Shaw v. Interthinx, Inc.*, No. 13-CV-01229-REB-NYW, 2015 WL 1867861, at *5 (D. Colo. Apr. 22, 2015) ("[A] percentage of the common fund is less subjective than the lodestar plus multiplier approach, matches the marketplace most closely, and is the better suited approach when class counsel were retained on a contingent fee basis . . . ." (citation omitted)); *Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1123 (C.D. Cal. 2008) (emphasizing that the percentage method "aligns the interests of counsel and the class by allowing class counsel to directly benefit from increasing the size of the class fund"); *see also* NAT'L ASS'N OF CONSUMER ADVOCATES, STANDARDS AND GUIDELINES FOR LITIGATING AND SETTLING CONSUMER CLASS ACTIONS 27 (3d ed. 2014) (noting that the percentage method is preferable from consumers' perspective because it "keeps class counsel's financial interest closely aligned with that of the class itself" and "approximates the 'free market' negotiated fees obtained in traditional contingency litigation").

[23] *In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 992 (cleaned up); *see also In re Chrysler Motors Corp. O.E.P. Lit.*, 736 F. Supp. 1007, 1009 (E.D. Mo. 1990) ("many courts, including the Supreme Court, have taken note of the fact that the awarding of a percentage of the recovery in a class action common fund case is a more appropriate and efficient means of calculating an attorneys' fee award") (*citing Blum v. Stenson*, 465 U.S. 886, 901 n. 16, (1984)).

[24] *See, e.g., Premachandra v. Mitts*, 727 F.2d 717, 733 (8th Cir. 1984) (courts may reduce fee awards accordingly in order to "[dis]courage overpreparation"); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 721 (7th Cir. 2001) ("[T]he lodestar approach creates [an] incentive to run up the billable hours."); *Swedish Hosp. Corp*, 1 F.3d at 1268–69 ("[U]sing the lodestar approach . . . attorneys are given incentive to spend as many hours as possible, billable to a firm's most

counsel are incentivized to work vigorously because their rewards, if any, are commensurate with the success they achieve on behalf of the class.[25] Moreover, the lodestar method has been heavily criticized by courts and commentators as "difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result."[26] As the Eighth Circuit has noted, the lodestar calculation "increases the workload of an already-overtaxed

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expensive attorneys [and] . . . there is a strong incentive against early settlement since attorneys will earn more the longer a litigation lasts."); *In re Cardinal Health Inc. Sec. Litig*., 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007) (noting that the lodestar method "incentivizes attorneys to work more hours, without regard to the quality of the output or the class's needs"); *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 418 (2d Cir. 2010) ("The lodestar method . . . creates an incentive for attorneys to bill as many hours as possible, to do unnecessary work, and for these reasons also can create a disincentive to early settlement."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002) ("[I]t is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary . . . , [and] the lodestar method does not reward early settlement."); *In re Netflix Privacy Litig*., No. 5:11-CV-00379 EJD, slip op. at 18 (N.D. Cal. Mar. 18, 2013) ("[T]he lodestar method's limitations lie in its creating a possible incentive for counsel to expend more hours than is necessary on a litigation or to delay settlement."); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 104 (Fed. Judicial Ctr. Apr. 2, 1990), *available at* https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf (noting that the lodestar method gives class counsel "incentives to run up hours unnecessarily").

[25] *See, e.g.*, *In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 992 ("Under the percentage method, the more the attorney succeeds in recovering money for the client . . . the higher dollar amount of fees the lawyer earns.") (cleaned up).

[26] *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1108 (D.N.M. 1999). *Accord, e.g.*, *Swedish Hosp. Corp*., 1 F.3d at 1269–70 ("The lodestar method makes considerable demands upon judicial resources since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable . . . . A related weakness in the lodestar approach is that it often results in substantial delay in distribution of the common fund to the class"); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 104 (Fed. Judicial Ctr. Apr. 2, 1990), *available at* https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf (noting that the lodestar method may "unduly burden judges").

judicial system," can be "insufficiently objective," brings about inconsistent results, may be "subject to manipulation," and can lead to "a disincentive for the early settlement of cases."[27]

37. To be sure, a percentage approach may raise some potential concerns when a class settlement involves a reversionary fund (all unclaimed funds revert to the defendant), and the claims process is a complicated one (thus deterring class members from filing claims to obtain any cash recovery).[28] Here, however, the proposed settlement creates a non-reversionary cash fund. And here, the proposed settlement does not create a complicated claims process that would discourage class members from submitting claims. Instead, the settlement provides for a distribution plan based on a minimum payment of $10 per class member, and a pro-rata portion of the net settlement fund according to the COI Charges and Expense Charges paid by each class member. No funds will revert to State Farm. And class members will receive their share of the settlement without being required to take any action, which, in my view, is the ideal way to distribute money from a common fund, where that is possible.

38. In my opinion, the above-discussed rationales favoring the percentage method over the lodestar method are directly applicable here. Class counsel took on difficult and challenging litigation on a contingency basis and achieved enormous success. Class counsel

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[27] *Johnston*, 83 F.3d at 245 n.8 (citations omitted); *see also In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1411 (D. Wyo. 1998) ("[t]he lodestar method . . . discourages early settlement, even on terms favorable to plaintiffs, because the attorneys will earn more the longer a litigation lasts").

[28] *See, e.g.*, *Shanley v. Evereve*, Inc., 22-CV-0319 (PJS/JFD), at *22 (D. Minn. Nov. 18, 2022) (defendant-friendly claims process and unclaimed settlement amounts would revert to the defendant).

obtained class certification, prevailed on myriad dispositive motions, and were preparing for the second class trial following the case they won (and successfully defended on appeal) in Missouri. Their efforts ultimately led to an extraordinary settlement. As I discuss below, the percentage sought by class counsel is reasonable (¶¶ 39–102), and there is no need for the Court to conduct a lodestar analysis even as a cross-check to the percentage method (¶ 103). In any case, as I explain, a lodestar cross-check fully supports class counsel's request for 33⅓ percent of the fund (¶¶ 104–133).

2. The 33⅓ Percent Requested Here Is Reasonable

39. As noted, class counsel seek attorneys' fees of 33⅓ percent of the $325 million settlement fund. In the Eighth Circuit, "a fee award totaling a third of the common fund" is "in line with other awards in [that] circuit."[29] Indeed, as the Eighth Circuit has noted, "courts have frequently awarded attorneys' fees ranging up to 36% in class actions."[30] As I discuss below, based on the applicable criteria, it is my opinion that the percentage sought by class counsel here is reasonable.

[29] *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019).

[30] *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017) (*citing In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002)).

a. The Percentage Requested Is Justified Under the *Johnson* Factors Based on the Compelling Circumstances in This Litigation

40. It is fundamental that, for a difficult and risky case, a substantial fee is justified.[31] In the Eighth Circuit, a district court addressing an attorneys' fee award is required to assess the facts and circumstances by looking at 12 factors. These so-called *Johnson* factors, originally set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*,[32] are:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee—this is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.[33]

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[31] *See, e.g.*, *In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 994 ("Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees."); *In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *4 (D. Kan. July 29, 2016) (noting that "the case presented a great deal of risk" to class counsel in awarding attorneys' fees of 33⅓ percent of $835 million fund); *In re U.S. Foodservice, Inc. Pricing Litig.*, No. 3:07-md-01894 (AWT), slip op. at 5 (D. Conn. Dec. 9, 2014) (Dkt. No. 521) (noting that "Class Counsel undertook numerous and significant risks" in awarding attorneys' fees of 33⅓ percent of $297 million fund); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) (noting that "[t]here were significant risks involved in this litigation" and that "the case did not lend itself to easy proof of liability or damages" in awarding attorneys' fees of 33 percent); *Been v. O.K. Indus., Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *6 (E.D. Okla. Aug. 16, 2011) (emphasizing that the case had been "prosecuted to judgment and through two appeals" in awarding attorneys' fees of 42 percent); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 148 (E.D. Pa. 2000) (noting that "[v]irtually nothing about this case was simplistic" in awarding attorneys' fees of 33⅓ percent).

[32] 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989).

[33] *Barfield v. Sho-Me Power Elec. Cooperative*, 2015 WL 3460346, at *5 (W.D. Mo. June 1, 2015) (*quoting Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 944 n.3 (8th Cir. 2007)).

41. The *Johnson* factors are considered in their totality or by groups of related factors, and courts have discretion on whether to apply particular factors and how much weight to give each one.[34] Moreover, in a common fund case, "the *most critical factor* in assessing fees is the degree of success obtained."[35]

42. In my opinion, the *Johnson* factors, taken as a whole, strongly support the reasonableness of the 33⅓ percent fee award requested in this case. I address each factor separately below.

i. Time and Labor Required

43. This litigation has required a significant investment of time by class counsel. As set forth more fully below (¶¶ 106–108), to date, class counsel have devoted more than 23,000

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[34] *See, e.g.*, *Keil v. McCoy*, 862 F.3d 685, 703 (8th Cir. 2017) (a district court is "not required to discuss all of the factors, since rarely are all of the *Johnson* factors applicable") (cleaned up); *Yarrington v. Solvay Pharmaceuticals, Inc*., 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) ("not all of the individual factors will apply in every case, affording the Court wide discretion in the weight to assign each factor"); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 993 ("not all of the individual *Johnson* factors will apply in every case, so the court has wide discretion as to which factors to apply and the relative weight to assign to each") (*citing Uselton v. Commercial Lovelace Motor Freight, Inc*., 9 F.3d 849, 854 (10th Cir. 1993)).

[35] *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 852 (8th Cir. 2002) (emphasis added). *Accord, e.g.*, *Urethane*, 2016 WL 4060156, at *4 ("[T]he amount involved and the results obtained . . . may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class") (cleaned up); *Lucken Family Ltd. P'ship, LLLP v. Ultra Resources, Inc.*, No. 09-cv-01543-REB-KMT, 2010 WL 5387559, at *3 (D. Colo. Dec. 22, 2010) ("[i]n a common fund case, the greatest weight should be given to the monetary results achieved for the benefit of the class."). *See also Keil v. McCoy*, 862 F.3d 685, 697 (8th Cir. 2017) (noting the "substantial and immediate benefits" the settlement conferred on class members); *In re CenturyLink Sales Practices & Sec. Litig*., MDL No. 17-2795 (MJD/KMM), at *32 (D. Minn. Dec. 4, 2020) (noting the "significant benefit" of the monetary and non-monetary relief obtained by the settlement).

hours to this litigation, and they expect to devote at least an additional 1,888 hours in the future in implementing the settlement. Thus, this is not a case in which class counsel was able to obtain the settlement with a minimum amount of work, thereby warranting a lower percentage of the recovery. To the contrary, the amount of work expended was significant and necessary.

ii. Novelty and Difficulty of the Questions

44. Substantial attorneys' fees are justified when the legal issues are particularly complex.[36] For example, the district court in the *Urethane Antitrust* litigation relied heavily on the fact that it "was an extremely difficult and complex case . . . with significant disputed issues arising at [various stages of the litigation]."[37] In awarding attorneys' fees of 33⅓ percent, the court emphasized that "[l]iability on these claims was far from certain, and thus the case presented a great deal of risk" to class counsel.[38] In the same vein, in *Cullen v. Whitman Medical Corp.*, the court noted, in awarding attorneys' fees of 33⅓ percent, that "[v]irtually nothing about this case was simplistic . . . [and that] both the legal theories and litigation process were complex."[39] Here, as discussed below, the issues in this litigation were complex and contentious.

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[36] *In re RFC & Rescap Liquidating Trust Action*, 399 F. Supp. 3d 827, 831 (D. Minn. 2019) (noting the complex legal issues involved and many complicated defenses raised by the defendants).

[37] *Urethane*, 2016 WL 4060156, at *5.

[38] *Id.* at *4.

[39] 197 F.R.D. 136, 148 (E.D. Pa. 2000). *Accord, e.g.*, *In re Resideo Techs., Inc. Sec. Litig.*, 19-cv-2863 (WMW/BRT), at *13 (D. Minn. Mar. 24, 2022) (noting that courts in the Eighth Circuit "have recognized that "securities claims proceeding as a class action present complex and novel issues") (cleaned up); *Buettgen v. Harless*, No. 3:09-cv-00791-K, 2013 WL 12303194, at *2 (N.D. Tex. Nov. 13, 2013) (emphasizing in awarding attorneys' fees that the case involved "particularly complex issues of law" and "numerous rounds of complicated briefing"); *In re Lease*

a) Difficult Legal Claims and Factual Issues

45. It is fundamental that the existence of difficult legal and factual issues can warrant substantial fees.[40] And courts have recognized that many class actions "are inherently complex."[41] For example, in awarding attorneys' fees of more than 30 percent in *Allapattah Services, Inc. v. Exxon Corp.*, the district court emphasized that "[t]he factual and legal framework out of which this case arose made it an extraordinarily difficult case."[42] Similarly, in *In re Resideo Techs., Inc. Securities Litigation*, the district court noted that the case "involved significant legal and factual issues" and that "[t]he difficulty of [those] issues supports the requested percentage-based award of attorneys' fees."[43] Likewise, in *Phillips v. Caliber Home Loans Inc.*, the court reasoned that "[t]he novelty and difficulty" of the case, which involved multiple complex

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Oil Antitrust Litig. (No. II), 186 F.R.D. 403, 445 (S.D. Tex. 1999) (relying on the existence of "difficult questions" of law in awarding "an above-average recovery").

[40] *See, e.g., In re Life Time Fitness Inc., Tel. Consumer Prot. Act Litig.*, 847 F.3d 619, 623 (8th Cir. 2017) (noting that the lawsuit presented difficult legal questions); *In re CenturyLink Sales Practices & Sec. Litig.*, MDL No. 17-2795 (MJD/KMM), at *34 (D. Minn. Dec. 4, 2020) (noting that "challenging legal and factual issues [faced by class counsel] in pursuing nationwide claims and relief" supported the requested 32.5 percent fee award); *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1115 (D. Kan. 2018) (noting that there were "seriously disputed questions of law and fact" in awarding class counsel one-third of the settlement fund).

[41] *Phillips v. Caliber Home Loans Inc.*, 19-cv-2711 (WMW/LIB), at *14 (D. Minn. Mar. 21, 2022) (citation omitted); *accord, e.g., In re Resideo Techs., Inc. Sec. Litig.*, 19-cv-2863 (WMW/BRT), at *13 (D. Minn. Mar. 24, 2022) (same); *Marshall v. Green Giant Co.*, 942 F.2d 539, 549 (8th Cir. 1991) ("It goes without saying that class actions are very complex and represent a significant drain on the court in terms of time and management."); *In re CenturyLink Sales Practices & Sec. Litig.*, MDL No. 17-2795 (MJD/KMM), at *26 (D. Minn. July 21, 2021) (noting that "securities claims proceeding as a class action present complex and novel issues") (cleaned up);

[42] 454 F. Supp. 2d 1185, 1206 (S.D. Fla. 2006).

[43] 19-cv-2863 (WMW/BRT), at *13 (D. Minn. Mar. 24, 2022).

questions of state and federal law, "support[ed] the requested [of 33⅓ percent] award of attorneys' fees."[44] Here, beyond the inherent complexity of class actions generally, there were a number of difficult legal and factual issues in this case. I detail some of them below.

46. First, there were difficult issues of contract interpretation on both the COI Charge and Expense Charge claims. *See* Siegel Att. Fees Decl. ¶ 18. Some courts denied State Farm's summary judgment motions on those claims, while other courts granted summary judgment on one or both of those claims.[45] For example, as noted above, on September 6, 2022, Judge Barbara Rothstein dismissed plaintiff's claims in their entirety. Importantly, Judge Rothstein's ruling was the most recent one on the COI Charge claim, and she acknowledged that some courts had denied State Farm's dispositive motions. However, after carefully reviewing the prior decisions as a whole, she dismissed the suit in its entirety. I would further note that, prior to the Eighth Circuit's opinion in *Vogt* favorable to policyholders (which class counsel was directly responsible for obtaining), appellate precedent strongly favored State Farm on the issue of contract interpretation. The most significant opinions were by the Seventh Circuit in *Norem v. Lincoln Ben. Life Co.*, 737 F.3d 1145 (7th Cir. 2013), and *Mai Nhia Thao v. Midland Nat'l Life Ins. Co.*, 549 F. App'x 534 (7th Cir. 2013), which rejected similar COI Charge claims against two different insurance

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[44] 19-cv-2711 (WMW/LIB), at *14 (D. Minn. Mar. 21, 2022); *accord, e.g.*, *In re Heritage Bond Litig.*, No. 02-ML-01475-DT, 2005 WL 1594403, at *20–21 (C.D. Cal. June 10, 2005); *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 570 (S.D. Iowa 2011) (noting the "complexity and expense of further litigation" in awarding class counsel approximately 33% of the settlement fund); *Cullen*, 197 F.R.D. at 148 (relying on factual complexity and voluminous discovery in awarding fees); *Eashoo v. Iovate Health Sciences U.S.A., Inc.*, No. 15-cv-01726-BRO (PJWx), 2016 WL 6205785, at *10 (C.D. Cal. Apr. 5, 2016) (similar); *Schwartz v. TXU Corp*., No. 3:02-cv-02243-K, 2005 WL 3148350, at *29 (N.D. Tex. Nov. 8, 2005) (similar).

[45] *See* Doc. 47 at 14–58 (detailed case-by-case discussion of dispositive motions rulings).

companies. During the litigation, the Eleventh Circuit also issued an opinion favoring the insurance company on a claim under a COI Charge provision somewhat similar to the one in the Polices here.[46] Class counsel ably navigated the adverse precedents such that *none* of the courts in these cases adopted the rationales in *Norem, Thao*, or *Slam Dunk*. The difficulty of the interpretative issues is also demonstrated by State Farm's evolving arguments. For example, in *Bally*, Judge Charles Breyer initially agreed with class counsel's interpretation that the Policies did not permit State Farm to load expenses and profit in the COI Charge, denying State Farm's motion for summary judgment.[47] Although ruling for plaintiffs, even Judge Breyer appeared to consider this a close call, certifying the order for interlocutory appeal to the Ninth Circuit. However, class counsel persuaded the Ninth Circuit to refuse to accept interlocutory review. Nonetheless, State Farm continued to press the issue of policy interpretation even in *Bally*. It identified a new argument and a different way to view the language in the Policies that, it contended, permitted it to load expenses and profit in the COI Charge, an interpretation that Judge Breyer later accepted in granting State Farm's second motion for summary judgment on the COI Charge claim.[48] Class counsel, however, persuaded Judge Breyer to grant the class summary judgment on liability as to the Expense Charge claim.[49] Following Judge Breyer's ruling, judges in the Arizona (*McClure*), Minnesota (*Jaunich*), and Texas (*Page*) cases all rejected State Farm's

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[46] *Slam Dunk I, LLC v. Conn. Gen. Life Ins. Co.*, 853 F. App'x 451 (11th Cir. 2021).

[47] *Bally v. State Farm Life Ins. Co.*, No. 18-CV-04954-CRB, 2019 WL 3891149, at *1 (N.D. Cal. Aug. 19, 2019).

[48] *Bally v. State Farm Life Ins. Co.*, 536 F. Supp. 3d 495 (N.D. Cal. 2021).

[49] *Bally v. State Farm Life Ins. Co.*, 587 F. Supp. 3d 996 (N.D. Cal. 2022).

policy interpretation. It is clear from these orders that the issue of policy interpretation was both nuanced and difficult. Notably, the litigation did not become any less challenging following the Eighth Circuit's opinion in *Vogt*, and class counsel did not wait for that appellate ruling before filing several of the cases settled here. They undertook to represent the class members in *Bally*, *Whitman*, and *McClure* even when it was quite possible that the Eighth Circuit would eventually agree with State Farm.

47. Second, various courts also rejected plaintiffs' conversion claim.[50] In *Whitman*, for example, Judge Rothstein found that the conversion claim failed because it was "derivative" of the failed breach of contract claims.[51] But even courts that denied summary judgment to State Farm on one or both of the breach of contract claims found it appropriate to grant summary judgment to State Farm on conversion.[52] For instance, Judge Susan Brnovich (D. Ariz) denied State Farm's summary judgment motion with respect to both the COI and Expense Charge claims but granted State Farm's motion with respect to conversion.[53] She concluded that the claim was barred by the economic loss doctrine because "Plaintiff has alleged no tortious conduct apart from breach of the Policy language. Essentially, plaintiff's conversion claim is based upon exactly the

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[50] Doc. 47 at 14–58.

[51] *See Whitman v. State Farm Ins. Co.*, No. 3:19-cv-06025-BJR, 2022 U.S. Dist. LEXIS 160432, at *18 (W.D. Wash. Sep. 6, 2022).

[52] *See e.g.*, *Vogt v. State Farm Life Ins. Co.*, No. 2:16-cv-04170-NKL, 2018 WL 1747336 at *9 (W.D. Mo. Apr. 10, 2018); *Page v. State Farm Life Insurance Co.*, 2022 WL 718789 (W.D. Tex. Mar. 10, 2022).

[53] *McClure v. State Farm Life Ins. Co.*, No. CV-20-01389-PHX-SMB, 2022 WL 2275665 (D. Ariz. June 23, 2022).

same conduct as the breach of contract claims in Counts I and II."[54] Critically, Judge Brnovich agreed with State Farm that "because Plaintiff's conversion claim fails, his punitive damages claim likewise fails."[55] With the courts' (virtually) uniform rejection of the conversion claims, plaintiffs and class members could not realistically expect to be successful in seeking punitive damages for a nationwide class, either in a trial context or as an element of a classwide settlement.[56]

48. Third, the cases posed challenging statute of limitations issues. *See* Siegel Att. Fees Decl. ¶ 20. For instance, Judge Paul Magnuson (D. Minn.) ruled that Minnesota did not have a discovery rule but instead followed the more stringent occurrence rule. Although fraudulent concealment could toll the statute of limitations under an occurrence rule, Judge Magnuson ruled that plaintiff had failed to come forward with evidence supporting such a contention.[57] As a result, Judge Magnuson ruled that, under the six-year limitations period, any claim arising before July 2014 was time barred.[58]

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[54] *Id.* at *8.

[55] *Id.*

[56] In *Vogt*, the court permitted the conversion claim to go to the jury, but it nonetheless granted summary judgment on the issue of punitive damages in favor of State Farm. The court found that State Farm's conduct was not sufficiently egregious to justify submitting the issue of punitive damages to the jury. Given that damages for the conversion claim were the same as for breach of contract, the conversion claim added little to no additional value to the class members' claims.

[57] *Jaunich v. State Farm Life Ins. Co.*, No. CV 20-1567 (PAM/JFD), 2022 WL 2318560, at *4 (D. Minn. June 28, 2022).

[58] *Id.*

49. Even in jurisdictions that have adopted a discovery rule, plaintiffs were not home free. Thus, while Judge Brnovich denied State Farm's motion for summary judgment on statute of limitations grounds, plaintiffs were still faced with having to establish at trial that they could not have discovered the alleged breach while their policies were active.[59] There was "also a question of fact as to when Plaintiff's causes of action accrued."[60] Thus, avoiding an adverse summary judgment ruling was by no means a guarantee that the claims would ultimately be deemed timely. In sum, there were myriad complex legal and factual issues here.

b) Difficult Expert Issues

50. The existence of hotly contested issues under *Daubert v. Merrell Dow Pharmaceuticals*[61] can warrant substantial fees. For example, in approving a percentage-based award in the *CenturyLink Sales Practices & Securities Litigation*, the court noted that continued litigation, including *Daubert* motions, "would involve considerable time and expense."[62] Similarly, in the *Flonase Antitrust Litigation*, in awarding 33⅓ percent of the settlement fund as attorneys' fees, the court relied upon the fact that class counsel had litigated a number of hotly

[59] *McClure*, 2022 WL 2275665, at *9.

[60] *Id*.

[61] 509 U.S. 579 (U.S. 1993).

[62] MDL No. 17-2795 (MJD/KMM), 2021 U.S. Dist. LEXIS 135880, at *17 (D. Minn. July 21, 2021).

contested *Daubert* challenges.[63] Likewise, in *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, the court cited "multiple *Daubert* challenges" in awarding attorneys' fees of 33⅓ percent.[64]

51. Here, as noted, substantial briefing and analysis was necessitated by State Farm's argument that plaintiffs' expert, Scott Witt, did not satisfy the standards of *Daubert*.[65] Indeed, class counsel advises me that State Farm filed *ten Daubert* motions in the various cases and deposed Mr. Witt *eleven* times. Moreover, the expert issues raised by State Farm were complicated. For example, in *Bally*, Judge Breyer (N.D. Cal.) devoted three pages to analyzing the admissibility of Mr. Witt's damages report.[66] Although he ultimately refused to strike the report, he had to review and analyze State Farm's arguments that: (1) Mr. Witt did not use actuarial judgment; (2) Mr. Witt's analysis failed to comply with Actuarial Standards of Practice (ASOP); (3) Mr. Witt used "blended" mortality rates that did not differentiate in pricing among tobacco users and non-users; (4) he improperly used "unpooled" rates, which differed based on the age of the particular policy; (5) he used a model that charged a higher rate than certain

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[63] *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 106 (E.D. Pa. 2013).

[64] No. 1:04-cv-3066-JEC, 2012 WL 12540344, at *3 (N.D. Ga. Oct. 26, 2012). *Accord, e.g.*, *Kleen Prods. LLC v. Int'l Paper Co.*, No. 1:10-cv-05711, 2017 WL 5247928, at *5 (N.D. Ill. Oct. 17, 2017) (relying on "substantial motion practice, including . . . motions to exclude expert testimony under *Daubert*" in awarding fees); *Cook v. Rockwell Int'l Corp.*, No. 90-cv-00181-JLK, 2017 WL 5076498, at *3 (D. Colo. Apr. 28, 2017) (relying on multiple *Daubert* motions in awarding fees); *Buettgen*, 2013 WL 12303194, at *2 (relying on contentious *Daubert* motions in awarding fees); *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1193, 1232 (S.D. Fla. 2006) (noting "week-long *Daubert* evidentiary hearing" in awarding fees).

[65] 509 U.S. 579 (1993).

[66] *Bally v. State Farm Life Ins. Co.*, 335 F.R.D. 288, 297–300 (N.D. Cal. 2020), Doc. 122 at 6–13.

policyholders were actually charged, and thus failed to separate harmed class members from unharmed ones; and (6) his model did not account for the fact that some class members suffered no damages.[67]

52. Even after prevailing on State Farm's *Daubert* challenges, class counsel had a difficult task ahead of them in persuading a jury to adopt Mr. Witt's damages opinions. Although they had prevailed at the *Vogt* trial, State Farm hired entirely new experts for the subsequent cases, and those experts were highly critical of Mr. Witt's analyses. *See* Siegel Att. Fees Decl. ¶ 14. These new experts included a Ph.D. economist, a former state insurance commissioner and executive of the National Association of Insurance Commissioners, an actuary (like Mr. Witt), and a consumer behavior expert. These experts were all well credentialed and, according to class counsel, highly paid—with State Farm having paid *over $4.6 million* to these experts at the time of their depositions. Their criticisms covered a broad array of subject areas and attacked damages on several levels, including opinions that policyholders suffered no damages in the event of a breach.

c) Hotly Contested Class Certification Issues

53. In justifying substantial attorneys' fees, a number of courts have relied on the fact that class counsel litigated difficult class certification issues. For example, in awarding class counsel a fee of approximately 33 percent of the settlement fund, the court in *Kelly v. Phiten USA, Inc.* noted that the class "would have faced challenges by the Defendant regarding their eligibility for class certification due to choice of law limitations, diversity complications, and arbitration

[67] *Id.*

agreements."[68] Similarly, in *In re CenturyLink Sales Practices & Securities Litigation*, where the court approved class counsel's 32.5 percent fee request, the court noted that "[if] the case had survived to the class certification stage, there would have been strong arguments against class certification . . . [and class counsel] would have had to expend considerable additional resources on discovery, expert analysis, [and] a highly contested motion for class certification."[69] In *Montague v. Dixie National Life Insurance*, the court reasoned that the "hotly contested" issue of class certification "provide[d] support for a 33 percent fee award."[70] Likewise, in awarding attorneys' fees of 33⅓ percent of the $586 million settlement fund in the *Initial Public Offering Securities Litigation*, the court emphasized that "class counsel briefed and argued three hotly contested class certification motions."[71] And in *Syngenta*, where "class certification was not assured" and the defendant's "experienced and well-funded top-shelf counsel . . . contested every issue," class counsel were awarded 33⅓ percent of a $1.5 billion settlement fund.[72] Likewise, in *In re Urethane*, where many issues—including the issue of class certification—were "significant"

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[68] 277 F.R.D. 564, 570 (S.D. Iowa 2011).

[69] No. CV 17-2832, 2020 WL 7133805, at *12 (D. Minn. Dec. 4, 2020).

[70] No. 3:09-00687-JFA, 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011).

[71] *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 508 (S.D.N.Y. 2009). *Accord, e.g.*, *In re Schering-Plough Corp. Enhance Sec. Litig.*, Nos. 08-397 & 08-2177 (DMC) (JAD), 2013 WL 5505744, at *26 (D.N.J. Oct. 1, 2013) (relying on "unusual class certification issues" in awarding fees); *Cullen*, 197 F.R.D. at 148 (relying on contested class certification motions in awarding fees); *Heritage Bond*, 2005 WL 1594403, at *20 (similar).

[72] *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1112 (D. Kan. 2018).

and "contested quite vigorously," class counsel were awarded 33⅓ percent of the $835 million settlement fund.[73]

54. To be sure, district court decisions in the present litigation consistently certified these State Farm life insurance cases as statewide class actions, given the overarching common issues. Nonetheless, there is no question that class counsel took a serious risk that class certification would be denied or that a previously certified class would later be decertified. State Farm contended that predominance under Rule 23(b)(3) could not be satisfied in these cases because extrinsic evidence was required to interpret the contract and ascertain each class member's understanding of the terms. State Farm also contended that individualized statute of limitations defenses defeated predominance. Moreover, State Farm argued that plaintiff's damages model was not supported by admissible expert testimony and that without a valid model, individualized damages issues predominated. In addition, State Farm argued that there was an intra-class conflict because the model adopted by plaintiffs' expert, Mr. Witt, favored short-term policyholders and tobacco users over long-term policyholders and non-tobacco users. State Farm made these arguments in several cases.[74]

55. State Farm also raised several challenges to class certification based on various other theories: that some class members suffered no injury or that there were intra-class conflicts from State Farm's methodology for calculating COI deductions. It was clear that State Farm considered these arguments to be substantial ones that posed significant risk for plaintiffs. For

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[73] *See Urethane*, 2016 WL 4060156, at *11.

[74] *See* Doc. 47 at 14–32 (summarizing State Farm's arguments in the various cases).

example, in *Vogt*, State Farm litigated those arguments all the way to the United States Supreme Court, asking the Court to grant certiorari (accompanied by impressive counsel and amici).[75] State Farm's efforts were unsuccessful: It did not prevail in opposing class certification or challenging it under Rule 23(f) or at final judgment, and it was likewise unsuccessful in obtaining certiorari. Nonetheless, State Farm continued to raise these arguments in the subsequent cases—resulting in seven fully briefed class certifications motions and a motion for decertification, with State Farm seeking Federal Rule 23(f) review of class certification orders three times and then cross appealing class certification in *Whitman*. State Farm obviously understood that these class certification rulings posed a grave threat, and they repeatedly and vigorously raised serious class certification arguments that class counsel had to address. At the same time, class counsel's success in obtaining and defending class certification undoubtedly placed substantial settlement pressure on State Farm, thereby contributing to the $325 million settlement.[76] Undoubtedly, after the $38.8 million judgment (before application of post-judgment interest) in the Missouri class action, State Farm faced even greater damages in various other states. In fact, I believe it was a smart tactical move for class counsel to file the multi-state *Rogowski* case after obtaining such an impressive array of

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[75] As noted (¶ 17), I have considered that class counsel was paid for their work in the *Vogt* case, including the work spent defending class certification on appeal. Nonetheless, that work was critical to the settlement class. In particular, if the Supreme Court had granted review and reversed class certification in *Vogt*, it would have imperiled class certification in every case. Moreover, there is little doubt that if class counsel had obtained another class judgment, State Farm would have made another attempt at Supreme Court review.

[76] *See, e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 475 (2013) (noting the "[s]ettlement pressure exerted by class certification"); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 629 (8th Cir. 2011) (noting that "many defendants face substantial settlement pressures as a result of class certification" (citation omitted)).

victories on class certification in the individual state class actions. That strategy undoubtedly put great pressure on State Farm, which understood that it would face a large, multi-state class in the very district and circuit where it had lost the *Vogt* case. As a result of class counsel's multi-jurisdictional strategy, by the time State Farm might have received a favorable appellate ruling by some court on class certification, it potentially would have incurred other adverse jury verdicts even larger than the Missouri verdict. Thus, the class benefited enormously from class counsel's efforts in obtaining—and defending on appeal—class certification in the face of numerous substantial arguments by State Farm.

d) Contested Trial

56. Because relatively few class actions go to trial,[77] courts reviewing attorneys' fee requests justifiably give significant weight, when applicable, to the fact that a contested trial occurred. For example, in its order awarding attorneys' fees in the *Deepwater Horizon Litigation*, the court noted that class counsel "did something that rarely happens in class actions: they actually went to trial."[78] The court emphasized that the "massive two-phase trial effort" weighed in favor of the fees requested by class counsel.[79] Similarly, in *Allapattah*, the district court emphasized that the settlement was reached only after class counsel succeeded at trial, noting that "[c]lass

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[77] *See, e.g.*, *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013) (noting that it is "the rare case in which a class action not dismissed pretrial goes to trial rather than being settled"); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1299 (11th Cir. 1999) ("Rarely do class action litigations proceed to trial."); Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1642 (2016) (indicating that "settlement is still the norm").

[78] *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 2:10-md-02179-CJB, 2016 WL 6215974, at *18 (E.D. La. Oct. 25, 2016).

[79] *Id.*

counsel . . . faced a potential catastrophic risk in the event the case was lost at trial."[80] In *Urethane*, the court relied heavily in its fee award on the impressive jury verdict obtained by class counsel.[81] The court emphasized that "the case was not settled pretrial" but rather was litigated before a jury, resulting in a verdict of over $400 million—an "incredible success on the merits."[82]

57. In the present case, a compelling justification for the fee award sought is that class counsel conducted a full trial on the merits in *Vogt*. That trial, involving a Missouri class, resulted in a verdict of $34.3 million in compensatory damages, with the jury deliberating for just over two hours. State Farm vigorously disputed the class's claims at trial and brought in an experienced trial team of attorneys from two law firms. I have no doubt that, had the Missouri

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[80] *Allapattah*, 454 F. Supp. 2d at 1203.

[81] *Urethane*, 2016 WL 4060156, at *4–7.

[82] *Id*. at *4. *Accord, e.g.*, *Brady v. Air Line Pilots Ass'n*, 627 F. App'x 142, 144–45 (3d Cir. 2015) (emphasizing that "Class Counsel conducted a five-week liability trial that resulted in a jury verdict in favor of the class" in upholding district court's 30 percent attorneys' fee award); *In re Syngenta*, 357 F. Supp. at 1115 (noting that "litigation was extensive and exhaustive . . . and included a trial and a plaintiffs' verdict"); *In re Apollo Grp. Inc. Sec. Litig*., No. 04-cv-02147-PHX-JAT, 2012 WL 1378677 (D. Ariz. Apr. 20, 2012) (awarding attorneys' fees of 33⅓ percent of $145 million fund based in large part on favorable jury verdict secured by class counsel, and noting: "[S]ecurities class actions rarely proceed to trial . . . [and] there was a great risk that this case would not result in a favorable verdict after trial."); *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912, 931–32 (D.P.R. 1991) (relying on multi-phase trial in setting aside total attorneys' fees of $68 million out of $220 million fund, or 30.9 percent), *rev'd on other grounds*, 56 F.3d 295 (1st Cir. 1995). Indeed, courts give substantial weight in awarding fees to the fact that a case was *close* to going to trial. *See, e.g.*, *Fleisher v. Phoenix Life Ins. Co.*, Nos. 11-cv-8405(CM), 14-cv-8714(CM), 2015 WL 10847814, at *12–13 (S.D.N.Y. Sept. 9, 2015) (noting, in awarding 33⅓ percent of cash settlement fund, that "the litigation was hard-fought" and a settlement was reached "on the eve of trial" and after an "all-day mock trial"); *In re Flonase Antitrust Litig*., 291 F.R.D. 93, 99, 104, 106 (E.D. Pa. 2013) (noting that class counsel "had completed significant preparation for trial" in awarding attorneys' fees of 33⅓ percent); *Columbus Drywall & Insulation*, 2012 WL 12540344, at *3 (emphasizing that "[t]he case settled only within 48 hours of trial" in awarding attorneys' fees of 33⅓ percent).

class lost the trial, class counsel's ability to negotiate a settlement anywhere near the magnitude of $325 million would have vanished. In my opinion, the fact that class counsel achieved a major jury verdict against such formidable opposition in a closely related Missouri class action was critical in paving the way for the substantial global settlement. I recognize that *Vogt* is not part of the nationwide class settlement, and I would endorse the fee proposal even without considering it; but as I explained (¶ 17), in my opinion, it is inextricably intertwined with the nationwide class settlement.

e) Absence of Government Litigation

58. In some cases, private counsel are assisted by the existence of parallel government litigation. Such government litigation—which may involve both criminal actions and civil enforcement—can provide valuable resources and can help uncover underlying wrongdoing. Thus, some courts have noted the heavy involvement of the government in setting awards below what class counsel requested. For example, in reducing class counsel's fee request in the *AOL Time Warner Securities Litigation*, the court noted that class counsel "benefited to a degree from work performed by others," including "[p]arallel government investigations."[83] Similarly, in explaining its fee award of only 10 percent in *In re Quantum Health Resources, Inc.*, the court emphasized that "[t]he facts of [the] case weighed heavily in the Class' favor from the start,

[83] *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02-cv-05575 (SWK), 2006 WL 3057232, at *17 (S.D.N.Y. Oct. 25, 2006).

largely because the material allegations of the complaint were supported by the unequivocal results of public investigations conducted by [California state agencies]."[84]

59. Conversely, courts have also noted the *absence* of government involvement in approving substantial fee requests. For example, in *In re CenturyLink Sales Practices & Securities Litigation*, the court noted that the plaintiffs "faced a risk of losing" because of "the fact that there was no government investigation regarding [the defendant's] statements to its investors" and that, therefore, "[p]roving loss causation would have been a significant hurdle."[85] Similarly, in *In re Gulf Oil/Cities Services Tender Offer Litigation*, the court emphasized that the case was "not [one] where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill. [Class counsel] did all the work on their own."[86] As the court noted in *Urethane*, the fact that "[class] [c]ounsel had to build this case on their own, *without the help of a government investigation or prosecution*," weighed in favor of the requested 33⅓ percent fee award.[87]

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[84] 962 F. Supp. 1254, 1259 (C.D. Cal. 1997).

[85] MDL No. 17-2795 (MJD/KMM), 2021 U.S. Dist. LEXIS 135880, at *17 (D. Minn. July 21, 2021).

[86] 142 F.R.D. 588, 597 (S.D.N.Y. 1992); *accord, e.g.*, *In re Syngenta*, 357 F. Supp. at 1112 (noting that the case "did not involve a government investigation or prosecution of the defendant, and thus plaintiffs' counsel were forced to undertake all of the necessary investigation and discovery").

[87] *Urethane*, 2016 WL 4060156, at *4 (emphasis added). *Accord, e.g.*, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1635648, at *7 (E.D. Pa. Apr. 5, 2018) ("This was not a case where government prosecutions laid the groundwork for private litigation. This case required a pioneering effort by Class Counsel." (citation, internal quotation marks, and brackets omitted)); *Standard Iron Works v. ArcelorMittal*, No. 08-cv-05214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) (noting, in awarding attorneys' fees of 33

60. Here, class counsel had no assistance of any kind from insurance regulators, state attorneys general, or any other state or federal officials. Siegel Att. Fees Decl. ¶ 4. In fact, State Farm hired a former state insurance commissioner, who gave the opinion that state regulatory bodies would not have approved the Policies if they had been construed to preclude State Farm from recovering all of its expenses and building a profit margin into the COI Charge, as plaintiffs contended. Here, class counsel bore the entire burden of investigating and proving State Farm's alleged breach of contract and conversion.

f) No Public Admission of Liability

61. In some instances, class counsel benefit from the fact that the defendant has publicly admitted wrongdoing. Such admissions no doubt make it easier for class counsel to prosecute the claims and negotiate a settlement. For example, in *Quantum Health*, the court emphasized the "significant public admissions by Quantum" in concluding that class counsel did not face "any significant risk" and awarding attorneys' fees of only 10 percent of the common fund.[88] Here, State Farm vigorously contested liability prior to entering into the class settlement,

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percent, that "Class Counsel initiated and developed this case with no assistance from any prior government investigation or prosecution"); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748–49 (E.D. Pa. 2013) (relying on absence of government investigation); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008) (similar); *Syngenta,* 357 F. Supp. 3d at 1112 (in awarding 33⅓ percent of $1.5 billion settlement, relying on the fact "that, unlike some other class actions, this case did not involve a government investigation or prosecution of the defendant, and thus plaintiffs' counsel were forced to undertake all of the necessary investigation and discovery").

[88] 962 F. Supp. 1254, 1259 (C.D. Cal. 1997). *See also, e.g., In re Schering-Plough Corp. Enhance Sec. Litig.*, Nos. 08-397 & 08-2177 (DMC) (JAD), 2013 WL 5505744, at *43 (D.N.J. Oct. 1, 2013) (noting that the litigation "was no easy task for [class counsel] because no Defendant ever admitted wrongdoing"). Additionally, even if the defendant has not publicly admitted wrongdoing, courts have focused on the relative ease of establishing liability in awarding fees

and even today, it still admits no wrongdoing or breach of contract despite its agreement to pay $325 million.[89]

g) No Public Relations Reason to Settle

62. In some cases, widespread adverse publicity creates a public relations nightmare for a defendant, thus increasing the need for such a defendant to settle on terms favorable to plaintiffs. Examples include the *Deepwater Horizon Litigation*, where BP faced "a torrent of criticism" in the wake of the oil spill disaster;[90] the *Volkswagen Clean Diesel Litigation*, where Volkswagen's admission of fraud shook consumer confidence and resulted in "something like a tsunami" of bad press;[91] and the *NFL Concussion Litigation*, where commentators noted that "regular updates from a courtroom had the potential to be a [public relations] nightmare for the NFL, especially because of the possibility of unflattering documents coming to light."[92] Here, there were no similar pressures that compelled State Farm to settle. This case has received virtually no media coverage (apart from legal publications that provided updates on case

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below those requested by class counsel. For example, the Third Circuit, in rejecting the district court's fee award in *In re Cendant Corp. Litigation*, emphasized that plaintiffs had "a simple case in terms of liability." 264 F.3d 201, 221 (3d Cir. 2001).

[89] *See* Doc. 47–1, ¶ 11.8 (Settlement Agreement).

[90] Leon Kaye, *Five Years After Deepwater Horizon, Can BP Repair Its Reputation?*, SUSTAINABLE BRANDS (Feb. 19, 2015), http://www.sustainablebrands.com/news_and_views/marketing_comms/leon_kaye/five_years_after_deepwater_horizon_can_bp_repair_its_reputa.

[91] Danny Hakim, *VW's Crisis Strategy: Forward, Reverse, U-Turn*, N.Y. TIMES (Feb. 26, 2016), https://www.nytimes.com/2016/02/28/business/international/vws-crisis-strategy-forward-reverse-u-turn.html.

[92] Dan Diamond, *NFL Pays $765 Million to Settle Concussion Case*, Still Wins, FORBES (Aug. 29, 2013), https://www.forbes.com/sites/dandiamond/2013/08/29/nfl-pays-765-million-to-settle-concussion-case-still-wins/#67a1d1317e62.

developments), despite the fact that the allegations involved harm to a predominantly elderly population.

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63. In sum, class counsel faced numerous difficult challenges that favor a substantial fee award. The district court's observations in *Urethane* are equally applicable here:

> [Class] counsel achieved an incredible result for the class, in a case with an extreme amount of risk at all stages of the litigation, and they obtained that result because they won what is reported to be one of the largest verdicts of its kind in United States history. Counsel had to build this case on their own, without the help of a governmental investigation or prosecution, . . . and they toiled for many years, at great expense to themselves, with a very real risk that they would not recover anything.[93]

iii. Skill Requisite to Perform the Legal Service Properly

64. A high level of skill was necessary to litigate and settle these cases. As noted above, this case involved a number of difficult legal and factual issues (¶¶ 45–49), and numerous other challenges (¶¶ 50–62).

a) Plaintiffs' Team

65. Plaintiffs' team needed to be at the top of their game in trial skills, legal research and analysis, class certification, knowledge of technical and complicated insurance issues, and appellate practice.

66. Thus, it is not surprising that the team representing the class included some of the country's most accomplished class action plaintiff lawyers. Team members have received

[93] *Urethane*, 2016 WL 4060156, at *6.

recognition as the "The Best Lawyers in America,"[94] "Super Lawyers,"[95] and "Rising Stars."[96] Many have held prominent leadership roles in other major class actions and MDL cases.[97] And they came to this litigation with years of experience suing insurance companies for overcharging

[94] The Best Lawyers in America are selected based on a peer-review process "designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical area and legal practice area." *Methodology Process*, BEST LAWYERS, https://www.bestlawyers.com/methodology (last visited Feb. 6, 2023). Attorneys on plaintiffs' team who have been named to The Best Lawyers in America include Norman Siegel, *see Attorneys*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/about-attorneys (last visited Feb. 6, 2023).

[95] Super Lawyers are selected each year based on an extensive research and peer-evaluation process. They represent the top five percent of attorneys in each state and practice area. *See Selection Process Detail*, SUPER LAWYERS, https://www.superlawyers.com/about/selection_process_detail.html (last visited Feb. 6, 2023). Attorneys on plaintiffs' team who have been selected as Super Lawyers include Norman Siegel, Bradley Wilders, and Lindsay Todd Perkins of Stueve Siegel Hanson and Matthew Lytle of Miller Schirger. *See Attorneys*, STUEVE SIEGEL HANSON, http://www.stuevesiegel.com/ssh/about-us/attorneys.html (last visited Feb. 6, 2023); *Attorneys*, MILLER SCHIRGER, https://www.millerschirger.com /docs/attorneys/contact.php (last visited Feb. 6, 2023).

[96] Attorneys under 40 years of age or in practice for ten years or less are eligible to be designated Rising Stars if they have not been designated Super Lawyers. The Rising Stars selection process is similarly based on independent research and a peer-evaluation process. Only 2.5 percent of eligible lawyers are designated Rising Stars. *See The Rising Stars Selection Process*, SUPER LAWYERS, https://www.superlawyers.com/about/selection_process_detail.html (last visited Feb. 6, 2023). Attorneys on plaintiffs' team who have been selected as Rising Stars include Matthew Lytle and Joseph Feierabend of Miller Schirger. Doc. 47-4 at 7, 24. Attorneys Lindsay Perkins and Ethan Lange have also been Rising Stars. *See Attorneys*, STUEVE SIEGEL HANSON, http://www.stuevesiegel.com/ssh/about-us/attorneys.html (last visited Feb. 6, 2023).

[97] For example, Norman Siegel of Stueve Siegel Hanson has served as lead counsel in the *In Re: Equifax Data Breach Litigation*, the *Home Depot Data Breach Litigation*, the *Target Data Breach MDL, and In Re: Capital One Customer Data Security Litigation*. *See Norman E. Siegel*, STUEVE SIEGEL HANSON, http://www.stuevesiegel.com/attorney/Siegel (last visited Feb. 6, 2023). Numerous other examples could be cited.

universal life insurance policy owners.[98] These are, in short, some of the country's premier complex litigation attorneys, who also brought major insurance expertise to the table.

67. Stueve Siegel Hanson has significant experience in major class actions.[99] The firm also has significant experience in MDL litigation.[100] Through its complex litigation work, Stueve Siegel Hanson has secured billions of dollars in relief for its consumer clients.[101]

68. The Stueve Siegel attorneys who played a major role in this litigation have impressive backgrounds. For example, Norman Siegel, a former Assistant Attorney General at the Missouri Attorney General's Office, has obtained billions of dollars in settlements for his clients, has won multi-million dollar jury verdicts, and has been selected to serve as lead counsel in several of the largest data breach cases litigated to date. Siegel was named among the "500 Leading Plaintiffs' Lawyers in America" by Lawdragon, Best Lawyers named him as a 2020

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[98] Doc. 47–2, ¶ 5 (Siegel Declaration).

[99] *See Consumer Protection*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/practices-consumer-protection (last visited Feb. 6, 2023); *Investigating Life Insurance "Cost of Insurance" Rate Increases and Overcharges*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/what-investigations-cost_of_insurance (last visited Feb. 6, 2023).

[100] *See, e.g.*, *Norman Siegel*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/attorneys-Siegel (last visited Feb. 6, 2023); *Barrett Vahle*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/attorneys-Vahle (last visited Feb. 6, 2023); *Todd Hilton*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/attorneys-Hilton (last visited Feb. 6, 2023).

[101] *See Consumer Protection*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/practices-consumer-protection (last visited Feb. 6, 2023).

"Lawyer of the Year," and Law360 named him a "Titan of the Plaintiff's Bar."[102] Bradley Wilders clerked for Judge John Gibson of the U.S. Court of Appeals for the Eighth Circuit, was a critical part of the team that achieved a $217.7 million judgment against a manufacturer of corn seed, has served as a special master in federal litigation, and has been named among Missouri and Kansas "Super Lawyers."[103] Lindsay Todd Perkins clerked for Judge Duane Benton of the U.S. Court of Appeals for the Eighth Circuit, served on the trial team in *Vogt*, has been involved in obtaining multiple multi-million dollar settlements, was recognized as a 2020 "Rising Star" by Law360, received an Up & Coming award in 2020 by Missouri Lawyers Weekly, and was named among Missouri and Kansas "Super Lawyers" in 2022.[104]

69. Miller Schirger similarly has skilled trial lawyers with significant experience in complex litigation, including insurance litigation.[105] The firm has been involved in a multitude of class action settlements, including nationwide settlements and mega-fund settlements.[106] In 2016, Miller Schirger, along with Stueve Siegel Hanson, obtained a $2.25 billion nationwide class action settlement against The Lincoln National Life Insurance Company over alleged life insurance

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[102] *See Norman Siegel*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/attorneys-Siegel (last visited Feb. 6, 2023).

[103] *See Bradley T. Wilders*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/attorneys-Wilders (last visited Feb. 6, 2023).

[104] *See Lindsay Todd Perkins*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/attorneys-Perkins (last visited Feb. 6, 2023).

[105] *See Firm Profile*, MILLER SCHIRGER, https://www.millerschirger.com/docs/Firm-Profile/contact.php (last visited Feb. 6, 2023).

[106] *See Results*, MILLER SCHIRGER, https://www.millerschirger.com/docs/results.php (last visited Feb. 6, 2023).

policy overcharges.[107] And, more recently, Miller Schirger, along with Stueve Siegel Hanson, settled a nationwide life insurance class action against USAA Life Insurance Company for $90 million.[108]

70. The specific Miller Schirger attorneys who played a major role in this litigation have impressive backgrounds. For example, John Schirger has thirty years of litigation experience, including extensive experience in class action and insurance litigation, and he spent roughly three years as in-house counsel in the insurance industry.[109] Schirger has been named a Top 100 Missouri and Kansas Super Lawyer, "Best of the Bar" by the Kansas City Business Journal, and a member of the Power 30 List for Commercial and Consumer Litigation by Missouri Lawyers Media.[110] Matthew Lytle has extensive experience representing clients in complicated matters, including class actions and other multi-party actions, has been named a "Super Lawyer" by Missouri and Kansas Super Lawyers, and was named to the 2012 BTI Client Service All-Stars.[111]

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[107] *See $2.25 billion nationwide class action settlement*, MILLER SCHIRGER, https://www.millerschirger.com/news/2-25-billion-nationwide-class-action-settlement/ (last visited Feb. 6, 2023).

[108] *See USAA Life Insurance Class Action Settles for $90 Million*, MILLER SCHIRGER, https://www.millerschirger.com/news/usaa-life-insurance-class-action-settles-for-90-million/ (last visited Feb. 6, 2023).

[109] Doc. 47-4 at 4.

[110] *See John J. Schirger*, MILLER SCHIRGER, https://www.millerschirger.com/docs/John-J-Schirger.php (last visited Feb. 6, 2023).

[111] Doc. 47-4 at 5.

b) The Opposition Team

71. An important factor in evaluating a proposed fee award is the "quality and vigor of opposing counsel."[112] For example, in awarding attorneys' fees of 33⅓ percent in *Dartell v. Tibet Pharmaceuticals, Inc.*, the court noted that "[t]he performance and quality of defense counsel . . . favors a finding that [class counsel] prosecuted this case with skill and efficiency."[113] Similarly, in awarding attorneys' fees of 33⅓ percent of the $510 million fund in the *Initial Public Offering Securities Litigation*, the court noted that class counsel "were pitted against . . . prominent national defense firms," and it emphasized what an "impressive feat" a favorable settlement was, achieved "against such formidable opponents."[114] Judge Lungstrum likewise awarded 33⅓ percent of a $1.5 billion settlement, noting that defendants were "represented by experienced and well-funded top-shelf counsel, [who] (quite properly) raised every defense and contested every issue throughout,"[115] much like State Farm did here. Numerous other courts have articulated similar reasoning.[116]

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[112] *In re Charter Communications, Inc.*, MDL No. 1506 All Cases, Consolidated Case No. 4:02-CV-1186 CAS, at *29 (E.D. Mo. June 30, 2005) (*citing In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004)).

[113] No. 14-cv-03620, 2017 WL 2815073, at *9–10 (D.N.J. June 29, 2017) (citations and internal quotation marks omitted).

[114] *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 510 (S.D.N.Y. 2009).

[115] *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d at 1112.

[116] *See, e.g., Pollard v. Remington Arms Co.*, 320 F.R.D. 198, 198 (W.D. Mo. 2017) (noting that defense counsel was "experienced and skilled"); *In re CenturyLink Sales Practices & Sec. Litig.*, MDL No. 17-2795 (MJD/KMM), at *34 (D. Minn. Dec. 4, 2020) (noting that the defendant and their counsel "mounted a strong defense" and required class counsel to respond to "a flurry of substantial and complex motions."); *Allapattah*, 454 F. Supp. 2d at 1207 ("Further adding to the

72. Here, extraordinary skill on the part of class counsel was required because State Farm hired some of the country's most prominent and respected defense attorneys. Attorneys from Faegre Drinker Biddle & Reath and Stinson led State Farm's trial team in *Vogt*, and Stinson led the *Vogt* Eighth Circuit appeal. Those lawyers continued to defend State Farm in some or all of the remaining cases. After its losses in *Vogt*, State Farm also brought in two powerhouse law firms as national counsel: Gibson Dunn (over 1700 lawyers) and Alston & Bird (over 820 lawyers).[117] By contrast, although assisted by various local lawyers, plaintiffs were represented primarily by two relatively small firms: Stueve Siegel Hanson LLP (26 attorneys) and Miller

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difficulty of the case was the quality of Plaintiffs' legal adversaries. Exxon hired some of the most able lawyers and experts in America and spared no expense in doing so."); *Billitteri v. Sec. Am., Inc.*, Nos. 3:09-cv-01568-F & 3:10-cv-01833-F, 2011 WL 3585983, at *7 (N.D. Tex. Aug. 4, 2011) ("Because of the extremely effective work of opposing counsel . . . the skill required here . . . certainly justifies the contemplated [fee] award."); *In re OSB Antitrust Litig.*, No. 06-cv-00826 (D. Pa. Dec. 9, 2008) (Dkt. No. 947) (noting, in awarding attorneys' fees of 33⅓ percent, that "counsel for Defendants—dozens of extremely distinguished lawyers from across the country—skillfully and vigorously opposed [class counsel]"); *Schwartz v. TXU Corp.*, No. 3:02-cv-2243-K, 2005 WL 3148350, at *29–30 (N.D. Tex. Nov. 8, 2005) ("The standing of opposing counsel should be weighed in determining the fee, because such standing reflects the challenge faced by plaintiffs' attorneys. The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation."); *Walco Investments, Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) ("Given the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude [than class counsel] could have achieved similar results[.]"); *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1377 (C.D. Cal. 1977) ("[P]laintiff's attorneys in this class action have been up against established and skilled defense lawyers, and should be compensated accordingly."); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974) (emphasizing, in awarding attorneys' fees to class counsel, that "attorneys for the defendants represent the cream of the antitrust bar in the United States").

[117] State Farm subsequently added Sullivan & Cromwell to the team, but only at the settlement-negotiation state.

Schirger, LLC (five attorneys).[118] In terms of sheer resources, this was truly a David versus Goliath scenario.

73. Indeed, as discussed below, State Farm's law firms were not just large; State Farm specifically cherry-picked some of the most highly regarded litigators within those firms. The remarkable team that State Farm put together for its defense is daunting in its size, strength, reputation, and experience. Focusing on just a handful of the many talented and award-winning lawyers retained by State Farm for this litigation:

a. In early 2020, State Farm retained Alston & Bird—and in particular, Cari Dawson and Tiffany Powers, among others. Dawson has led numerous high-profile MDLs and class actions in insurance, product liability, and other cases. Her list of high-profile appointments is extremely impressive, and the firm does not exaggerate in describing her as "a go-to lawyer for clients nationwide."[119] Powers is co-lead of the firm's insurance practice and has vast experience representing major insurance companies in high-stakes class actions.[120]

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[118] *See Attorneys*, STUEVE SIEGEL HANSON, https://www.stuevesiegel.com/about-attorneys (last visited Jan. 20, 2023); *Attorneys*, MILLER SCHIRGER, https://www.millerschirger.com/docs/attorneys/contact.php (last visited Feb. 6, 2023).

[119] *See* Cari K. Dawson, ALSTON & BIRD, https://www.alston.com/en/professionals/d/dawson-cari-k (last visited Feb. 6, 2023). Dawson has been involved in other high-profile class action cases, including serving as lead class action defense counsel to Porsche Cars North America, Inc. in the Volkswagen "Clean Diesel" MDL and lead class action defense counsel to Toyota in the Toyota Unintended Acceleration MDL. *Id.*

[120] *See* Tiffany L. Powers, ALSTON & BIRD, https://www.alston.com/en/professionals/p/powers-tiffany-l (last visited Feb. 6, 2023). For example, Powers has represented "top-tier national insurance carriers in putative class actions or mass actions in over 30 states" and served as co-lead counsel in *Hovenkotter v. Safeco Ins. Co. of Illinois*, No. C09-0218JLR (W.D. Wash.), a "landmark case for the insurance industry." *Id.*

b. State Farm also retained Kristin Linsley, Deborah Stein, and Scott Edelman of Gibson Dunn to represent them at the district court level. Linsley clerked for Supreme Court Justice Antonin Scalia, was appointed in 2008 to be a Special Master by the Supreme Court, and has a national reputation for achieving results for her clients in high-profile, complex matters.[121] Stein is co-chair of Gibson's insurance practice group and has vast experience representing major insurance companies in class actions and MDLs.[122] Edelman has vast experience as a first-chair trial lawyer in numerous high-profile cases.[123] Moreover, in its effort to obtain interlocutory appellate review at the federal court of appeals level and certiorari from the U.S. Supreme Court on class certification issues, State Farm brought in one of the country's leading Supreme Court advocates: Theodore Boutrous, also from Gibson Dunn. Among his many accomplishments, Boutrous briefed and argued the seminal case, *Wal-Mart-Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), on behalf of Wal-Mart, achieving a decisive victory in one of the Supreme Court's most important and frequently cited class action cases.[124]

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[121] *See* Kirstin A. Linsley, GIBSON DUNN (lasted visited Feb. 1, 2023), https://www.gibsondunn.com/lawyer/linsley-kristin-a/.

[122] *See* Deborah L. Stein, GIBSON DUNN, https://www.gibsondunn.com/lawyer/stein-deborah-l/ (last visited Nov. 30, 2022). For example, Stein successfully represented Travelers in "dozens of cases brought by policyholders seeking 'business interruption' coverage for financial losses incurred during the COVID-19 pandemic" and has successfully defended insurance companies in cybersecurity class action litigation. *Id.*

[123] *See* Scott A. Edelman, GIBSON DUNN, https://www.gibsondunn.com/lawyer/edelman-scott-a/ (last visited Dec. 7, 2022). Those trials include *In re Korean Ramen Antitrust Litig.*, where he obtained a complete defense jury verdict and *Intertainment v. Franchise* Pictures, where he obtained a $122 million jury verdict. *Id.*

[124] *See* Theodore J. Boutrous Jr., GIBSON DUNN, https://www.gibsondunn.com/lawyer/boutrous-jr-theodore-j/ (last visited Feb. 6, 2023). Other Supreme Court cases argued by Boutrous include *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), and *Hollingsworth v. Perry*, 133 S. Ct., 2652 (2013). *Id.*

Few attorneys in the country can match the depth and breadth of Boutrous's appellate experience. And were that not enough, Boutrous was able to marshal other powerhouse appellate attorneys to submit amicus briefs in support of certiorari, including David Ogden of Wilmer Hale (representing the American Council of Life Insurers as amicus)[125] and Adam Unikowsky of Jenner & Block (representing the Chamber of Commerce as amicus).[126]

c. As noted, State Farm's trial team in *Vogt* was made up of attorneys from the Faegre Drinker and Stinson firms, who continued to represent State Farm in the subsequent cases. One of those attorneys who had a key role throughout all the cases and who argued that crucial Eighth Circuit appeal in *Vogt* was Todd Noteboom of Stinson. Noteboom has extensive class action and insurance expertise.[127] He is a familiar and respected face in the Eighth Circuit, having briefed and argued numerous cases in that court.[128]

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[125] *See* David W. Ogden, WILMER HALE, https://www.wilmerhale.com/en/people/david-ogden (last visited Feb. 6, 2023). Ogden is a nationally recognized litigator. He clerked for Justice Harry Blackmun and has served as the Deputy Attorney General of the United States (the number 2 position in the Department of Justice) and as Assistant Attorney General for the DOJ's Civil Division.

[126] *See* Adam Unikowsky, JENNER & BLOCK https://jenner.com/people/AdamUnikowsky (last visited Feb. 6, 2023). Unikowsky clerked for Justice Antonin Scalia and has significant appellate and Supreme Court experience. For example, Unikowsky briefed and argued *Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019), a landmark case involving a tribal corporation.

[127] *See* Todd A. Noteboom, STINSON, https://www.stinson.com/people-ToddNoteboom (last visited Feb. 6, 2023).

[128] For example, Noteboom argued *Zean v. Fairview Health Servs.*, 858 F.3d 520 (8th Cir. 2017), *Anderson v. EMC Mortgage Corp.*, 631 F.3d 905 (8th Cir. 2011); *Klosek v. American Express*, 370 F. App'x 761 (8th Cir. 2010); and *Syverson v. Firepond, Inc.*, 383 F.3d 745 (8th Cir. 2004). *See* United States Court of Appeals for the Eighth Circuit, *Oral Arguments by Party/Attorney*, https://www.ca8.uscourts.gov/oral-arguments-partyattorney (last visited Feb. 6, 2023).

d. Theodore Boutrous also served as appellate counsel in *Whitman* and *Jaunich*. Gibson Dunn also provided appellate assistance in *Bally*. And Sheppard Mullin also provided appellate work in *Vogt* and *Bally*.

74. The above discussion is just a partial list of the numerous experienced and high-profile attorneys whom State Farm retained to defend these cases. The company was obviously prepared to spend whatever it took to win this litigation, even if that meant simultaneously hiring multiple law firms and individual superstars within those firms. The fact that class counsel achieved such an impressive settlement against a multitude of top-flight defense law firms is a testament to class counsel's skill and persistence.

c) Class Counsel's Performance Against State Farm's Team

75. In the face of State Farm's formidable multi-firm team, class counsel performed exceptionally well. For instance:

- They obtained seven favorable class certification opinions and did not lose a single motion for class certification during the course of the litigation. They successfully defeated State Farm's request for Rule 23(f) review on three occasions. They also defeated State Farm's request for interlocutory review of Judge Breyer's first summary judgment order in *Bally* after Judge Breyer had certified the question for appeal. Class counsel did not lose a single *Daubert* ruling and amassed an impressive array of rulings from different judges affirming the admissibility of Mr. Witt's testimony. They defeated State Farm's summary judgment motions as to the issues of policy interpretation on the COI Charge and Expense Charge claims in Minnesota and Arizona and obtained a favorable report and recommendation from the magistrate judge in Texas at the time of the settlement. When they lost summary

judgment on the COI Charge claim in *Bally*, they were left with only the Expense Charge claim. But they faced a problem in that the court in *Vogt* had found that the damages model did not fit the Expense Charge claim. Class counsel worked with Mr. Witt to develop a new damages model for the Expense Charge claim, and Judge Breyer then granted summary judgment to the plaintiffs on that claim as to liability. He further rejected State Farm's *Daubert* challenges and motion for decertification of the class directed at the new model.

- The *Vogt* trial and Eighth Circuit appeal were a completely one-sided outcome, with class counsel recovering close to the entire amount they sought, and with the jury requiring just over two hours to deliberate after a four-day trial. There was no way for State Farm to spin this as anything but a complete loss. Likewise, the Eighth Circuit appeal in *Vogt* was a complete and total victory for plaintiffs. Although plaintiffs' successes at trial and in the Eighth Circuit in *Vogt* are notable and impressive, I am especially struck by State Farm's lack of success in securing U.S. Supreme Court review in *Vogt*. As noted above, State Farm brought in heavy hitter Ted Boutrous at the Supreme Court level, and he and State Farm were supported by prominent amicus organizations (U.S. Chamber of Commerce and American Council of Life Insurers), represented by experienced Supreme Court advocates. I would have expected class counsel likewise to bring in an experienced, high-profile Supreme Court advocate to match Boutrous and his team. After all, plaintiffs had more than $34 million at stake, and that recovery, as well as any recovery in any of these cases, could have been eliminated had the Supreme Court granted review and agreed with State Farm that the case was not a proper class action. But plaintiffs

did not bring in new, high-profile Supreme Court counsel but instead relied on the same team that had represented them so effectively in the lower courts. Thus, Bradley Wilders of Stueve Siegel Hanson was counsel of record in the Supreme Court, and all of the other lawyers listed on the Supreme Court opposition to certiorari were from either Stueve Siegel Hanson or Miller Schirger. As someone with vast experience at the Supreme Court level, I reviewed the opposition to certiorari filed by plaintiffs. In my view, the filing was superb. It responded to every major point raised by State Farm in seeking review and showed compellingly that there was no issue worthy of Supreme Court review. Based on plaintiffs' and State Farm's briefing, the Supreme Court denied certiorari. As I noted above, the appellate precedent in *Vogt*, and in particular the successful defense of the district court's class certification order, were key aspects of the present litigation against State Farm. If class counsel had not performed so effectively, the ability of any of the settlement class to recover would have been seriously imperiled, especially given the relatively low value of the claims individually.

iv. Preclusion of Other Employment Due to Acceptance of the Case

76. As a result of this multi-state litigation, the two primary law firms representing plaintiffs were clearly hampered in their ability to take on significant other work. *See* Siegel Att. Fees Decl. ¶ 9 ("Our investment of labor and expenses certainly limited significantly the other work we were able to take on during the four years following *Vogt.*"). As noted, both plaintiff firms are relatively small. The demands of this case were enormous by any measure. Three attorneys have billed more than 3000 hours on the case; at least one additional attorney billed

more than 2500 hours; and at least three additional attorneys have billed more than 700 hours. I am advised by class counsel that more than 28 depositions were taken on both sides (including depositions in *Vogt*, which the parties agreed could be used in other cases). Plaintiffs' expert (Mr. Witt) alone was deposed 11 times by State Farm in this litigation and three times in *Vogt*. Also, State Farm produced between 35,603 and 44,609 documents in each of the cases (although a number of those were the same in multiple cases). The extensive motions practice resulted in 13 summary judgment briefs, eight class certification or decertification motions, 13 *Daubert* motions, and four Rule 12 motions. Siegel Att. Fees Decl. ¶ 10. Plus, various other motions were litigated.[129] Clearly, this litigation has been a huge resource drain on the two principal plaintiffs' law firms involved and has significantly impeded the ability of those firms to take on other work. Given the major challenges in this case (*see* ¶¶ 45–62), I have no doubt that such commitment—at the expense of forgoing other lucrative work—was necessary and helps explain why plaintiffs achieved such an impressive settlement.

v. Customary Fee

77. In individual contingency-fee contracts, the attorneys' fees percentage is typically 33⅓ percent, although that percentage can go much higher if, for example, the case goes to trial.[130] Here, I understand that there were six contingent fee contracts at the 40 percent level

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[129] *See* Doc. 47-1, at 3–40.

[130] *See, e.g.*, *Galloway v. Kansas City Landsmen, LLC*, 833 F.3d 969, 973 (8th Cir. 2016) (noting that, in the district court's experience, "33% is in the middle of the range that attorneys performing contingency fee work" typically charge); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (noting that the "usual range for contingent fees is between 33 and 50 percent"); *Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781 (SRN/JSM), at *5 (D. Minn. July 13, 2015) ("courts have consistently awarded one-third contingent fees"); *Swinton v. Squaretrade, Inc.*, 454

and three at the 33⅓ percent level. This is not surprising: Contingent fee agreements of 33 percent or more are common.[131]

78. In assessing reasonable fees, numerous courts have cited the actual percentages in individual fee agreements. As the Seventh Circuit has explained:

> 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. The court must base the award on relevant market rates and the *ex ante* risk of nonpayment. To determine the market for attorney's fees, the court should

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F. Supp. 3d 848, 887 (S.D. Iowa 2020) (recognizing that a one-third contingency fee is "typical"); *Hite v. Vermeer Manufacturing Co.*, 361 F. Supp. 2d 935, 953 (S.D. Iowa 2005) (noting that a one-third contingency is standard in Iowa for contingency cases); *Will v. General Dynamics Corporation*, CIVIL No. 06-698-GPM, at *5 (S.D. Ill. Nov. 22, 2010) (noting that "a one-third fee is consistent with the market rate" for complex plaintiffs' attorney work); *Urethane*, 2016 WL 4060156, at *5 (noting that "a one-third fee is customary in contingent-fee cases, and indeed that figure is often higher for complex cases or cases that proceed to trial"); *Sanchez v. Roka Akor Chicago LLC*, No. 14-cv-04645, 2017 WL 1425837, at *6 (N.D. Ill. Apr. 20, 2017) (collecting cases noting that the usual contingent fee percentage is between 33⅓ percent and 50 percent); Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 381, 409 (1998) (noting that "standard contingent fees . . . [are] one-third of any recovery" and that fees "may vary with the stage at which the matter is resolved (*e.g.*, one-third of the recovery if the case settles before trial; forty percent thereafter)"); Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1971 (2017) (study finding that, in New York, contingent fees "are almost always one-third"); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 286 (1998) (survey of Wisconsin attorneys revealed that "a contingency fee of 33% was by far the most common," but the "range for those cases involving a suit but not a trial was 20% to 43%[, and] [f]or those going to trial, the range was from 25% to as high as 50%").

[131] *See, e.g.*, *Montague*, 2011 WL 3626541, at *3 ("A 33% fee award from the common fund in this case is consistent with what is routinely privately negotiated in contingency fee litigation."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: an Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 35 (2004) ("Substantial empirical evidence indicates that a one-third fee is a common benchmark in private contingency fee cases."); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 284–86 (1998) (noting that 33⅓ percent "is the standard contingency fee figure" and finding, in a study of Wisconsin attorneys, that "a contingency fee of 33% was by far the most common, accounting for 92% of those cases").

> look to actual fee contracts that were privately negotiated for similar litigation . . . .[132]

Similarly, the court in *Allapattah* noted 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, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."[133] Here, the market rate (the rate negotiated by individual plaintiffs and counsel) was clearly at or above 33⅓ percent. The fact that numerous individual plaintiffs agreed to a 40 percent contingency fee speaks volumes regarding the difficulty of the litigation and the fairness of a fee request of 33⅓ percent.

vi. Any Prearranged Fee

79. As noted (¶ 77), six individuals entered into private contingency fee contracts of 40 percent and three entered into private contingency fee contracts of 33⅓ percent.

vii. Time Limitations Imposed by the Client or the Circumstances

80. In awarding fees, a number of courts have emphasized the litigation pressures faced by plaintiffs. For example, in *Johnson*, the court noted that "priority work that delays the lawyer's other legal work is entitled to some premium."[134] In *League of Women Voters of*

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[132] *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011).

[133] 454 F. Supp. 2d at 1211. *Accord, e.g.*, *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."); *RJR Nabisco Inc. Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) (noting that "what should govern [fee] awards is . . . what the market pays in similar cases").

[134] *Johnson*, 488 F.2d at 718.

Missouri v. Ashcroft, the Eighth Circuit noted that the fee request was reasonable under the *Johnson* factors in light of, among other things, "the time-sensitive nature of the claims."[135] And in *Allapattah*, the court cited the "frantic pace" of the litigation in "giv[ing] significant weight to this factor in setting the [fee] percentage."[136]

81. Here, serious time limitations were imposed in this litigation. The various courts that were adjudicating individual cases in this litigation held both sides' feet to the fire, resolving the complicated class certification issues, pressing forward on case management and discovery, setting tight deadlines, and moving forward toward class trials in *Jaunich, Whitman*, and *Bally*. At the time of settlement, class counsel had completed discovery in several of the cases and had either recently received dispositive rulings (*Jaunich*, *Whitman*, and *Bally*) or were waiting on such rulings (*McClure, Page*). Prosecuting so many cases simultaneously is time consuming and limits the ability of class counsel to perform other work, particularly when the litigation spans multiple jurisdictions and (unlike in an MDL) does not involve the efficiencies of being assigned to a single judge.

82. More generally, because many of the class members in this life insurance litigation were elderly, class counsel were especially mindful of the need to move expeditiously

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[135] 5 F.4th 937, 941 (8th Cir. 2021); *see also In re CenturyLink Sales Practices & Sec. Litig.*, MDL No. 17-2795 (MJD/KMM), at *34 (D. Minn. Dec. 4, 2020) (noting that class counsel aptly responded to "a flurry of substantial and complex motions," including dispositive motions, filed by defense counsel).

[136] 454 F. Supp. 2d at 1215. *Accord, e.g., In re OSB Antitrust Litig.*, No. 06-cv-00826, slip op. at 5 (D. Pa. Dec. 9, 2008) (Dkt. No. 947); *Lucas v. Kmart Corp.*, No. 99-cv-01923, 2006 WL 2729260, at *6 (D. Colo. July 27, 2006).

in pursuing and responding to discovery; litigating summary judgment, class certification, and *Daubert* issues; and looking ahead to trial.

viii. Amount Involved and Results Obtained

83. As the Eighth Circuit has explained, "the degree of success obtained is the most critical factor in determining the reasonableness of a fee award."[137] For example, in the *Rite Aid Corporation Securities Litigation*, the court emphasized that the $126.6 million settlement was the largest recovery on record against auditors in a securities class action.[138] Here, class counsel successfully negotiated a non-reversionary cash settlement of $325 million, which is likely the largest all-cash cost of insurance settlement in history. Siegel Att. Fees Decl. ¶ 3. And it is clearly large by any class action standard.[139]

84. Moreover, under the settlement, every class member is entitled to meaningful recovery, representing a significant portion of their losses. *See* ¶¶ 26–27; Siegel Decl. ¶ ¶ 21-22.

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[137] *Vines v. Welspun Pipes Inc.*, 9 F.4th 849, 856 (8th Cir. 2021) (cleaned up).

[138] 362 F. Supp. 2d 587, 90 (E.D. Pa. 2005).

[139] *See, e.g.*, *Cook v. Rockwell Int'l Corp.*, 2017 WL 5076498 *12 (D. Colo. Apr. 28, 2017) (noting that the $375 million settlement was an "extraordinary result"); *In re Vitamins Antitrust Litig.*, 2004 U.S. Dist. LEXIS 31735, at *30 (D.D.C. Oct. 22, 2004) (noting the "remarkable" $365 million settlement). Indeed, even in securities settlements, where large settlements are not as infrequent, a downward trend in amounts over the past decade shows the highest total settlement value in 2021 was $153.7 million. In 2021, only 4 percent of all securities settlements exceeded $100 million. *See* Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-year Review*, 19, NERA (2021), https://www.nera.com/content/dam/nera/publications/2022/PUB_2021_Full-Year_Trends_012022.pdf; SECURITIES CLASS ACTION SERVICES, *The Top 100 U.S. Class Action Settlements of All Time*, at 6–17, https://www.issgovernance.com/file/publications/iss-scas-top-100-us-class-action-settlements-of-all-time-as-of-dec-2022.pdf (last visited Feb. 6, 2023) (finding only 40 securities settlements over $300 million since 1995).

The settlement reflects nearly all of the overcharges attributed to the Expense Charge claim and a third of the full alleged overcharges of the COI Charge claim. Importantly, State Farm's experts offered alternative damages calculations for both claims that ranged from zero damages to sixty percent of the full damages alleged by plaintiffs. And as the ruling in *Whitman* reflects, there was a significant risk of no recovery. Given State Farm's no-holds-barred defense and the risks faced by class counsel, the percentage of the overcharges recovered here is exceptional. By comparison, the same class counsel obtained a $90 million cash settlement for policyholders in *Spegele v. USAA Life Insurance Co.*, which "reflect[s] a significant percentage of the alleged damages," and the district court found that to be an "excellent result."[140] And that settlement was reached before any summary judgment rulings. Here, after considerably more effort, litigation spanning multiple jurisdictions, and several adverse rulings, class counsel obtained an even better result for a larger class.

85. Critically, all of the funds (after attorneys' fees, expenses, and any approved service awards) will go to the class. No funds are subject to reversion to State Farm. This is the polar opposite of a case in which class members end up with little value, such as a settlement involving worthless coupons,[141] or one where much or most of the fund is unclaimed and reverts

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[140] *See Spegele v. USAA Life Ins. Co.*, No. 5:17-CV-967-OLG, 2021 WL 4935978, at *6 (W.D. Tex. Aug. 26, 2021).

[141] *Compare, e.g., Swinton*, 454 F. Supp. 3d at 861 (noting that heightened scrutiny is required when a settlement includes coupons as compensation), *with Columbus Drywall & Insulation*, 2012 WL 12540344, at *3 (noting, in awarding attorneys' fees of 33⅓ percent, that "unlike some class settlements, the recovery here consists entirely of cash, rather than coupons or discounts on future purchases from the defendants").

to the defendant.[142] Here, as noted, class members will receive substantial compensation for their losses. In my opinion, this is a superb result, especially given the difficulties noted in ¶¶ 45–62. The fact that class counsel achieved such an impressive result weighs strongly in favor of the requested 33⅓ percent fee.

ix. Experience, Reputation, and Ability of Attorneys

86. As noted in ¶¶ 65–70, class counsel are highly skilled and experienced class action attorneys, whose prior representations included many important class action and MDL cases. And they were litigating against several of the country's most prominent and formidable law firms and individual attorneys within those firms. *See* ¶¶ 71–74.

x. Undesirability of the Case

87. Any lawyer considering involvement on the plaintiffs' side in this case had to understand that the litigation involved a huge commitment of time and resources, with an outcome that was anything but certain. I would note that the alleged violations here began decades ago, and class counsel appear to be the first and only lawyers willing to represent the settlement class. As noted, class counsel started these cases and filed several of them when the appellate precedent greatly favored State Farm. Plaintiffs were facing difficult legal, factual, class certification, and expert issues. *See* ¶¶ 45–62. And they were litigating against a defendant that was committed to devoting any and all resources necessary to achieve success. Moreover, as fiduciaries for the certified classes, class counsel could not simply cut their losses and quit when the case became

[142] *Compare, e.g.*, *Shanley v. Evereve, Inc.*, 22-CV-0319 (PJS/JFD), at *22 (D. Minn. Nov. 18, 2022) (unclaimed settlement amounts would revert to the defendant).

too challenging and expensive.[143] Indeed, the challenges of this litigation explain why several class representatives were willing to agree to 40 percent individual contingency fee agreements. *See* ¶ 77. These challenges also explain why (unlike in many other class actions) no other plaintiff firms emerged to file copy-cat class action complaints against State Farm. *See* Siegel Att. Fees Decl. ¶ 23.

xi. Nature and Length of Professional Relationship with the Client

88. For the vast majority of class members, there was no prior relationship. Courts have generally given little weight to this *Johnson* factor, noting that "[t]he meaning of this factor . . . and its effect on the calculation of a reasonable fee has always been unclear."[144] Here, to the extent that this factor is relevant at all, it is largely neutral.

xii. Awards in Similar Cases

89. Fee awards in other cases involving significant challenges confirm the reasonableness of the fees sought here. As I explain in detail below, the percentage requested here (33⅓ percent) is in line with percentages awarded in numerous other class actions. It also aligns with the fees awarded in other cost of insurance settlements like this one. As I noted, class counsel achieved a greater recovery here than they achieved in *Spegele v. USAA Life Ins. Co.*, and the

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[143] *See, e.g.*, *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (noting the "fiduciary duty owed [to] the class" by class counsel); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys . . . also owe the entire class a fiduciary duty once the class complaint is filed.").

[144] *Bruner v. Spring/United Mgmt. Co.*, No. 07-cv-02164-KHV, 2009 WL 2058762, at *9 (D. Kan. July 14, 2009).

court granted their fee request of 30 percent of the recovery in that case.[145] Likewise, class counsel obtained a $59.75 million cash settlement in *Larson v. John Hancock Life Ins. Co.*, No. RG16813803 (Alameda Co., Cal.), and the trial court awarded their requested fee of 30 percent there.[146] *See* also ¶ 95 and ¶ 96 (Table 1).

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90. As the above discussion reflects, analysis of the *Johnson* factors demonstrates the reasonableness of the fees sought here. The case imposed enormous demands on class counsel, and it entailed a significant risk that counsel would invest massive hours and substantial funds, only to recover nothing. The fee award sought is supported by the multi-jurisdictional and complex nature of the litigation, the extensive work required of class counsel under severe time pressure, the successful appellate work, and the compelling and historic $325 million settlement. This is anything but a garden-variety case, and in my opinion, the fee award should reflect that reality.

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[145] *Spegele v. USAA Life Ins. Co.*, No. 5:17-CV-967-OLG, 2021 WL 4935978, at *6 (W.D. Tex. Aug. 26, 2021).

[146] *Larson v. John Hancock Life Ins. Co. (U.S.A.)*, No. RG16813803, 2018 WL 8016973, at *6 (Cal.Super. May 08, 2018).

B. The Percentage Requested Is Supported by Awards in Other Class Actions, Including So-Called Mega-Fund Cases

91. In this section, I explain why, in my opinion, an award of 33⅓ percent is consistent with awards in other complicated class actions that resulted in impressive settlements. My focus here is on mega-fund settlements, *i.e.*, those above $100 million.[147]

92. I am fully aware that a fee of 33⅓ percent is above the average and median fee award in class actions, although it is close to the percentage range in the Eighth Circuit.[148] I also recognize that, in general, fee awards (as a percentage) tend to decline as the amount of the settlement increases, with the lowest percentage awards appearing in so-called mega-fund settlements.[149] The Eighth Circuit has not expressly or implicitly adopted this approach, however.

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[147] *See, e.g., Reyes v. Experian Info. Sols.*, No. 20-55909, at *4 (9th Cir. Apr. 8, 2021) ("megafund cases are usually those with settlements exceeding $100 million"); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 998-99 (mega-fund class actions involve settlements over $100 million); *Peace Officers' Annuity & Benefit Fund of Georgia v. DaVita Inc.*, No. 17-CV-0304-WJM-NRN, (D. Colo. July 15, 2021) ("megafund" settlement of over $130 million); *In re Snap Inc. Sec. Litig.*, No. 2:17-cv-03679-SVW-AGR (C.D. Cal. June 29, 2022) (approving mega-fund settlement of $154.7 million).

[148] *See, e.g.*, THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 151 (Fed. Judicial Ctr. 1996), *available at* http://www.uscourts.gov/sites/default/files/rule23_1.pdf (1996 study of four federal districts found that average and median awards ranged from 26 to 31 percent); Fitzpatrick, *supra* note 21, at 811, 833, 836 (finding, for 2006–2007 period, average and median of about 25 percent with the awards in the Eighth Circuit having an average of 26.1 percent and a median of 30 percent); Eisenberg, Miller & Germano (2017), *supra* note 21, at 947, 951 (finding average of 27 percent and median of 29 percent for 2009–2013 period with an average of 29 percent and a median of 32 percent in the Eighth Circuit); Eisenberg & Miller (2010), *supra* note 21, at 259 (finding, in 1993–2008 study, average fees of 24 percent and median fees of 25 percent with average of 25 percent and median of 30 percent in the Eighth Circuit).

[149] *See, e.g.*, Fitzpatrick, *supra* note 21, at 811 (noting that, in the eight cases involving settlements between $250 million and $500 million during 2006–2007, average and median awards

And importantly, the very concept that fees as a percentage should decline as the size of the fund increases has been roundly criticized by a number of courts, and I wholeheartedly agree with those criticisms. In *Syngenta*, for example, the district court explained that the declining percentage approach "fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery."[150] Similarly, in *Urethane*, the district court rejected objectors' reliance on statistical studies in arguing that fee awards should necessarily decrease with the size of the fund. To the contrary, in awarding attorneys' fees of 33⅓ percent in *Urethane*, the court stated:

> This Court appreciates that some courts have awarded lower percentages to avoid granting an excessive windfall to counsel under the unique circumstances of those cases. On the other hand, *the Court agrees with those courts who have noted that such a diminishing scale can fail to provide the proper incentive for counsel* . . . . [I]n the present case, . . . class counsel achieved extraordinary success in a very long litigation. Thus, use of a declining-scale approach is not appropriate here, and the Court will award fees based on the unique circumstances of the case.[151]

93. Likewise, the Third Circuit has noted that the "position [that fees should decrease with the size of the fund] has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply."[152]

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were 17.8 percent and 19.5 percent, respectively); Eisenberg, Miller & Germano (2017), *supra* note 21, at 947–48 (describing "scaling effect" where, "as [the] recovery amount increases, the ratio of the size of the attorneys' fee relative to the size of the recovery (*i.e.*, the fee percentage) tends to decrease" and finding that average and median fees for settlements greater than $100 million varied from "a low of 16.6% in 2009 to a high of 25.5% in 2011").

[150] *In re Syngenta*, 357 F. Supp. 3d at 1114 (*quoting Allapattah*, 454 F. Supp. 2d at 1212-13).

[151] *Urethane*, 2016 WL 4060156, at *5–6 (emphasis added).

[152] *In re Cendant Corp. Litig.*, 264 F3d 201, 284 n.55 (3d Cir. 2001).

In the *Rite Aid Securities Litigation*, the Third Circuit made clear that "there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizeable fund."[153] In the court's view, "the declining percentage concept does not trump the fact-intensive [attorneys' fees] analysis."[154] And in *Allapattah*, the court emphasized that a declining percentage reduction:

> is antithetical to the percentage of the recovery method[,] . . . the whole purpose of which is to align the interests of Class Counsel and the Class by rewarding counsel in proportion to the result obtained. By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for the Class Counsel to settle too early for too little.[155]

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[153] *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005), *as amended* (Feb. 25, 2005).

[154] *Id.*

[155] 454 F. Supp. 2d at 1213. *Accord, e.g., In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (similar).

Other courts have made the same points.[156] Moreover, numerous scholars agree that fee percentages should not necessarily be lower in mega-fund cases.[157] In my opinion, these courts

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[156] *See, e.g.*, *In re Equifax*, 999 F.3d at 1280 (11th Cir.) ("We decline to add an additional factor requiring the District Court to expressly consider the economies of scale in a megafund case . . . . [in part because r]equiring consideration of the economies of scale could also create 'perverse incentives,' as it may encourage class counsel to pursue 'quick settlements at sub-optimal levels.'"), *cert. denied*, *Huang v. Spector*, 142 S. Ct. 431 (2021), and *cert. denied*, *Watkins v. Spector*, 142 S. Ct. 765 (2022); *In re Xcel Energy, Inc., Secs., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 997 (D. Minn. 2005) (rejecting an objectors' contention that "courts traditionally account[] for economies of scale by awarding lower fees as the size of the fund increases") (citation omitted); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005) (noting that "there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund"); *In re Auto. Parts Antitrust Litig.*, No. 2:12-cv-00203, 2017 WL 3525415, at *2 (E.D. Mich. July 10, 2017) ("[T]here is no requirement that the Court necessarily apply a declining fee percentage based on the absolute dollar amount of [the settlement]. [O]ther federal courts have also rejected the so-called 'mega fund' adjustment to fee awards based solely on the size of a settlement. Instead, consideration must be given to, among other things, the stage of the litigation when a settlement has been achieved and the labor and expense that were required . . . to achieve the settlement."); *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2016 WL 6215974, at *16 ("[C]ourts have rejected a blanket rule that would automatically cap the fee percentage at a low figure when the class recovery is quite high."); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (rejecting "[o]bjectors argu[ment] that the fact of a large settlement justifies a reduction in the percent fee awarded" because "[s]uch an approach . . . fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery"); *Nichols v. SmithKline Beecham Corp.*, No. 00-cv-06222, 2005 WL 950616, at *21 (E.D. Pa. Apr. 22, 2005) (noting that "reducing the percentage of recovery awarded as a fee in this case to a mean fee percentage derived from other cases . . . [would be] an impermissibly formulaic approach"); *In re Linerboard Antitrust Litig.*, No. 98-cv-05055, 2004 WL 1221350, at *16 (E.D. Pa. June 2, 2004) (rejecting "sliding scale approach" as "economically unsound" and reasoning that "the highly favorable settlement was attributable to [class counsel's] skill and it is inappropriate to penalize them for their success"); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 8:10ML 02151 JVS (FMOx) (C.D. Cal. June 17, 2013), ECF No. 3802 ("The Court . . . agrees with . . . other courts . . . which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class.").

[157] *See, e.g.*, 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); Declaration of Professor Geoffrey P. Miller at 11, *In re Takata*

and scholars have correctly criticized the notion that fee percentages should necessarily decline with the size of the fund.

94. An empirical study conducted in 2010 by Professor Brian Fitzpatrick of Vanderbilt University School of Law showed an inverse relationship between fee percentages and the amounts of settlements.[158] Of the mega-fund settlements surveyed by Professor Fitzpatrick where the fund was between $250 million and $500 million—like the one here—the average and median fee awards were 17.8 percent and 19.5 percent, respectively.[159] There are several caveats that I would point out, however. First, as the court in *Syngenta* noted in discussing mega-fund cases involving lower percentage awards, in "many such cases, the court did not reject a higher request but rather accepted the low one."[160] Second, as I note below (¶ 96), I have identified 25 settlements since the 2010 study involving funds between $250 and $500 million in which percentage-based fees of 33 percent or greater were awarded. Third, by definition, the median

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Airbag Prods. Liab. Litig., No. 1:15-md-02599-FAM (S.D. Fla.) (Dkt. No. 2318-3) (filed Jan. 24, 2018), *available at* https://www.autoairbagsettlement.com/Content/Documents/Exhibit%20C%20to%20Response%20to%20Objections%20HN.pdf; Declaration of Brian T. Fitzpatrick at 14 & n.4, *In re High-Tech Employees Antitrust Litig.*, No. 11-CV-2509-LHK (N.D. Cal.) (filed May 8, 2015), *available at* http://www.hightechemployeelawsuit.com/media/303927/15-5-8__1079__fitzpatrick_decl__motion_for_attorney_fees.pdf; Declaration of Brian T. Fitzpatrick on the Reasonableness of Class Counsel's Requested Award of Attorneys' Fees at 7, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3269-1) (filed July 15, 2016), *available at* http://polyetherpolyolsettlement.com/docs/Reply_Mem_iso_Attys_Fees_etc_Exhibits_for_website.pdf.

[158] Fitzpatrick, *supra* note 21, at 845.

[159] *Id.* at 839 tbl.11. *See also Ark. Teacher Ret. Sys. v. State St. Corp.*, 25 F.4th 55, 65–66 (1st Cir. 2022) (discussing Professor Fitzpatrick's findings).

[160] *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1114 (D. Kan. 2018).

value is the value in the middle of a data set; of the values used to identify the median, half are necessarily equal to or *greater than* the median. And various values used to calculate an average may be equal to or *greater than* the average.[161] Of the eight cases surveyed by Professor Fitzpatrick with settlements in the $250 million to $500 million range, the standard deviation of the fee awards in those cases was 7.9 percent, showing large variability in the percentages arrived at in mega-fund cases like this one. Such variability supports Judge Lungstrum's remarks in *Syngenta* that, while

> [i]t is true that economies of scale may mean that a large percentage would result in an unacceptable windfall in some cases . . . the court does not agree that megafund cases should necessarily be subject to a diminishing scale by which the award percentage falls as the settlement amount grows. As the Court has noted previously, use of such a scale fails to provide the proper incentive for counsel and is fundamentally at odds with the percentage-of-the-fund approach . . . .[162]

Instead, all of the mega-fund cases, including the ones that awarded a lower percentage, were "decided on their particular facts, just as this case must be decided by application of the *Johnson* factors to its particular circumstances."[163] As I discuss throughout this Declaration, the extraordinary level of work and result achieved here in the face of enormous risk warrants a substantial fee, even though lower percentages might me more appropriate in different factual settings.

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[161] Indeed, from 1996 to 2011, the median percentage of attorneys' fees in mega-fund cases valued between $100 and $500 million was 23.9%; the median value from 2012–2021 was 25.8%, *see* McIntosh & Starykh, *supra* note 139, at 27.

[162] *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1114 (D. Kan. 2018).

[163] *Id.*

95. Indeed, there are numerous mega-fund cases with percentage-based fee awards equal to or greater than those sought here. As would be expected, those awards are based on a careful analysis of the specific facts and challenges of a given case. For example, in *In re Vitamins Antitrust Litigation,*[164] *Standard Iron Works v. ArcelorMittal,*[165] and *In re Flonase Antitrust Litigation,*[166] the courts awarded, respectively, 34.06 percent, 33 percent, and 33⅓ percent as attorneys' fees because of the complex issues involved, the quality of class counsel's work, and the results obtained.

96. The mega-fund cases cited in paragraph 95 are just three examples. In the table below, I have collected 48 mega-fund cases that involved fee awards of 30 percent or greater (twenty-five of which awarded 33 percent or more). Importantly, twenty-five of the cases post-date the publication of Professor Fitzpatrick's 2010 study.

TABLE 1: Fee Awards of 30 Percent or More in Mega-Fund Class Actions

Case	Recovery	Fee Award	Trial?
Cook v. Rockwell Int'l Corp., 2017 WL 5076498 (D. Colo. Apr. 28, 2017)	$375 million	40 percent	Yes
Lobo Exploration Co. v. BP Am. Prod., No. CJ-1997-72 (Oka. Dist. Ct., Beaver Cnty. Dec. 8, 2005)	$150 million	40 percent	No
Simmons v. Anadarko Petroleum Corp., No. CJ-2004-57 (Okla. Dist. Ct., Caddo Cnty., Dec. 23, 2008)	$155 million	40 percent	No

[164] No. MISC 99-197(TFH), 2001 WL 34312839, at *11–13 (D.D.C. July 16, 2001).

[165] No. 08-cv-05214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014).

[166] 951 F. Supp. 2d 739, 747–49 (E.D. Pa. 2013).

Case	Recovery	Fee Award	Trial?
Lauriello v. Caremark RX LLC, No. 01-cv-2003-006630.00 (Ala. Cir. Ct., Jefferson Cnty. Aug. 15, 2016)	$310 million	40 percent	No
In re Merry-Go-Round Enterprises, Inc., 244 B.R. 327 (Bankr. D. Md. 2000)	$185 million	40 percent	No
In re Combustion, Inc., 968 F. Supp. 1116 (W.D. La. 1997)	$127 million	36 percent	No[167]
In re Managed Care Litig. v. Aetna, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003)	$100 million	35.5 percent	No
Haddock v. Nationwide Life Ins. Co., No. 3:01-cv-01552-SRU (D. Conn. Apr. 9, 2015) (Dkt. No. 601)	$140 million	35 percent	No
In re Vitamins Antitrust Litig., No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001)	$365 million	34.06 percent	No
In re Syngenta AG MIR 162 Corn Litig., 357 F.Supp.3d 1094 (D. Kan. 2018)	$1.5 billion	33.33 percent	Yes
Hale v. State Farm Mut. Auto Ins. Co., 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018)	$250 million	33.33 percent	Yes
In re Loestrin 24 Fe Antitrust Litig., MDL No. 2472 (D.R.I. July 17, 2020)	$120 million	33.33 percent	No
DeLoach v. Phillip Morris Co., No. 1:00-cv-01235, 2003 WL 25683496 (M.D.N.C. Dec. 19, 2003)	$212 million	33.33 percent	No

[167] A trial was conducted in the parallel government enforcement action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., but the private class action based on plaintiffs' tort claims was settled prior to trial.

Case	Recovery	Fee Award	Trial?
In re Tricor Direct Purchaser Antitrust Litig., 1:05-cv-00340-SLR (D. Del. Apr. 23, 2009) (Dkt. No. 543)	$250 million	33.33 percent	No
In re Neurontin Antitrust Litig., No. 2:02-cv-01830 (D.N.J. July 6, 2014) (Dkt. No. 114)	$190 million	33.33 percent	No
In re Titanium Dioxide Antitrust Litig., No. 1:10-cv-00318 (D. Md. Dec. 13, 2013) (Dkt. No. 555)	$163.5 million	33.33 percent	No
In re U.S. Foodservice, Inc. Pricing Litig., No. 3:07-md-01894 (AWT) (D. Conn. Dec. 9, 2014) (Dkt. No. 521)	$297 million	33.33 percent	No
In re Urethane Antitrust Litig., No. 2:04-md-01616-JWL (D. Kan. July 29, 2016) (Dkt. No. 3276)	$835 million	33.33 percent	Yes
In re Relafen Antitrust Litig., No. 01-cv-12239-WGY (D. Mass. Apr. 9, 2004) (Dkt. No. 297) (direct purchaser litigation)	$175 million	33.33 percent	No
In re Flonase Antitrust Litig., 951 F. Supp. 2d 739 (E.D. Pa. 2013)	$150 million	33.33 percent	No
City of Greenville v. Syngenta Crop Prot., No. 3:10-cv-00188 (S.D. Ill. Oct. 23, 2012)	$105 million	33.33 percent	No
In re OSB Antitrust Litig., No. 06-cv-00826 (D. Pa. Dec. 9, 2008) (Dkt. No. 947)	$120.7 million	33.33 percent	No
In re Apollo Grp. Inc. Sec. Litig., No. 04-cv-02147-PHX-JAT, 2012 WL 1378677 (D. Ariz. Apr. 20, 2012)	$145 million	33.33 percent	Yes

Case	Recovery	Fee Award	Trial?
Cabot East Broward 2 LLC v. Cabot, 2018 WL 5905415 (S.D. Fla. Nov. 9, 2018)	$100 million	33.33 percent	No
In re Buspirone Antitrust Litig., No. 1:01-md-01413-JGK (S.D.N.Y. Apr. Nov. 18, 2003) (Dkt. No. 171)	$220 million	33.30 percent	No
In re Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467 (S.D.N.Y. 2009)	$510 million	33.30 percent	No
In re Broiler Chicken Antitrust Litig., 16 C 8637 (N.D. Ill. Oct. 7, 2022)	$181 million	33 percent	No
Standard Iron Works v. ArcelorMittal, No. 08-cv-05214, 2014 WL 7781572 (N.D. Ill. Oct. 22, 2014)	$164 million	33 percent	No
Dahl v. Bain Capital Partners, LLC, No. 1:07-cv-12388 (D. Mass. Feb. 2, 2015) (Dkt. No. 1095)	$590.5 million	33 percent	No
San Allen, Inc. v. Buehrer, No. CV-07-644950 (C.P., Cuyahoga Cnty., Ohio Nov. 25, 2014)	$420 million	32.7 percent	Yes
In re Auto. Refinishing Paint Antitrust Litig., No. MDL-1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008)	$105.7 million	32.7 percent	No
Allapattah Services, Inc. v. Exxon Corp., 454 F. Supp. 2d 1185 (S.D. Fla. 2006)	$1.06 billion	31.33 percent	Yes
In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995)	$220 million	30.9 percent	Yes
In re Domestic Drywall Antitrust Litig., MDL No. 2437 (E.D. Pa. July 17, 2018)	$190 million	30 percent	Yes
Peace Officers' Annuity & Benefit Fund v. DaVita Inc., Civil Action No. 17-cv-	$135 million	30 percent	No

Case	Recovery	Fee Award	Trial?
0304-WJM-NRN (D. Colo. July 15, 2021)			
In re Dole Food Co., Inc. Stockholder Litig., 2016 WL 541917 (Del. Ch. Feb. 10, 2016)	$113 million	30 percent	Yes
Weatherford Roofing Co. v. Employers Nat'l Ins. Co., No. 91-05637 (116th Tex. Dist. Ct., Dallas Cnty. Dec. 1, 1995)	$140 million	30 percent	Yes
In re (Bank of America) Checking Account Overdraft Litig., 830 F. Supp. 2d 1330 (S.D. Fla. 2011)	$410 million	30 percent	No
Tennille v. Western Union Co., No. 09-cv-00938-JLK-KMT, 2014 WL 5394624 (D. Colo. Oct. 15, 2014)	$180 million	30 percent	No
In re Linerboard Antitrust Litig., No. 98-cv-05055, 2004 WL 1221350 (E.D. Pa. June 2, 2004)	$202.5 million	30 percent	No
In re Home-Stake Prod. Co. Sec. Litig., MDL No. 153 (N.D. Okla. Jan. 2, 1990)	$185 million	30 percent	Yes
In re (Chase Bank) Checking Account Overdraft Litig., No. 1:09-md-02036 (S.D. Fla. Dec. 19, 2012) (Dkt. No. 3134)	$162 million	30 percent	No
In re (Citizens Bank) Checking Account Overdraft Litig., No. 1:09-md-02036 (S.D. Fla. Mar. 12, 2013) (Dkt. No. 3331)	$137.5 million	30 percent	No
In re Informix Corp. Sec. Litig., No. 97-cv-01289-CRB (N.D. Cal. Nov. 23, 1999) (Dkt. No. 471)	$132.2 million	30 percent	No
Kurzweil v. Philip Morris Co., Inc., Nos. 94-civ-2373 (MBM), 94-civ-2546 (BMB), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123 million	30 percent	No

Case	Recovery	Fee Award	Trial?
In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	$111 million	30 percent	No
Klein v. O'Neal, Inc., 705 F. Supp. 2d 632 (N.D. Tex. Apr. 9, 2010), *as modified* (June 14, 2010)	$110 million	30 percent	No
In re Prison Realty Sec. Litig., No. 3:99-cv-00458 (M.D. Tenn. Feb. 9, 2001) (Dkt. No. 108)	$104 million	30 percent	No

97. These cases show that, even in mega-fund cases, there is nothing unprecedented about awards in the range requested here. In my view, this case—even as a mega-fund case—justifies an award of 33⅓ percent, given the difficult factual, legal, and expert issues, contested class certification issues, formidable opposing counsel, multi-jurisdictional nature, and the significant risk of no recovery. That justification is even greater if the Court considers the trial on the merits in *Vogt*, which I view as a very strong fact favoring a 33⅓ percent award—a fact present in only 12 of the 48 cases listed in Table 1. As I have noted, there is no question that class counsel's success at trial in *Vogt*, the appellate rulings obtained there, and the avoidance of U.S. Supreme Court review were significant benefits to the settlement class. The fact that class counsel had to litigate the cases for several more years following *Vogt* and invest over 23,000 additional

hours of work to achieve this settlement speaks volumes regarding the risk to class counsel and the formidable defense by State Farm that class counsel overcame.[168]

98. Ultimately, in my view, it is erroneous to focus solely on averages and medians. Instead, a nuanced, fact-specific analysis of the 33⅓ percent fee request is critical. That analysis should be driven by the particular circumstances of this case, including the litigation's difficult legal and factual challenges, the precise work performed by class counsel, and the fact that class counsel litigated several cases up to the eve of trial—and, if *Vogt* is considered, prevailed in a hard-fought classwide trial and in the various appellate challenges—and subsequently negotiated a historic $325 million non-reversionary cash settlement. Relying on averages and medians without focusing on the crucial facts of *this* litigation and settlement would be a flawed approach.

99. Moreover, given that mega-fund class actions are less common than those with smaller recoveries, average and median fee percentages for those cases are subject to greater variation.[169] Notably, a number of mega-fund settlements have been securities class actions,

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[168] Of course, if the trial and appellate work in *Vogt* are considered, it would be appropriate to also consider that class counsel received significant attorneys' fees in *Vogt* equal to 33⅓ percent. But if the Court were to combine the $325 million settlement and the $41.6 million judgment in *Vogt* (which I understand was the total amount after post-judgment interest was included), that would put the total recovery in all the litigation against State Farm at $366.66 million. A total fee of 33⅓ percent of that amount would still fit comfortably within the awards listed in Table 1 and the precedent described above. Thus, while class counsel's total fee award is being recovered separately in *Vogt* and this case, the aggregate amount is still reasonable.

[169] *See, e.g.*, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2016 WL 6215974, at *16 (noting that with respect to mega-fund cases "there are fewer percentage awards to serve as a benchmark; consequently, there is some variability in the percentages awarded in these cases").

where average and median fee awards tend to be lower than the overall averages and medians.[170] Presumably, one reason for lower fees in securities cases is that the crucial issue of class certification—a major source of dispute here (*see* ¶¶ 54–55)—is generally less challenging in securities cases.[171] And in many securities settlements, private plaintiffs were helped by parallel government enforcement actions.[172] Moreover, in some mega-fund securities fraud settlements, courts have pointed to the lack of complex legal and factual challenges and the relative ease of achieving settlement in awarding lesser attorneys' fees.[173] In contrast, class counsel did not have the benefit of any of these risk-reducing factors here.

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[170] *See* Fitzpatrick, *supra* note 21, at 834.

[171] *See, e.g.*, *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, No. 3:05-MD-527 RLM, 2017 WL 1735541, at *5 (N.D. Ind. Apr. 28, 2017) (noting, in awarding attorneys' fees of 30 percent and distinguishing lower fee awards in comparable securities cases, that "securities cases . . . differ . . . in many ways, not least of which that class certification in securities cases is nearly automatic under today's laws"); *see also* Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 824 (2013) (noting that because "securities fraud suits . . . tend to involve overarching issues that impact all class members and seek damages that can be easily calculated," they "are commonly certified").

[172] *See, e.g.*, *PaineWebber Ltd. P'ships Litig. v. Geodyne Res., Inc.*, 999 F. Supp. 719, 725 (S.D.N.Y. 1998) ("[W]hile Class Counsel did not necessarily piggyback on the SEC's efforts from the beginning of these actions, their risk in litigating Class Members' claims was substantially reduced by pressure placed on [the defendant] in the SEC Order. Largely for this reason, the Court declines to award Class Counsel the doubling of its lodestar that they seek."); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1336 (S.D. Fla. 2001) (SEC's investigation and investigatory materials were "at least somewhat helpful" to class counsel, and merited a downward adjustment in class counsel's requested fee); *see also* Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 B.Y.U.L. Rev. 1239, 1297 (2003) (noting that "courts reduced fees [in securities class actions] based on their perception that enforcement actions by the SEC assisted plaintiffs' counsel or reduced the risk of loss").

[173] *See, e.g.*, *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742–43 (3d Cir. 2001) (noting that the "case was neither legally nor factually complex and did not require significant motion practice or discovery by [class counsel], and the entire duration of the case from the filing

100. In my opinion, the critical takeaway from the case law is that attorneys' fee awards should bear a relationship to the degree of risk involved.[174] Indeed, courts often expressly note the degree of risk assumed by class counsel in approving larger fee awards.[175] As one court noted in awarding attorneys' fees of 33 percent, "Courts recognize that the risk of receiving no recovery is a major factor in awarding attorneys' fees. [T]he riskier the case, the greater the justification for a substantial fee award."[176] Another court explained that "[a]ttorneys' risk is perhaps the foremost factor in determining an appropriate fee award."[177] Indeed, a number of the

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of the Amended Complaint to the submission of a Settlement Agreement to the District Court was only four months").

[174] *See, e.g.*, Eisenberg & Miller, *supra* note 131, at 27, 38 ("Fees are . . . correlated with risk: the presence of high risk is associated with a higher fee, while low-risk cases generate lower fees . . . . That fees are adjusted for risk is widely accepted in the literature."). In their more recent study, Professors Eisenberg, Miller, and Germano found that "the association between risk and fee percentage continues in the 2009–2013 data." Eisenberg, Miller & Germano (2017), *supra* note 21, at 958

[175] *See, e.g.*, *In re Life Time Fitness Inc., Tel. Consumer Prot. Act Litig.*, 847 F.3d 619, 623 (8th Cir. 2017) (affirming district court's percentage-based fee award because, among other things, the attorneys assumed significant risk in taking on the lawsuit and class counsel devoted significant time to the litigation); *Pollard v. Remington Arms Co.*, 320 F.R.D. 198, 198 (W.D. Mo. 2017) (noting that class counsel "faced great risks in this litigation" and that, in light of favorable verdicts obtained by the defendants elsewhere, "there was a considerable chance Plaintiffs would recover nothing"). *Accord, e.g., Larson v. Allina Health Sys.*, No. 17-cv-03835 (SRN/TNL), at *4 (D. Minn. May 22, 2020); *Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, Court File No. 10 cv 1712 (MJD/JSM), at *7 (D. Minn. Apr. 5, 2013); *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, Court File No. 11-MD-2247 ADM/JJK, at *23 (D. Minn. June 29, 2012).

[176] *Montague*, 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011).

[177] *Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *14 (S.D. Fla. Jan. 31, 2008). *Accord, e.g., In re Ocean Power Technologies, Inc.*, No. 3:14-cv-03799, 2016 WL 6778218, at *28 (D.N.J. Nov. 15, 2016) ("Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees."); *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 309

Johnson factors focus specifically on the risks imposed by the litigation, including the difficulty of the issues and the undesirability of the case. *See* ¶ 40 (*quoting Johnson* factors)

101. An emphasis on risk is especially relevant in mega-fund cases, where class counsel often invest many thousands of attorney hours and millions of dollars in expenses. For example, in *In re Charter Communications*, the court reasoned that the percentage-based fee award was "particularly reasonable given the risks undertaken . . . and the excellent results achieved [by class counsel]."[178] Similarly, in *Roberts v. Texaco*, the court observed that it is "the skill, ingenuity, effort and *risk* of counsel that, in the final analysis, produces the result."[179] As noted, this case exemplifies the significant risks undertaken by class counsel on behalf of the class to obtain a historic settlement.

102. In short, the requested fee of 33⅓ percent of a $325 million judgment fits comfortably within the case law, given the particular facts and circumstances of this case. In my opinion, the fact that this is a mega-fund case does not undermine that conclusion.

C. There Is No Need for a Lodestar Cross-Check

(S.D. Miss. 2014) (noting that "courts have found that class counsel ought to be compensated . . . for risk of loss or nonpayment assumed by carrying through with the case").

[178] No. 4:02-CV-1186 CAS, at *22 (E.D. Mo. June 30, 2005).

[179] *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197 (S.D.N.Y. 1997) (emphasis added). *Accord, e.g., In re Tyco Int'l Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) (noting that the case "involved a greater risk of non-recovery than other multibillion-dollar securities class action settlements" and emphasizing that, "[h]ad [class counsel] lost at summary judgment or fallen short of establishing liability at trial, they would have lost the tens of millions of dollars in expenses and all of the attorney time that they collectively invested in th[e] case").

103. The next issue is whether the fees requested by class counsel should be tested using a "lodestar cross-check"—*i.e.*, a procedure that courts sometimes use to verify the reasonableness of the fees sought based on sheer percentages.[180] This Court is certainly not *required* to conduct a lodestar cross-check.[181] Indeed, a lodestar cross-check can lead to the very harmful consequences that the percentage method is designed to avoid. As one court has noted, "[t]he lodestar analysis, even when used as a cross check to determine a reasonable percentage award, has the effect of rewarding attorneys for the same undesirable activities that the percentage method was designed to discourage, namely 'incentiviz[ing] [class counsel] to multiply filings

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[180] *See, e.g.*, *In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 999 ("Although not required, the court will exercise its discretion and verify the reasonableness of [an] attorney fee award by cross-checking it against lodestar.") (*citing Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)); *In re Crocs, Inc. Sec. Litig.*, No. 07-cv-02356-PAB-KLM, 2014 WL 4670886, at *4 & n.4 (D. Colo. Sept. 18, 2014) (describing role of lodestar cross-check as a means to confirm the reasonableness of a percentage fee award, and noting that the "cross-check calculation need entail neither mathematical precision nor bean counting" (citation omitted)).

[181] *See, e.g.*, *In re CenturyLink Sales Practices & Sec. Litig.*, No. CV 17-2832, 2020 WL 7133805, at *13 (D. Minn. Dec. 4, 2020) ("When the Court uses the percentage-of-the-benefit method, it is not required to cross-check it against the lodestar method.") (*citing Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017)); *In re Pork Antitrust Litig.*, CIVIL 18-1776 (JRT/JFD), at *20 (D. Minn. Sep. 14, 2022) (*citing Keil v. Lopez*, *supra*) (lodestar cross-check not required); *Jewell*, 167 F. Supp. 3d at 1241 ("district courts need not calculate a lodestar when applying the percentage method") (*citing Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994)); *Bacchi v. Mass. Mut. Life Ins. Co.*, No. 12-11280-DJC, slip op at 7 (D. Mass. Nov. 8, 2017) (noting that lodestar cross-check is discretionary); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, 2007 WL 119157, at *3 (M.D.N.C. Jan. 10, 2007) (noting that "[i]t is not necessary for the Court to conduct a lodestar analysis"); *Laffitte v. Robert Half Int'l Inc.*, 376 P.3d 672, 688 (Cal. 2016) (noting that courts "retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee"). This is not a case like *Health Republic Ins. Co. v. United States*, __ F. 4th __ , 2023 WL 1113158 (Fed. Cir. Jan. 31, 2023), in which the class notice promised class members that a lodestar cross-check would be conducted.

and drag along proceedings to increase their lodestar.'"[182] (*See* ¶ 36) It is not surprising, therefore, that even when approving relatively high percentage fee awards, a number of courts in the Eighth Circuit have used the percentage method without reference to a lodestar cross-check.[183] Many other jurisdictions follow a similar approach.[184] Indeed, in awarding attorneys' fees of 30 percent in the $410 million *Bank of America Checking Account Overdraft Litigation* settlement without conducting a lodestar cross-check, the court emphasized that "[t]he lodestar approach should not

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[182] *Jewell*, 167 F. Supp. 3d at 1242 (citation omitted).

[183] *See, e.g.*, *Baldwin v. Nat'l W. Life Ins. Co.*, 2:21-CV-04066-WJE, at *3 (W.D. Mo. June 16, 2022) (calculating and approving attorneys' fees by using the percentage method and without reference to a lodestar or lodestar cross-check); *Massey v. Shelter Life Ins. Co.*, No. 05-4106-CV-NKL, at *2 (W.D. Mo. Oct. 17, 2006) (same).

[184] *See, e.g.*, *Swedish Hosp. v. Shalala*, 1 F.3d 1261, 1266–70 (D.C. Cir. 1993) (lodestar analysis not required); *Fankhouser v. XTO Energy, Inc.*, 2012 WL 4867715, at *3 (W.D. Okla. Oct. 12, 2012) (awarding 36 percent fee without lodestar cross-check); *Hill v. Marathon Oil Co.*, No. 5:08-cv-00037, slip op. at 5–6 (W.D. Okla. Oct. 3, 2012), *available at* https://ecf.okwd.uscourts.gov/doc1/14912670884 (awarding 33⅓ percent fee without lodestar cross-check); *CompSource Okla. v. BNY Mellon, N.A.*, No. CIV 08-469-KEW, 2012 WL 6864701, at *8 (N.D. Okla. Oct. 25, 2012) (awarding 25 percent fee without lodestar cross-check); *Droegemueller v. Petroleum Dev. Corp.*, 2009 WL 961539, at *4 (D. Colo. Apr. 7, 2009) (awarding 33⅓ percent fee without lodestar cross-check); *Lewis v. Wal-Mart Stores, Inc.*, 2006 WL 3505851, at *2 (N.D. Okla. Dec. 4, 2006) (awarding 33⅓ percent fee without lodestar cross-check); *Millsap v. McDonnell Douglas Corp.*, No. 94-CV-633-H(M), 2003 WL 21277124, at *9 (N.D. Okla. May 28, 2003) (awarding 25 percent fee without lodestar cross-check); *CompSource Okla. v. BNY Mellon, N.A.*, No. CIV 08-469-KEW, 2012 WL 6864701, at *8 (N.D. Okla. Oct. 25, 2012) (noting, in not conducting a lodestar cross-check that, "a majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions.").

be imposed through the back door via a cross-check."[185] In 2022, a federal court in Georgia cited my declaration in the *Githieya* case in concluding that a lodestar cross-check was not required.[186]

D. In Any Event, a Lodestar Analysis Supports the Fees Requested

104. Even if the Court were to conduct a lodestar cross-check, such an analysis, in my opinion, would not cast doubt on the reasonableness of the fees requested by class counsel. In circuits where the cross-check is required, it is used primarily "to prevent counsel from receiving a windfall" and "does not supplant the court's detailed inquiry into the attorneys' skill and efficiency in recovering the settlement[.]"[187] The fee requested here is not a windfall.

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[185] *In re Bank of Am. Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 (S.D. Fla. 2011). Likewise, numerous scholars have argued that courts should not use a lodestar cross-check when applying the percentage method. *See, e.g.*, Declaration of Brian T. Fitzpatrick at 6–7, *In re High-Tech Employees Antitrust Litig.*, No. 11-CV-2509-LHK (N.D. Cal.) (filed May 8, 2015), *available at* http://www.hightechemployeelawsuit.com/media/303927/15-5-8__1079__fitzpatrick_decl__motion_for_attorney_fees.pdf; MORRIS RATNER, CIVIL PROCEDURE: CLASS ACTION FEE AND COST AWARDS 30–32 THE JUDGE'S BOOK: Vol. 1, Article 9 (2017); Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809, 1813–14 (2000).

[186] *Githieya v. Global Tel Link Corp.*, No. 1:15-cv-00986-AT (N.D. Ga. Aug. 30, 2022) ("The Court finds that a lodestar cross-check is not necessary here for the reasons set forth in the declaration of Professor Robert Klonoff.").

[187] *In re Cardinal Health Inc. Sec. Litigations*, 528 F. Supp. 2d 752, 764 (S.D. Ohio 2007) (awarding fee that resulted in multiplier of 6).

105. The lodestar method involves "multipl[ying] the number of hours worked by the prevailing hourly rate."[188] The court then considers the "less objective" factors of "the contingent nature of success" and the "quality of the attorneys' work."[189] I focus on these issues below.

1. The Hours Spent by Class Counsel Are Reasonable

106. I have been provided with copies of all time entries and hours summaries from Stueve Siegel Hanson and Miller Schirger. (I did not receive or review time records from the other firms.) Miller Schiger has spent 11,756 hours on the litigation, Stueve Siegel Hanson has spent 8,680 hours, and other firms have spent 2,674 hours on this litigation. In total, class counsel have spent 23,110 hours prosecuting this litigation.[190]

107. I see no red flags suggesting that the work of the plaintiffs' firms was inefficient or that there was needless duplication. Attorneys at the plaintiffs' law firms targeted specific tasks: overseeing overall strategy and case management; performing legal research; drafting briefs and memoranda; preparing for trial and oral arguments (and conducting trial and oral arguments);

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[188] *Vines v. Welspun Pipes Inc.*, 9 F.4th 849, 855 (8th Cir. 2021) (*quoting Childress v. Fox Assocs., LLC*, 932 F.3d 1165, 1172 (8th Cir. 2019); *cf. Skender v. Eden Isle Corp.*, 33 F.4th 515, 521 (8th Cir. 2022) ("the court may exclude hours that were not reasonably expended").

[189] *Anderson v. Travelex Ins. Servs.*, 8:18-CV-362 (D. Neb. Sep. 22, 2021) (*citing Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1312-13 (8th Cir. 1981). *Accord, e.g.*, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10-ml-02151-JVS (FMOx), 2013 WL 12327929, at *34 (C.D. Cal. July 24, 2013) (multiplier awarded based on "all the circumstances of [the] litigation, particularly the risks"); *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 680 (N.D. Tex. 2010), *as modified* (June 14, 2010) (noting that a multiplier was "warranted due to the risks entailed in this litigation"); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1271 (D. Kan. 2006) (finding multiplier resulting from lodestar cross-check "[e]minently reasonable based on the risks associated with counsel taking on this case").

[190] *See* Siegel Att. Fees Decl. Appendix A.

reviewing, analyzing, and coding documents; preparing for and conducting depositions; and drafting discovery responses and pleadings. In this litigation, one partner had primary responsibility for class certification and summary judgment briefing; another was primarily responsible for technical issues involving plaintiffs' expert (Mr. Witt); still another was responsible for *Daubert* briefing. Moreover, the paralegals assigned to the case focused on traditional paralegal tasks, such as preparation of potential exhibits for trial and depositions; document management; assisting with filing of court documents; and performing basic research. I have seen nothing to suggest that the case was overstaffed, that there was needless duplication of effort, or that attorneys or paralegals were focusing on unnecessary tasks.

108. Moreover, as discussed in class counsel's supporting Declaration (Siegel Att. Fees Decl. ¶ 12), class counsel made great efforts to minimize duplication of tasks. Class counsel has advised me that they sent more than one attorney to a hearing or deposition only when there was a clear need for doing so. Class counsel obtained State Farm's agreement to use the depositions of State Farm's employees in *Vogt* and did not re-depose those witnesses in any of these cases. Furthermore, they consolidated the depositions of State Farm's experts across the cases, taking only one or two depositions of each of State Farm's four experts. Despite their efforts at efficiencies, the substantial hours were necessary. *See* Siegel Att. Fees Decl. ¶ 13. For example, State Farm deposed Mr. Witt 11 times after having deposed him three times in *Vogt*. There was significant briefing in each case, including voluminous summary judgment briefing that spanned different precedent in different cases. While class counsel used the same expert and same damages framework, the specific damages model in each case had to be tailored to the policyholder data for each class, new reports had to be produced, and ultimately Mr. Witt and class counsel had to

prepare for each deposition. The same point can be made with respect to State Farm's multiple efforts to litigate class certification issues.

109. The billing records I reviewed confirmed class counsel's descriptions. This is true for both of the principal law firms. (As noted, I did not review billing records for the local counsel.)

110. Indeed, the billing records I reviewed for the two principal law firms contained clear and complete descriptions of work performed, with time broken down into tenth-of-an-hour increments.

2. The Billing Rates Proposed by Class Counsel Are Reasonable

111. To gauge the reasonableness of class counsel's rates, courts begin by referring to a reasonable hourly rate. "A reasonable hourly rate is usually the ordinary rate for similar work in the community where the case has been litigated."[191] But where "local community rates would not be sufficient to attract experienced counsel in a specialized legal field, the appropriate rate may be determined by reference to a national market or a market for a particular legal specialization."[192] Here, the litigation was nationwide in scope, involving lawsuits in numerous federal courts throughout the country. And it involved highly specialized universal life insurance

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[191] *Emery v. Hun*t, 272 F.3d 1042, 1048 (8th Cir. 2001) (*citing Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140 (8th Cir. 1982) (en banc)).

[192] *S.C. v. Riverview Gardens Sch. Dist.*, No. 18- 4162-CV-C-NKL, at *11 (W.D. Mo. Sep. 3, 2020) (cleaned up); *see also Dinosaur Merch. Bank v. Bancservices Int'l LLC*, No. 1:19 CV 84 ACL, at *8 (E.D. Mo. June 26, 2020) (noting that "in a specialized legal field, the appropriate rate may be determined by reference to a national market or a market for a particular legal specialization") (cleaned up); *Am. Gen. Life Ins. Co. v. Vision*, No. 19-CV-3016-CJW-KEM, at *24 (N.D. Iowa Nov. 19, 2019) (same).

issues. Thus, it is appropriate to focus on a national market, not simply on rates within the Western District of Missouri.

112. The designated hourly rates for the two law firms submitting most of the lodestar hours range from $675–$1,125 for partners, $700 for the ESI director, $695 for an of counsel, $450–$750 for associates, $225–$340 for paralegals, $225 for law clerks, and $250–$300 for staff. Courts have approved rates for prominent plaintiffs' complex litigation firms that are comparable to those designated by the plaintiffs' firms in this litigation. Stueve Siegel Hanson has an impressive record of having comparable rates approved, with several judicial opinions in 2018 and thereafter approving rates for firm personnel as high as $1,125 for partners, $695 for associates, and $340 for paralegals.[193]

113. Indeed, even higher rates than those requested here would be justified given the complicated, multi-jurisdictional nature of this case.[194] For example, in *Volkswagen Clean Diesel*,

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[193] *See, e.g.*, *Hays v. Nissan N. Am. Inc.*, No. 4:17-CV-0353-BCW (W.D. Mo. Sept. 30, 2022) ($1,125 for partners, $695 for associates, $340 for paralegals); *In re Equifax Customer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS 118209, at *259 (N.D. Ga. Mar. 17, 2020) (approving, *inter alia*, partner rates ranging from $935 (for Mr. Siegel) to $1,050 per hour), *aff'd in relevant part*, 999 F.3d 1247 (11th Cir. 2021); *Hapka v. Carecentrix, Inc.*, No. 2:16-cv-02372-KGG, slip op. at 3 (D. Kan. Feb. 15, 2018), *available at* https://ecf.ksd.uscourts.gov/doc1/07914925572 (*citing* Pls.' Mem. in Support of Mot. for an Award of Attorneys' Fees, Expenses, & Costs to Class Counsel & a Class Representative Service Award at 13–20 (filed Dec. 8, 2017)); *Criddell v. Premier Healthcare Services, LLC*, No. 16-cv-05842-R-KS (C.D. Cal. Jan. 16, 2018) (Dkt. No. 64) (approving hourly partner rate of $825 and hourly associate rate of $395); *Spangler v. Nat'l Coll. of Tech. Instruction*, No. 14-cv-03005-DMS (RBB), 2018 WL 846930, at *2 (S.D. Cal. Jan. 5, 2018) (approving Stueve Siegel Hanson's 2016 rates of $795 to $825 per hour for partners and $315 to $525 per hour for associates).

[194] *See, e.g.*, *Jeffboat LLC v. Office of Workers' Comp. Programs*, 553 F.3d 487, 490 (7th Cir. 2009) (noting that the "national market" is relevant to complex cases where the attorneys involved are "highly specialized"); *Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1995)

class counsel's hourly rates were as high as $1,600 for partners and $790 for associates.[195] And in *Nitsch v. DreamWorks Animation SKG, Inc.*, billing rates for partners were as high as $1,200 per hour.[196] In *In re LTL Management*, the court determined that rates ranging from $1,000 to

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(noting that the relevant market may be expanded where "special skills" are required by the litigation); *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 226, 232 (2d Cir. 1987) (approving "the use of national hourly rates in exceptional multiparty cases of national scope"); *Urethane*, 2016 WL 4060156, at *7 ("[T]he amounts at issue justified use of the best counsel charging the highest rates (just as [the defendant] used similarly high-priced counsel in the litigation)."); *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 660 (E.D. La. 2010) ("[T]he attorneys come from states across the country. Thus a more national rate is the appropriate pole star to guide the Court."); *Lucas v. Kmart Corp.*, No. 99-cv-01923, 2006 WL 2729260, at *4 (D. Colo. July 27, 2006) ("Hourly rates must reflect the prevailing market rates in the relevant community. Because of the significant resources and skill required, as well the risks entailed, to litigate large-scale actions on behalf of a class, very few attorneys handle such cases. Thus the relevant community . . . likely consists of attorneys who litigate nationwide, complex class actions.").

[195] *In re Volkswagen "Clean Diesel" Marketing, Sales Practices & Prods Liab. Litig.*, No. 3:15-md-02672-CRB, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017).

[196] No. 14-CV-04062-LHK, 2017 WL 2423161, at *9 (N.D. Cal. June 5, 2017). *See also, e.g., Whiteley v. Zynerba Pharm.*, Civil Action 19-4959, at *27 (E.D. Pa. Sep. 16, 2021) (hourly rates up to $1100 were reasonable and appropriate considering the market, skill level, and experience of the attorneys); *In re Cathode Ray Tube (Crt) Antitrust Litig.*, MDL 1917, No. 3:07-cv-5944 JST, 2016 WL 721680, at *43 (N.D. Cal. Jan. 28, 2016) (finding $875/hr for lead counsel "reasonable and responsible" for purposes of lodestar cross-check in antitrust class settlement); *In re Amgen Sec. Litig.*, No. CV 7-2536 PSG, 2016 U.S. Dist. LEXIS 148577, at *27 (C.D. Cal. Oct. 25, 2016) (approving "a billing rate ranging from $750 to $985 per hour for partners, $500 to $800 per hour for 'of counsels'/senior counsel, and $300 to $725 per hour for other attorneys"); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701-MJR-DGW, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (awarding fees of $974/hr for attorneys with at least 25 years of experience; $826/hr for attorneys with 15–24 years in ERISA class settlement); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-2509-LHK, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015) (billing rates for partners as high as $975/hr); *Cheesemore v. Alliance Holdings, Inc.*, No. 09-cv-413-wmc, 2014 WL 4415919, at *6 (W.D. Wis. Sept. 5, 2014) (approving rate of $895/hr for highest level partners in ERISA class settlement); *In re Heartland Payment Systems, Inc.*, 851 F. Supp. 2d 1040, 1087–88 (S.D. Tex. 2012) (noting hourly rates as high as $825/hr; court found the hourly rates were "within the 'prevailing market rates for lawyers with comparable experience and expertise' in complex class-action litigation and thus are reasonable.") (citation omitted); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 10-ml-02151

$1,875 per hour were reasonable for highly skilled partners in a bankruptcy trustee action.[197] Here, all of the proposed rates are at or below $1,125 per hour, despite the prominence and vast experience of the attorneys involved.

114. The rates proposed by the plaintiffs' firms here are also extremely reasonable when compared to rates for prominent defense firms, including State Farm's law firms here. It is instructive, in gauging billing rates for class counsel, to look at rates for the firm actually representing the defendant in the litigation.[198]

NS, 2013 WL 12327929, at *33 n.15 (C.D. Cal. July 24, 2013) (approving rates up to $950 per hour). Rates for paralegals in other major class actions have ranged from $150 to $490 per hour. *See, e.g.*, *In re Volkswagen*, 2017 WL 1047834, at *5 ($150 to $490 per hour); Co-Lead Class Counsel's Pet. for An Award of Atty's Fees at Add. 1, Ex. C, *In re Nat'l Football League Players' Concussion Injury Litig*., No. 12-MD-2323 (AB) (E.D. Pa.) (filed Feb. 13, 2017) ($215 to $325 per hour); *Astiana v. Kashi Co.*, No. 11-cv-01967-H (BGS), slip op. at 6 (S.D. Cal. Sept. 2, 2014) (Dkt. No. 241) ($245 to $315 per hour).

[197] No. 21-30589, at *6–9 (Bankr. D.N.J., May 20, 2022); *see also* Roy Strom, *Big Law Rates Topping $2,000 Leave Value 'In Eye of Beholder'*, BLOOMBERG, (Jan. 26, 2023) https://news.bloomberglaw.com/business-and-practice/big-law-rates-topping-2-000-leave-value-in-eye-of-beholder; Karen Sloan, *Lawyer's $2,465 Hourly Rate Draws Objection in J&J Talc Bankruptcy Case*, REUTERS, (May 24, 2022).

[198] *See, e.g.*, *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 n.18 (7th Cir. 1982) ("The rates charged by the defendant's attorneys provide a useful guide to rates customarily charged in this type of case." (citation omitted)); *Ruiz v. Estelle*, 553 F. Supp. 567, 589 (S.D. Tex. 1982) ("In an action for which no adequate parallel can be found, the best example of a fee paid for similar work is that paid by opposing counsel in the same action."); *cf. I.W. v. School Dist. of Philadelphia*, No. 14-3141, 2016 WL 147148, at *13 (E.D. Pa. Jan. 13, 2016) ("Evidence of the hours expended by the non-prevailing party on the same task is relevant to the determination of whether the hours requested by the prevailing party are reasonable." (citations omitted)); *Mitroff v. Xomox Corp*., 631 F. Supp. 25, 28 (S.D. Ohio 1985) ("Pertinent to any consideration of a reasonable amount of time expended in the prosecution of a law suit is the amount of time expended by the defendant in defending that law suit.").

115. Here, partners at State Farm's law firms bill at substantially higher rates than plaintiffs' counsel here are proposing. For instance, Gibson Dunn partners reportedly bill as high as $1,625 per hour.[199] Even back in 2015, a fee application of Gibson Dunn revealed rates for partners in a bankruptcy case as high as $1,475.[200] And a 2019 fee application of Gibson Dunn shows that bankruptcy partners bill from $1,095 to $1,285 and associates bill from $850 to $945.[201] Other sources confirm similarly high rates for Alston & Bird. A 2019 fee application of Alston & Bird revealed that the firm's partners bill from $700 to $925 per hour, and associates bill from $385 to $630 per hour.[202]

116. The same is true for other major defense law firms. In recent years, some partners at several major law firms have been billing at $1900 or more per hour.[203] Hogan Lovells has

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[199] Tiffany Stecker, *Gibson Dunn Lawyers Hired by California Redistricting Commission*, Bloomberg Law (June 30, 2021, 8:18 PM), https://www.bloomberglaw.com/bloomberglawnews/business-and- practice/X16EFV3G000000?bna_news_filter=business-and-practice#jcite.

[200] *See* Final Application of Gibson, Dunn & Crutcher LLP as General Bankruptcy and Restructuring Co-Counsel for Debtors and Debtors-in-Possession for Allowance of Compensation for Services Rendered and Reimbursement of Expenses Incurred for the Final Period Mar. 12, 2015–Nov. 19, 2015, at 4, *In re SRC Liquidation, LLC*, No. 15-10541-BLS (Bankr. D. Del.) (Dkt. No. 1404) (filed Dec. 15, 2015).

[201] *See* Summary of Seventh Monthly Application of Gibson, Dunn & Crutcher LLP as Co-Counsel to the Debtors and Debtors-in-Possession for Allowance of Compensation and Reimbursement of Expenses Incurred for the Interim Period from February 1, 2019 Through and Including February 28, 2019, at 2, *In re Brookstone Holdings Corp.*, No. 18-11780-BLS (Bankr. D. Del.) (Dkt. No. 1125) (filed Mar. 18, 2019).

[202] *See* First and Final Application For Approval of Compensation And Reimbursement of Expenses For Alston & Bird Llp as General Reorganization Counsel For Debtor, at 8, *In re XTAL Inc.*, No. 18-52770-MEH (Bankr. N.D. Cal.) (Dkt. No. 247) (filed June 26, 2019).

[203] *See* Strom, *supra* note 197 (identifying numerous firms as examples).

advised a bankruptcy court that the hourly rate for partners is between $950 and $2,465, $910–$1,735 for counsel, $605–$1,055 for associates, and $275–$550 for paralegals.[204]

117. Even data from several years ago supports rate of well over $1,000 per hour for senior partners. For instance, a 2016 American Bar Association report (relying on public filings in Chapter 11 bankruptcy cases) noted billing rates as high as $1,475 at Proskauer Rose; $1,450 at Ropes & Gray; and $1,425 at both Akin Gump Strauss Hauer & Feld and Skadden Arps Slate Meagher & Flom.[205] Indeed, according to some sources (discussing rates in 2014 and 2015), some prominent partners at top law firms have billing rates as high as $2,000 per hour.[206] For associates, a 2011 study found rates at DLA Piper as high as $730; at Kay Scholer, rates as high as $705; and

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[204] *See* Objection of the United States Trustee to Debtor's Application for Retention of Hogan Lovells Us Llp as Special Counsel, Effective as of April 4, 2022, at 5, *In re LTL Management*, No. 21-30589 (MKB) (Bankr. D.N.J.) (Dkt. 2324) (filed May 20, 2022); *but see* No. 21-30589, at *6–9 (Bankr. D.N.J., May 20, 2022) (concluding that $1,875 per hour was reasonable for highly skilled partners in a bankruptcy trustee action, while rejecting rates of $2,465 per hour as unreasonable).

[205] *See* Martha Neil, *Top Partner Billing Rates at BigLaw Firms Approach $1,500 Per Hour*, ABA JOURNAL (Feb. 8, 2016), http://www.abajournal.com/news/article/top_partner_billing_rates_at_biglaw_firms_nudge_1500_per_hour.

[206] *See, e.g.*, Aebra Coe, *What Do the Highest-Paid Lawyers Make an Hour?*, Law360 (May 11, 2016), https://www.law360.com/legalindustry/articles/794929/what-do-the-highest-paid-lawyers-make-an-hour- (noting that research conducted by the BTI Consulting Group revealed that rates "reached $2,000 per hour" in 2016, up from the previous high of $1,600 per hour in 2015); Kathryn Rubino, *$2,000 An Hour Lawyers: That's One Way to Fund Salary Increases*, ABOVE THE LAW (June 13, 2016), https://abovethelaw.com/2016/06/2000-an-hour-lawyers-thats-one-way-to-fund-salary-increases/ (similar); *see also* Karen Sloan, *$1,000 Per Hour Isn't Rare Anymore*, NAT'L L.J. (Jan. 13, 2014), https://www.law.com/nationallawjournal/almID/1202637587261/NLJ-Billing-Survey%3A-%241%2C000-Per-Hour-Isn%27t-Rare-Anymore/ (noting that "four-figure hourly rates for in-demand partners at the most prestigious firms don't raise eyebrows—and a few top earners are closing in on $2,000 an hour").

at Winston & Strawn, rates as high as $600.[207] Naturally, today's rates for partners and associates at prominent firms are even higher, and as noted, rates at or above $1,900 per hour for partners appear to be increasingly common.[208] At Covington, for example, junior associates bill at $595 per hour and senior partners bill from $1,445 to $2,300 per hour.[209]

118. The rates designated by the plaintiffs' attorneys and paralegals (and other staff) in the present case are comparable to (or below) the above-described billing rates of major defense firms. Importantly, no attorney from any of the plaintiffs' firms proposes rates for partners more than $1,125 per hour, and even that rate was designated solely for two senior Stueve Siegel partners who of course also delegated significant work to attorneys billing at lower rates. Likewise, the range of billing rates of the associate attorneys involved here—$450 to $750—is significantly less than many defense firms charge. Indeed, the hourly rates for a number of the

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[207] *See A Nationwide Sampling of Law Firm Billing Rates*, NAT'L L.J. (Dec. 19, 2011), *available at* http://tpmlaw.com/global_pictures/NationalLawJournal2011.PDF.

[208] *See*, e.g., Strom, *supra* note 197 (noting that Hogan Lovells bills up to $2,465 per hour and Latham & Watkins bills up to $2,075 per hour); Debra Cassens Weiss, *BigLaw partner's hourly billing rate of nearly $2,500 draws objection from bankruptcy trustee*, ABA Journal (May 25, 2022), https://www.abajournal.com /news/article/biglaw-partners-hourly-billing-rate-of-nearly-2500-draws-objection-from-bankruptcy-trustee (noting that billing rates "have been creeping toward the $2,000 mark"); Hugh A. Simons, *Why Elite Law Should Raise Rates*, THE AM. LAWYER (Feb. 26, 2018), https://www.law.com/americanlawyer/2018/02/26/why-elite-law-should-raise-rates/ (noting that attorneys' hourly billing rates "rose by 33 percent from 2007 to 2017" and that rates continue to increase, "with standard rates rising at 3 percent [per year]").

[209] Debra Cassens Weiss, *This former attorney general now bills for BigLaw at nearly $2,300 per hour*, ABA Journal, (April 19, 2021), https://www.abajournal.com/news/article/this-former-attorney-general-now-bills-for-biglaw-at-nearly-2300-an-hour; *see also Lechner v. Mut. of Omaha Ins. Co.*, 8:18CV22, at *5 (D. Neb. Feb. 8, 2021) (noting class counsel's "rates of between $535.00 per hour and $970.00 per hour for attorneys . . . are within the range of market rates for attorneys of their experience and expertise").

Miller Schirger *partners* involved here are in line with that of *associates* at Gibson Dunn. Moreover, as noted (¶ 112), the plaintiffs' law firms involved here have been awarded hourly rates comparable to those requested here.

119. The blended rate for Stueve Siegel Hanson in this case is $792.47 per hour. The blended rate for Miller Schirger is $706 per hour. The other firms' blended rate is $669.06 per hour. These rates are consistent with or below blended rates in various other major multi-state class actions. For example, in *NFL Concussion*, the court approved a blended rate of $861.28 per hour for Seeger Weiss specifically, and a blended rate of $623.05 per hour for all common benefit counsel.[210] In *Jackson County v. Trinity Industries*, the two principal law firms here obtained approval of a $662 blended rate.[211]

120. In any event, in my opinion, it is not particularly useful to compare the blended rate here with blended rates in other cases, especially those in which the tasks performed were very different. Here, class counsel used the same team to prosecute this case, and the related cases, that it used in the *Vogt* case—several of whom I understand were associates when that case started but are now partners. It would not have been efficient or beneficial to the settlement class to replace these experienced and successful attorneys with less experienced attorneys who knew little or nothing about the State Farm litigation. In addition, much of the work was, by its very

[210] *See In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, slip op. at 20-21 (E.D. Pa. May 24, 2018) (Dkt. No. No. 10019) (approving lodestar for Seeger Weiss); *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1635648, at *9 (E.D. Pa. Apr. 5, 2018) (approving blended rate of $623.05 per hour for all common benefit counsel).

[211] *Jackson Cnty. V. Trinity Indus.*, No. 1516-CV23684, at *4 (Cir. Ct. Mo. 2022).

nature, high-level work and thus not suitable for a paralegal or low-level attorney.[212] For example, the firm could not assign paralegals or recent law school graduates to brief and argue class certification motions, conduct high-level settlement negotiations, interview and work with experts, or brief and argue complicated legal issues in trial or appellate courts. It should not be surprising, therefore, that of the 14 attorneys involved from Miller Schirger and Stueve Siegel Hanson, the top four billers (three with more than 3,000 hours and one with more than 2,500 hours) are partners. Given the nature of the tasks that make up many of the hours spent by class counsel, the blended rate here is very reasonable. Simply comparing the blended rates here to those in other cases—in which the mix of tasks performed may have been very different—is not a very probative exercise.

E. Additional Expected Hours Should Be Included

121. When calculating the lodestar, courts routinely take into account hours that class counsel reasonably anticipate spending on the matter after final approval (*e.g.*, hours to be spent on claims administration issues).[213] In addition to the 23,110 hours they have spent on the case

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[212] *See, e.g.*, *Young v. Polo Retail, LLC*, No. 02-cv-4546-VRW, 2007 WL 951821, at *7 (N.D. Cal. Mar. 28, 2007) ("[T]he central role of settlement negotiations in this litigation—and the central role of senior attorneys in those negotiations—suggest that typical blended hourly rates . . . are inappropriate here.").

[213] *See, e.g.*, *Tennille v. Western Union Co.*, No. 09-cv-00938-MSK-KMT, 2013 WL 6920449, at *3 (D. Colo. Dec. 31, 2013) (instructing plaintiffs to include in their lodestar calculation "an estimate of the future hours that will be necessary to carry the case to completion under the Settlement Agreement"); *Reyes v. Bakery & Confectionery Union*, 281 F. Supp. 3d 833, 853, 856–57 (N.D. Cal. 2017) (including estimated hours for "future work" related to, *inter alia*, "managing class members' claims"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), slip op at 8 (N.D. Cal. Mar. 17, 2017) (granting fee request reserving "an additional 21,000 hours to (1) guide the hundreds of thousands of Class Members through [claims period]; (2) assist in the implementation and supervision of the

to date, class counsel expect to spend at least 1,888 hours in the future due to the size of the class and the scope of the settlement administration process. Siegel Att. Fees Decl. ¶ 6. This estimate is based on class counsel's experience in two prior cost of insurance settlements. It is conservative because it does not account for any possible appellate work if there are objections and appeals to the settlement. Additional work will include managing the settlement, responding to class member inquiries, ensuring class members receive their distributions, and overseeing the settlement administration. In particular, when the settlement provides for the distribution of checks without claim forms being submitted, there are likely to be a substantial number of uncashed or returned checks. Likewise, given that the class spans policyholders who purchased their policy decades ago, the death of policyholders will likely raise a significant number of individual issues that need to be managed, probably for years to come. For example, I am advised that class counsel have already started receiving inquiries by beneficiaries and heirs who received the notice on behalf of a deceased class member. As noted, there is authority that such post-settlement approval hours should be included in the lodestar.

F. The Multiplier Is Well Justified Based on the Facts

122. Based on the 23,110 hours expended thus far and the hourly rates proposed, class counsel's lodestar would be $16,977,873. That calculates to a multiplier of 6.4, not counting hours going forward. Counting 1,888 hours going forward as well (based on class counsel's estimate),

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Settlement . . . ; and (3) defend and protect the settlement on appeal, among other things" (cleaned up)); *AT&T Mobility*, slip op at 16–17 (*citing* the "considerable ongoing efforts" required of class counsel to implement the settlement as a "factor [that] supports a generous reward").

the total lodestar is $18,364,930 using the overall blended rate of $734.67 for the 1,888 anticipated hours, resulting in a multiplier of 5.9. In my view, either multiplier is fully justified here.

123. As a threshold matter, I believe that class counsel are clearly entitled to more than just their hours multiplied by their hourly rates. When using the lodestar method to calculate fees, courts often apply a multiplier "to compensate for the risk of [the] litigation."[214] When using the lodestar as a cross-check on a percentage-based fee, the multiplier is simply designed to assess whether there are reasons to question the reasonableness of the resulting fee. In analyzing the multiplier, the ultimate standard is "reasonableness," and courts often look to those *Johnson* factors that are not already subsumed within the lodestar calculation (excluding, for example, "the time and labor involved," because class counsel's hours and rates are already accounted for by the lodestar).[215]

124. In this case, there is no question that class counsel reasonably expected to be awarded more than just their hours multiplied by their hourly rates (assuming that the Court were to apply the lodestar method as the primary method or as a cross-check). As explained in ¶¶ 45–

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[214] *Been*, 2011 WL 4478766, at *10.

[215] *See, e.g.*, *Keil v. Lopez*, 862 F.3d 685, 697 (8th Cir. 2017) ("To determine the reasonableness of a fee award . . ., district courts may consider relevant factors from the twelve factors listed in *Johnson*"); *In re Miniscribe Corp.*, 309 F.3d 1234, 1243 (10th Cir. 2002) (applying "*Johnson* criteria for determining the multiplier . . . to be applied to the lodestar amount"); *Swinton v. Squaretrade, Inc.*, 454 F. Supp. 3d 848, 884 (S.D. Iowa 2020) ("the lodestar amount can be adjusted, up or down, to reflect the individualized characteristics of a given action . . . [and courts] must consider relevant factors from the twelve [*Johnson*] factors") (cleaned up); *Koehler v. Freightquote.com, Inc.*, No. 12-2505-DDC-GLR, 2016 WL 3743098, at *6–9 (D. Kan. July 13, 2016) (approving class counsel's requested multiplier where "the other *Johnson* factors demonstrate[d] the reasonableness of the fee").

62, class counsel took on litigation that entailed enormous risk and challenges. It would be illogical and unfair to rely solely on standard billing rates, without enhancement, in a situation where there was a serious likelihood that class counsel would recover nothing. Class counsel's designated hourly rates do not reflect that risk. As noted, those rates are in line with (or below) those awarded to plaintiffs' firms (before factoring in a multiplier) in other major class actions. *See* ¶¶ 112–113. And they are comparable to—or below—what prominent defense firms charge (*see* ¶¶ 115–118), even though such defense firms are paid their hourly rates regardless of whether they win or lose.[216]

125. A multiplier of either 5.9 or 6.4, while higher than average, is not high here given that this is anything from a routine or average case. This litigation entailed enormous risk, as detailed above (*see* ¶¶ 45–62), and class counsel had to litigate against a defendant that was willing to spend whatever it took to achieve success.

126. A lodestar multiplier "need not fall within any pre-defined range, so long as the court's analysis justifies the award, such as when the multiplier is in line with multipliers used in other cases."[217] In the present context, other courts have noted similar case-specific factors in upholding multipliers greater than 5.9 or 6.4, especially where (as here) class counsel achieved extraordinary results. For example, in approving a multiplier of 6 in *Cardinal Health*, the district

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[216] *See, e.g.*, *Lowery v. City of Albuquerque*, No. CIV 09-0457 JB/WDS, 2013 WL 1010384, at *44 (D.N.M. Feb. 27, 2013) (noting that class counsel "had to take considerable risks so its hourly rate should be more"); *see also* note 215, *supra* (cases noting multiplier's role in compensating plaintiffs' attorneys based on various *Johnson* factors).

[217] *In re Xcel Energy, Inc., Secs., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005).

court noted that "the risk of non-recovery [was] the most important factor in the fee determination."[218] Similarly, in the *Toyota Unintended Acceleration* case, the district court emphasized that a multiplier should be awarded based on "all the circumstances of [the] litigation, *particularly the risks*."[219] In *Rite Aid*, the court noted, in approving a 6.96 multiplier, that (like the historic life insurance settlement here) the case involved the largest recovery against an auditor in a Rule 10b-5 securities action.[220] Similarly, in *Cardinal Health*, the court approved a multiplier of 6, even though it was outside "the normal range of lodestar multipliers," emphasizing the "outstanding settlement" and the "noticeable skill of counsel."[221] Likewise, in *Credit Default Swaps*, the court approved a lodestar multiplier "of just over 6," noting the enormous time expended, the risk undertaken, and "[t]he quality of work performed on behalf of the class by its counsel," which the court characterized as "superb."[222] These points apply fully here.

127. Notably, the Eighth Circuit has noted that a multiplier of 5.3 "does not exceed the bounds of reasonableness."[223] Likewise, the Ninth Circuit upheld a multiplier of 6.85 in *Steiner v. American Broadcasting Co., Inc.*, emphasizing that it was "well within the range of

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[218] 528 F. Supp. 2d at 766.

[219] *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10-ml-02151-JVS (FMOx), 2013 WL 12327929, at *34 (C.D. Cal. July 24, 2013) (emphasis added).

[220] 362 F. Supp. 2d 587, 589–90 (E.D. Pa. 2005).

[221] *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752 (S.D. Ohio 2007).

[222] No. 1:13-md-02476, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016).

[223] *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019) (citation omitted).

multipliers that courts have allowed."[224] Another court has noted that "[c]ourts regularly award lodestar multipliers of up to *eight* times the lodestar, and in some cases, even higher multipliers."[225] And in *In re Charter Communications Securities Litigation* the court noted, in awarding a multiplier of 5.61, that the multiplier was "fully justified here given the effort required, the hurdles faced and overcome, and the results achieved."[226]

128. Importantly, I believe the multiplier here can be explained in large part by class counsel's lean and efficient staffing of the case (*see* ¶¶ 106–108). Counsel could have ensured a higher lodestar (and thus a lower multiplier) by adding attorneys even when additional assistance was not essential or by duplicating work already performed in *Vogt*. But they should be commended—not penalized—for taking a lean staffing approach. As the Eighth Circuit has

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[224] 248 F. App'x 780, 783 (9th Cir. 2007).

[225] *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (emphasis added). *See also, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6, app. (9th Cir. 2002) (collecting cases applying multipliers ranging as high as 19.6); *In re Credit Default Swaps Antitrust Litig.*, No. 1:13-md-02476, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (multiplier of 6.2); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (multiplier of 6); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589–90 (E.D. Pa. 2005) (multiplier of 6.96); *Stop & Shop Supermarket Co. v. Smith-Kline Beecham Corp.*, No. Civ. A. 03-4578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (multiplier of 15.6); *In re Buspirone Antitrust Litig.*, No. 1:01-md-01413-JGK, slip op. at 8 (S.D.N.Y. Apr. 18, 2003) (Dkt. No. 171) (multiplier of 8.46); *Newman v. Carabiner International, Inc.*, No. 1:99-cv-02271, slip op. at 11 (S.D.N.Y. Oct. 25, 2001) (Dkt. No. 31) (multiplier of 7.7); *In re 3COM Corp. Sec. Litig.*, No. C-97-21083, slip op. at 12 (N.D. Cal. Mar. 9, 2001) (multiplier of 6.67); *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327, 335 (Bankr. D. Md. 2000) (multiplier of 19.6); *Perera v. Chiron Corp.*, No. 95-20725-SW (N.D. Cal. 1999) (multiplier of 9.14), *cited in* ELIZABETH J. CABRASER, CALIFORNIA CLASS ACTIONS AND COORDINATED PROCEEDINGS § 15.05 (2d ed. 2017).

[226] No. 4:02-cv-01186-CAS, 2005 WL 4045741, at *18 (E.D. Mo. June 30, 2005).

cogently recognized, it would be unfair to "penalize counsel" for acting efficiently.[227] A multiplier even higher than that sought here has been deemed appropriate where, as here, "through the exercise of their considerable skill, plaintiffs' counsel obtained a historic recovery for the class in a rare and complex kind of case where victory at trial would have been, at best, remote and uncertain."[228]

129. Another appropriate way to measure the multiplier is to look at the results obtained in *Vogt* and the total attorneys' fees, including what was awarded in *Vogt*. This is similar to how MDL courts often look at fee awards when individual cases within the overall litigation are resolved at different times. In those cases, the total fee across all the cases is measured against the full lodestar across all the cases. Class counsel report that their lodestar in *Vogt*, using the hourly rates they had when they were paid in *Vogt*, was $6,513,961, which is hardly surprising given that they litigated a class action through trial, two full appeals, and through a petition for certiorari to the U.S. Supreme Court. So, class counsel's total received fee in *Vogt* ($13,866,666), the requested fee in this case ($108,333,333), and a lodestar of $24,878,891—which represents class counsel's work on this litigation, the 1,888 hours class counsel anticipates spending going forward, and the hours worked in *Vogt*—leads to a multiplier of 4.9, which is easily justified by precedent even for more routine cases.

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[227] *Rawa v. Monsanto Co.*, 934 F.3d at 870.

[228] *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (approving multiplier of 6.96).

G. The Multiplier Is Well Justified in Comparison with Other Mega-Fund Cases

130. Multipliers at levels comparable to (or well in excess of) the 5.9–6.4 multiplier sought here have been approved in numerous mega-fund cases. Such cases include the following:

TABLE 2: Multipliers Over 5.0 in Mega-Fund Class Actions

Case	Recovery	Multiplier	Trial?
Stop & Shop Supermarket Co. v. Smith-Kline Beecham Corp., No. 03-cv-04578, 2005 WL 1213926 (E.D. Pa. May 19, 2005)	$100 million	15.6	No
Lobo Exploration Co. v. BP Am. Prod., No. CJ-1997-72 (Oka. Dist. Ct., Beaver Cnty. Dec. 8, 2005)	$150 million	8.7	No
In re Buspirone Antitrust Litig., No. 1:01-md-01413-JGK (S.D.N.Y. Apr. 18, 2003) (Dkt. No. 171)	$220 million	8.46	No
New England Carpenters Health Benefits Fund v. First Databank, Inc., No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)	$350 million	8.3	No
In re Rite Aid Corp. Sec. Litig., 362 F. Supp. 2d 587 (E.D. Pa. 2005)	$126.6 million	6.96	No
In re Cendant Corp. Litig., 243 F. Supp. 2d 166 (D.N.J. 2003), *aff'd*, 404 F.3d 173 (3d Cir. 2005)	$3.18 billion	6.87	No
In re 3COM Corp. Sec. Litig., No. C-97-21083 (N.D. Cal. Mar. 9, 2001)	$259 million	6.67	No
In re Credit Default Swaps Antitrust Litig., No. 1:13-md-02476, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016)	$1.86 billion	6.2	No

Case	Recovery	Multiplier	Trial?
In re Cardinal Health Inc. Sec. Litig., 528 F. Supp. 2d 752 (S.D. Ohio 2007)	$600 million	6	No
In re Charter Commc'ns, Inc. Sec. Litig., No. 4:02-cv-01186-CAS, 2005 WL 4045741 (E.D. Mo. June 30, 2005)	$146.2 million	5.6	No
Roberts v. Texaco, 979 F. Supp. 185 (S.D.N.Y. 1997)	$115 million	5.5	No
Gutierrez v. Wells Fargo Bank, N.A., No. C 07-05923 WHA (N.D. Cal. May 21, 2015)	$203 million	5.5	Yes
In re Enron Corp. Sec., Derivative & ERISA Litig., 586 F. Supp. 2d 732 (S.D. Tex. 2008)	$7.22 billion	5.21	No

131. Here, a multiplier of 5.9–6.4 for class counsel is well justified under the case law because class counsel took on a challenging and risky case with extremely complex legal and factual issues; prosecuted it skillfully over the course of several years in multiple jurisdictions without assistance from any official investigation; obtained class certification despite State Farm's vigorous opposition; conducted a complete classwide trial that resulted in an impressive $34 million jury verdict; and obtained a historic $325 million settlement for the class.

H. The Multiplier Is Supported by the Relevant *Johnson* Factors

132. The reasonableness of the 5.9–6.4 multiplier, and by extension the 4.9 multiplier that factors in *Vogt*, is further confirmed by those *Johnson* factors that are not already subsumed by the lodestar calculation. In particular, this is an unusually complicated case, with difficult legal and factual issues, and it involved contested class certification motions, contentious summary

judgment, Rule 12(b)(6), and *Daubert* motions. Class counsel took on substantial risk, were precluded to a significant extent from doing other work, and achieved an enormous and historic $325 million settlement.

I. Conclusion on Attorneys' Fees

133. The attorneys' fees sought (33⅓ percent) are well justified based on the percentage method and remain fully justified and reasonable even if this Court were to analyze the fees under a lodestar cross-check.

VIII. OUT-OF-POCKET EXPENSES

A. The Out-of-Pocket Expenses Sought by Class Counsel are Reasonable

134. Under the settlement, class counsel are allowed to seek up to $1.5 million in actual expenses without objection from State Farm. Class counsel seek actual out-of-pocket costs in the amount of $1,358,443.06. Siegel Att. Fees Decl. ¶ 27. The largest components of these costs are for experts, online legal research, travel expenses, and class notice and administration. Siegel Decl. Appendix B. It is well settled that an attorney "who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved."[229]

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[229] *Tussey v. ABB, Inc.*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *5 (W.D. Mo. Aug. 16, 2019). *Accord, e.g.*, *Sprague v. Ticonic*, 307 U.S. 161, 166-67 (1939) (recognizing federal courts' power to award costs from a common fund); *Been v. O.K. Indus., Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *3 (E.D. Okla. Aug. 16, 2011) ("Attorneys who recover a common fund for a class are entitled to . . . reasonable . . . costs and expenses from the fund."); *Wakefield v. Wells Fargo & Co.*, No. 3:13-CV-05053-LB, 2015 WL 3430240, at *6 (N.D. Cal. May 28, 2015) ("Class counsel are entitled to reimbursement of reasonable out-of-pocket expenses."); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534–35 (E.D. Mich. 2003) ("Under the common

135. In my opinion, the costs sought by class counsel are eminently reasonable. The categories of expenses incurred are common in major class actions, and the amounts sought do not appear unreasonable for litigation of this magnitude. They are under the $1.5 million amount that State Farm agreed not to oppose, and my opinion is that the full $1.5 million would be reasonable. Notably, class counsel paid those enormous costs at great risk because they had no assurance that the litigation would ultimately succeed.

136. The amount sought is also reasonable when viewed as a percentage of the fund. The expenses represent only 0.42 percent of the fund. Costs of that magnitude are well within—indeed, below—the norm for major class actions. For example, in the *Enron* case, costs were 0.50 percent;[230] in *VisaAntitrust*, costs were 0.55 percent;[231] in the *Tyco Securities Litigation*, costs were 0.87 percent;[232] in *Dahl v. Bain Capital Partners, LLC*, costs were 2.03 percent;[159] and in the *U.S. Foodservice Pricing Litigation*, costs were 2.7 percent.[160] Moreover, as noted, the costs are for standard (and expected) expenses for litigation like this, and thus do not raise any concerns.

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fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses.").

[230] *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008) (approximate $39 million in costs compared to $7.2 billion settlement).

[231] *See In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003) ($18.7 million in costs compared to $3.4 billion settlement).

[232] *See In re Tyco Int'l Ltd. Litig.*, 535 F. Supp. 2d 249 (D.N.H. 2007) ($28.9 million in costs compared to $3.3 billion settlement).

IX. SERVICE AWARDS

A. The Proposed Service Awards for Class Representatives Are Reasonable

137. Class counsel seek service awards for the class representative plaintiffs in the amount of $25,000 each. In my view, these proposed service awards are reasonable.

138. The class representatives invested significant time and effort on behalf of the class. For most, their work on this case took them away from their families and their work. As explained in detail in the Declaration of Norman Siegel (Siegel Att. Fees. Decl. ¶ 28), each of the class representatives performed critical tasks at every stage of the litigation, including providing policy documents, assisting in discovery, participating (when applicable) in trial-related efforts, and reviewing and approving the settlement.

139. In the Eighth Circuit and most other circuits, service awards are permitted as compensation to class representatives based upon: their efforts to "protect the interests of the class; the degree to which the class has benefitted from those actions; and the amount of time and effort plaintiffs expended in pursuing the litigation."[233] Courts often look to "the extent of the plaintiff's personal involvement in the lawsuit in terms of discovery responsibilities and/or

[233] *Tussey v. ABB, Inc.*, No. 06-04305-CV-C-NKL, 2012 WL 5386033, at *10 (W.D. Mo. Nov. 2, 2012), *vacated and remanded on other grounds*, 746 F.3d 327 (8th Cir. 2014) (*citing In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002)); *accord, e.g.*, *UFCW Local 880–Retail Food Emp'rs Joint Pension Fund v. Newmont Mining Corp*., 352 F. App'x 232, 235–36 (10th Cir. 2009); *Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003) (noting that "incentive awards are efficacious ways of . . . rewarding individual efforts taken on behalf of the class," noting that "[n]umerous courts have authorized incentive awards," and citing cases approving service awards); *Lane v. Page*, 862 F. Supp. 2d 1182, 1234 (D.N.M. 2012) (noting that service awards serve "to compensate a class representative for risks they take and work they perform on behalf of the class").

testimony at depositions or trial."[234] Moreover, courts frequently evaluate service awards "in comparison to the total recovery on behalf of the class."[235]

140. Courts have approved substantial service awards where the class representatives undertook significant work on behalf of the class. The service awards sought here are substantial but not unprecedented, especially given the large common fund created. Courts have awarded multiples of what is requested here—$100,000 or more— in a number of cases where the representatives performed major roles. In *Urethane,* the district court awarded service awards as high as $150,000 to $200,000 out of a fund of $835 million.[236] In *Boynton v. Headwaters, Inc.*, the court approved service awards of $100,000 out of a fund of $16 million, noting the "diligence" of the class representatives and the "significant financial sacrifices" they made in playing such active, time-consuming roles.[237] Other examples of awards much higher than those sought here are *In re High-Tech Employee Antitrust Litigation,*[238] *In re Titanium Dioxide Antitrust*

[234] *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 257 (E.D. Pa. 2011).

[235] *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 565 F. Supp. 2d 49, 57 (D.D.C. 2008).

[236] *See In re Urethane Antitrust Litig.*, No. 04-md-01616-JWL, slip op. at 2 (D. Kan. July 29, 2016) (Dkt. No. 3276).

[237] No. 10:2-cv-01111-JPM-EGB, 2012 WL 12546853, at *3 (W.D. Tenn. Mar. 27, 2012).

[238] No. 11-cv-02509-LHK, 2015 WL 5158730, at *17–18 (N.D. Cal. Sept. 2, 2015) ($100,000–$140,000 incentive payments out of $16 million settlement fund).

Litigation,[239] *Ivax Corp. v. Aztec Peroxides, LLC*,[240] *In re Neurontin Antitrust Litigation*,[241] *Marchbanks Truck Services v. Comdata Network, Inc.*,[242] *Been v. O.K. Industries, Inc.*,[243] *Columbus Drywall & Insulation, Inc. v. Masco Corp*,[244] *Velez v. Novartis Pharmaceutical Corp.*,[245] and the *NFL Concussion Litigation*.[246] Importantly, the Eighth Circuit has approved

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[239] No. 10-cv-00318(RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) ($125,000 service award out of $163.5 million fund).

[240] No. 1:02-cv-00593, slip op. at 2 (D.D.C. Aug. 24, 2005) (Dkt. No. 78) ($100,000 service awards out of $21 million fund).

[241] No. 02-cv-01830, slip op. ¶ 31 (D.N.J. Aug. 6, 2014) (Dkt. No. 114) ($100,000 service awards out of $190 million fund).

[242] No. 07-cv-01078, slip op. at 2, 8 (E.D. Pa. July 14, 2014) (Dkt. No. 713) ($150,000 and $75,000 service awards out of $130 million fund).

[243] No. CIV-02-285-RAW, 2011 WL 4478766, at *12 (E.D. Okla. Aug. 16, 2011) ($100,000 service awards out of $15.6 million fund).

[244] No. 1:04-cv-03066-JEC, 2008 WL 11319972, at *3 (N.D. Ga. Mar. 4, 2008) ($100,000 service awards out of $37.25 million fund).

[245] No. 04-cv-09194-CM, 2010 WL 4877852, at *4, *8, *28 (S.D.N.Y. Nov. 30, 2010) ($125,000 service awards out of $152.5 million fund).

[246] *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1635648, at *10–11 (E.D. Pa. Apr. 5, 2018) ($100,000 service awards out of $1 billion fund).

$25,000 service awards.[247] Under this case law, it is my opinion that service awards of $25,000 per class representative—out of a massive $325 million recovery—are reasonable.[248]

141. In evaluating the reasonableness of proposed service awards, courts consider a number of factors:

> (1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefitted from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation.[249]

Courts also consider the personal risk assumed by the class representative.[250] I assess each of these factors below and conclude that each supports a $25,000 award per class representative.

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[247] *Tussey v. ABB, Inc.*, 850 F.3d 951, 961 (8th Cir. 2017) (approving $25,000 service award); *see also Thornburg v. Open Dealer Exch., LLC*, No. 17-06056-CV-SJ-ODS, at *5 (W.D. Mo. July 22, 2019) (approving $15,000 service award); *Leonard v. John Hancock Life Ins. Co. of N.Y.*, No. 18-CV-04994-AKH, at *2 (S.D.N.Y. Mar. 17, 2022) (approving $25,000 service award); *Mondrian v. Trius Trucking, Inc.*, 1:19-cv-00884-ADA-SKO, at *23 (E.D. Cal. Oct. 6, 2022) (approving $10,000 service award out of fund of $688,750).

[248] I note that the class representative in *Vogt* was awarded $15,000. But that award does not legally bind this Court in exercising its discretion with respect to the class representatives in this nationwide settlement, particularly given the historic $325 million settlement fund negotiated here.

[249] *Objector v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (*citing In re US Bancorp Litigation*, 291 F.3d 1035 (8th Cir. 2002)).

[250] *Merryman v. JPMorgan Chase Bank*, N.A., 2019 WL 6245396, at *8 (S.D.N.Y. Nov. 22, 2019); *accord, e.g., In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 263, 293 (D. Kan. 2010) (noting that service awards are justified "to compensate [class representatives] for personal risk incurred"); *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL-1426, 2008 WL 63269, at *7 (E.D. Pa. Jan. 3, 2008) (noting, in awarding service awards of $30,000 each, that "[t]he Class Representatives not only conferred benefits on all of the Class Members, but also risked jeopardizing their existing relationships with their suppliers of automotive refinishing paint products"); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299–300 (N.D. Cal. 1995) (noting that, in evaluating the reasonableness of service awards, courts consider "the risk to the class representative in commencing suit, both financial and otherwise").

142. **Actions to Protect the Interests of the Class.** As noted in ¶ 138, the class representatives took an active role in discovery and other proceedings, and they ensured that the settlement was fair and reasonable. The settlement could not have been achieved without class representatives who were willing to undertake these burdens.

143. **Benefit to the Class.** The benefit to the class is obvious: The class representatives did important heavy lifting that enabled class counsel to obtain a historic $325 million nationwide settlement. With up to 760,000 class members, the total service awards represent a cost of fewer than 33 cents per class member. There is no doubt the benefits provided by the class representatives outweigh the insubstantial cost to the remaining class members. As the court noted in *In re Linerboard Antitrust Litigation*: "Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly."[251]

144. **Time and Effort.** As noted in ¶ 138, the class representatives invested significant time ensuring that the case was effectively litigated and that the nationwide settlement was fair and reasonable.

145. **Risk.** The class representatives took a substantial risk that, despite all the hours they put into the case, they might end up recovering nothing. Had the litigation been unsuccessful for the class, the class representatives would have been ineligible for any service awards. Thus, like class counsel, the class representative undertook enormous risk.

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[251] No. 98-cv-05055, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004).

X. CONCLUSION

146. In my opinion, the attorneys' fees, expenses, and service awards sought by class counsel are reasonable and should be approved.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based on information known to me.

Robert H. Klonoff

February 13, 2023

APPENDIX A

CURRICULUM VITAE

ROBERT H. KLONOFF
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Date of Birth: March 15, 1955
Place of Birth: Portland, Oregon

EDUCATION:

J.D., Yale University, 1979

A.B., University of California, Berkeley, 1976, Majored in Political Science/Economics (Highest Honors)

WORK EXPERIENCE:

Current Positions:

Jordan D. Schnitzer Professor of Law, Lewis & Clark Law School (since 2014)

Panelist, FedArb (alternative dispute resolution)

Prior Positions:

Dean of the Law School, Lewis & Clark Law School (2007-2014)

Douglas Stripp/Missouri Endowed Professor of Law, University of Missouri-Kansas City School of Law (2003-2007)

Jones Day, Washington, D.C. (Partner, 1991-July 2003; Of Counsel, 1989-1991, 2003- 2007)

Adjunct Professor of Law, Georgetown University Law Center (class action law and practice) (1999-2003)

Visiting Professor of Law, University of San Diego School of Law (1988-1989)

Assistant to the Solicitor General of the United States (1986-1988)

Assistant United States Attorney (Criminal Division, District of Columbia) (1983-1986)

Associate, Arnold & Porter, Washington, D.C. (1980-1983)

Law Clerk to the Honorable John R. Brown, Chief Judge, United States Court of Appeals for the Fifth Circuit (1979-1980)

Summer Associate, Baker & Botts, Houston, and Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C. (1978)

Summer Associate, Sidley & Austin, Washington, D.C. (1977)

SPECIAL HONORS AND ACHIEVEMENTS:

Recipient, Lewis & Clark Law School's 2020 Leo Levenson Award for Excellence in Teaching (the law school's most prestigious award)

Recipient, 2018 Albert Nelson Marquis Lifetime Achievement Award in the field of law from *Who's Who in America*

Member, 2011-2017, United States Judicial Conference Advisory Committee on Civil Rules (appointed by Chief Justice John G. Roberts, Jr., in 2011 as the sole voting member from the law school academy; reappointed May 2014 for a second three-year term)

Elected Member, International Association of Procedural Law

Fulbright Specialist Scholar at the University of Hong Kong Faculty of Law (2016)

Recipient, Oregon Consular Corps Award for Individual Achievement in International Outreach, Portland, Oregon (May 2013)

Associate Reporter, American Law Institute's *Principles of the Law of Aggregate Litigation* (class action project; drafts presented at several annual meetings; final version approved by full ALI in May 2009 annual meeting and published in May 2010)

Elected Member, American Law Institute

Fellow, American Academy of Appellate Lawyers

Sustaining Life Fellow, American Bar Foundation

Academic Fellow, Pound Institute

Recipient, 2007 Award for Outstanding UMKC Law Professor (based on vote of 3d year class)

2007 UMKC Law School Commencement Speaker (based on vote of 3d year class)

Recipient, 2006 UMKC Law School Elmer Pierson Teaching Award for Most Outstanding Teacher in the Law School (selected by the Dean)

Recipient, 2005 President's Award for Outstanding Service from the UMKC Law School Foundation

Reporter, 2005 National Conference on Appellate Justice (co-sponsored by the Federal Judicial Center, National Center for State Courts, and other organizations)

Co-Recipient, District of Columbia Bar's Frederick B. Abramson Award for Superior Service to the Community (June 1998)

Attorney General's Special Achievement Award for Outstanding Work as an Assistant to the Solicitor General of the United States (1986, 1987)

Attorney General's Special Achievement Award for Outstanding Work as an Assistant United States Attorney (1984, 1985)

The Benjamin N. Cardozo Prize for Best Moot Court Brief for Academic Year 1978-1979, Yale Law School

Semi-Finalist, Moot Court Oral Argument, Yale Law School (Fall, 1978)

Phi Beta Kappa

U.C. Berkeley's Most Outstanding Political Science Student (1976)

The Edward Kraft Award for Outstanding Work as a Freshman Student, U.C. Berkeley (1974)

MEMBERSHIPS:

U.S. Supreme Court Bar

Various Federal Circuit and District Courts

District of Columbia Bar

Missouri State Bar

Oregon State Bar

Multnomah County Bar

American Law Institute

American Bar Association

American Bar Association Committee on Class Actions & Derivative Suits (Section of Litigation)

PUBLICATIONS:

Books:

Wright & Miller, *Federal Practice and Procedure* (co-author with sole responsibility for the three volumes devoted to class actions)

Castanias & Klonoff, *Federal Appellate Practice in a Nutshell* (West 3d ed. forthcoming 2022)

Klonoff, *Introduction to the Study of U.S. Law: Cases and Materials* (West 2d ed. 2021) (with teacher's manual)

Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* (West 6th ed. 2021)

Klonoff, *Federal Multidistrict Litigation in a Nutshell* (West 2020)

Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* (West 5th ed. 2017)

Castanias & Klonoff, *Federal Appellate Practice in a Nutshell* (West 2d ed. 2017)

Klonoff, *Class Actions and Other Multi-Party Litigation: Cases and Materials* (West 4th ed. 2017) (with teacher's manual)

Klonoff, *Introduction to the Study of U.S. Law: Cases and Materials* (West 2016) (with teacher's manual)

Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* (Thomson West 4th ed.) (2012)

Klonoff, Bilich & Malveaux, *Class Actions and Other Multi-Party Litigation: Cases and Materials* (West 3d ed.) (2012) (with teacher's manual)

Klonoff (associate reporter), *Principles of the Law of Aggregate Litigation*, American Law Institute Publications (2010) (along with Samuel Issacharoff, reporter, and associate reporters Richard Nagareda and Charles Silver)

Castanias & Klonoff, *Federal Appellate Practice and Procedure in a Nutshell* (Thomson West) (2008)

Klonoff & Colby, *Winning Jury Trials: Trial Tactics and Sponsorship Strategies* (NITA 3d ed.) (2007)

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Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* (West Group 1999)

Klonoff & Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* (Michie Co. 1990)

Articles and Book Chapters:

Klonoff, *COVID-19 Aggregate Litigation: The Search for the Upstream Wrongdoer*, 91 Fordham L. Rev. 385 (forthcoming 2022)

Klonoff, *3M's Bankruptcy Maneuver Raises Issues for Justice System* (Law 360, Aug. 11, 2022)

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Klonoff, *International Handbook on Class Actions*, chapter on the Future of U.S. Aggregate Litigation, Cambridge University Press (2021)

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The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements, 80 Tul. L. Rev. 1695 (co-author) (2006)

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"Legal Approaches to Sex Discrimination" (co-author), in H. Landrine & E. Klonoff, *Discrimination Against Women: Prevalence, Consequences, Remedies* (Sage Pub. 1997)

Sponsorship Strategy: A Reply to Floyd Abrams and Professor Saks, 52 Md. L. Rev. 458 (1993) (co-author)

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Contributing Editor, *Criminal Practice Institute Trial Manual*, Young Lawyers Section, Bar Ass'n of D.C. (1986)

The Congressman as Mediator Between Citizens and Government Agencies: Problems and Prospects, 15 Harv. J. Legis. 701 (1979)

A Dialogue on the Unauthorized Practice of Law, 25 Villanova L. Rev. 6 (1979) (co-author)

The Problems of Nursing Homes: Connecticut's Non Response, 31 Admin. L. Rev. 1 (1979)

SIGNIFICANT LEGAL EXPERIENCE:

Argued eight cases before the U.S. Supreme Court

Authored dozens of U.S. Supreme Court filings (certiorari petitions, certiorari oppositions, merits briefs, reply briefs)

Briefed and argued numerous cases before various U.S. circuit and district courts and state trial and appellate courts

Tried dozens of cases (primarily jury trials)

Handled more than 100 class action cases as co-counsel, including *TransUnion v. Ramirez* (U.S. Supreme Court) and *In re National Prescription Opiate Litigation* (Sixth Circuit)

Served as an expert witness in numerous high profile class action and other aggregate cases, including the *British Petroleum Deepwater Horizon Oil Spill* litigation, the *National Football League Concussion* litigation, the *Volkswagen Clean Diesel* litigation, the *Wells Fargo Unauthorized Accounts* litigation, the *Equifax Data Breach* litigation, the *Syngenta Genetically Modified Corn* litigation, the *Broiler Chicken Antitrust* litigation, and the *Parkland Shooting* civil litigation.

Worked extensively with testifying and consulting experts on class action issues, including economists, securities experts, medical and scientific experts, and leading academics

Presented more than 100 cases to the grand jury while serving as an Assistant U.S. Attorney

Handled hundreds of sentencing hearings, preliminary hearings, and probation revocation hearings

SIGNIFICANT TEACHING AND SPEAKING ENGAGEMENTS

Speaker on Multidistrict Litigation and Moderator on Case Management Breakout Session, Mass Tort MDL Certificate Program, Bolch Judicial Institute, Duke University School of Law (Nov. 7, 2022) (held remotely)

Speaker on Class Actions and Moderator of Class Actions Breakout Session, 2022 Transferee Judges' Conference (approximately 125 federal judges), the Breakers, Palm Beach, Fla. (Nov. 1, 2022)

Speaker, Class and Aggregate Litigation in Europe and North America, New York University School of Law's Campus in Florence, Italy (July 8, 2022)

Speaker and Co-Organizer, McGovern Symposium on Civil Litigation, Duke University School of Law, Durham, North Carolina (May 27, 2022)

Moderator of Panel, Advanced MDL Certificate Program, Duke University School of Law, Durham, North Carolina (May 26, 2022)

Speaker, The Jewish Influences, Life & Legacy of Justice Ruth Bader Ginsburg, Cardozo Society of Washington State and Philadelphia Brandeis Society (April 5, 2022) (held remotely)

Panelist, Mass Torts/Bankruptcy Conference, Fordham University School of Law, New York, New York (Feb. 25, 2022)

Speaker on the Legacy of Justice Ruth Bader Ginsburg (held remotely), Temple Beth Sholom Synagogue, Salem Oregon (June 27, 2021)

Panel Moderator, Mass-Tort MDL Bench-Bar Conference (held remotely), George Washington University Law School, Washington, D.C. (June 10, 2021)

Speaker on Class Actions (held remotely), Oregon Association of Defense Counsel, Portland Oregon (May 20, 2021)

Speaker on Class Actions and Multidistrict Litigation (held remotely), South Ural State University Institute of Law, Chelyabinsk, Russia (April 8, 2021)

Speaker on Class Actions and Multidistrict Litigation (held remotely), Northwestern Pritzker School of Law, Complex Litigation Seminar, Chicago, Illinois (March 31, 2021, and again on March 30, 2022)

Speaker on Multidistrict Litigation, Class Actions, and the *Volkswagen Clean Diesel* Case (held remotely), Bahcesehir University, Istanbul, Turkey (July 15, 2020)

Speaker, Multidistrict Litigation Conference (held remotely), Emory University School of Law, Atlanta, Georgia (June 19, 2020)

Speaker, Class Action Conference, Fordham Law Review and the Institute for Law & Economic Policy, New York, New York (Feb. 27-28, 2020)

Keynote Speaker, Harold Schnitzer Spirit of Unity Peace Leadership Award Ceremony, Salem, Oregon (Nov. 20, 2019).

Conference Chair and Participant, 2019 Symposium on Class Actions and Aggregate Litigation, Pound Civil Justice Institute and Lewis & Clark Law School, Portland, Oregon (Nov. 1-2, 2019).

Speaker, International Class Actions Conference, Vanderbilt Law School, Nashville, Tennessee (Aug. 23, 2019)

Keynote Speaker, Pound Civil Justice Institute, Aggregate Litigation in State Court: Conference of State Court Appellate Judges, San Diego, California (July 27, 2019)

Visiting Professor of Law, University of Bologna School of Law, Ravenna, Italy (July, 2019) (faculty member for summer program on Transnational Torts)

Visiting Professor of Law, University of Trento School of Jurisprudence, Trento, Italy (May, 2019) (taught Introduction to U.S. Law)

Visiting Professor of Law, Royal University of Law and Economics, Phnom Penh, Cambodia (April 2019)

Speaker, Impact Fund Class Action Conference, San Francisco, California (Feb. 22, 2019)

Speaker on Class Actions, 17th Annual Impact Fund Class Action Conference, San Francisco, California (Feb. 23, 2019)

Visiting Professor of Law, National Taiwan University, Taipei, Taiwan (December 2018) (taught course on U.S. Class Actions)

Speaker on the National Football League Concussion case, National Taiwan University, Taipei, Taiwan (December 20, 2018)

Speaker on Class Actions, Live Webinar Broadcast, Rule 23 Will Be Amended in Four Days: Are You Ready, American Bar Association (Nov. 27, 2018)

Speaker, American Bar Association's 22d Annual Institute on Class Actions, Chicago, Illinois (Oct. 18, 2018)

Speaker, MDL at 50 –The 50th Anniversary of Multidistrict Litigation, New York University School of Law, New York, New York (Oct. 12, 2018)

Visiting Professor of Law, University of Bologna School of Law, Ravenna, Italy (July 2018) (faculty member for environmental law program; lectured on environmental class actions)

Speaker on Class Actions, Freie University Faculty of Law, Berlin, Germany (June 26, 2018)

Visiting Professor of Law, Royal University of Law and Economics, Phnom Penh, Cambodia (April 2018) (taught course on Introduction to United States Law)

Co-Chair, Moderator, and Panelist, Posner on Class Actions, Columbia Law School, New York, New York (March 2, 2018)

Panelist on Civil Discovery, Vanderbilt University School of Law, Nashville, Tennessee (October 13, 2017)

Panelist on the Civil Rules Committee Process, University of Arizona College of Law, Tucson, Arizona (October 7, 2017)

Visiting Professor of Law, University of Bologna School of Law, Ravenna, Italy (July 2017) (faculty member for environmental law program; lectured on environmental class actions)

Visiting Professor of Law, University of Trento School of Jurisprudence, Trento, Italy (May 2017) (taught course on Introduction to U.S. Law)

Panelist on Class Actions, Beard Group, Class Action Money and Ethics Conference, New York, New York (May 1, 2017)

Visiting Professor of Law, Tel Aviv University, Tel Aviv, Israel (January 2017) (taught course on class actions)

Panelist on Class Actions, Tel Aviv University, Fifty Years of Class Actions – A Global Perspective (January 4, 2017)

Panelist on Class Actions, New York University Law School Conference on Rule 23@50, New York, New York (December 2, 2016)

Panelist on Class Actions, Appellate Judges Education Institute, Philadelphia, Pennsylvania (November 11, 2016)

Speaker on Class Actions, National Legal Aid Defender Association National Farmworker Conference, Indianapolis, Indiana (November 10, 2016)

Panelist on Class Actions, American Bar Association Class Action Institute, Las Vegas, Nevada (October 20, 2016)

Panelist, Duke University Law School Conference on Class Action Settlements, San Diego, California (October 6, 2016)

Fulbright Scholar, Hong Kong University School of Law (August- September 2016) (taught course on class actions and delivered campus-wide lecture on criminal procedure)

Visiting Professor of Law, National Taiwan University, Taipei, Taiwan (June 2016) (taught course on Introduction to United States Law)

Speaker on Class Actions, University of Zagreb Law School, Zagreb, Croatia (May 11, 2016)

Panelist on Civil Litigation, Association of American Law Schools Annual Meeting, New York, New York (January 8, 2016)

Visiting Professor of Law, Bahçeşehir University School of Law, Istanbul, Turkey (December 2015) (taught Introduction to United States Law)

Participant, Conference on Civil Justice (Pound Institute) Emory University Law School, Atlanta, Georgia (October 15, 2015)

Participant, Conference on Class Actions, Duke Law School, Arlington, Virginia (July 23-24, 2015)

Participant, Conference on Class Actions, Defense Research Institute, Washington, D.C. (July 23-24, 2015)

Participant, Civil Procedure Workshop, Seattle University Law School, Seattle, Washington (July 17, 2015)

Panelist on Class Actions, Annual Meeting, American Association for Justice, Montreal, Canada (July 12, 2015)

Speaker on Class Actions, International Association of Procedural Law, Istanbul, Turkey (May 28, 2015)

Panelist, Subcommittee on Class Actions of U.S. Judicial Conference Advisory Committee on Civil Rules, American Law Institute Annual Meeting, Washington, D.C. (May 17, 2015)

Moderator, Ethical Issues in Class Actions and Non-Class Aggregate Litigation, American Law Institute Annual Meeting, Washington, D.C., (May 17, 2015)

Visiting Professor of Law, University of Trento School of Jurisprudence, Trento, Italy (March 2015) (taught U.S. Class Actions)

Speaker on Class Actions, European University Institute, Fiesole, Italy (February 23, 2015)

Visiting Professor of Law, University of Notre Dame, Fremantle Australia (January 2015) (taught course on U.S. Civil Rights and Civil Liberties)

Visiting Professor of Law, Universidad Sergio Arboleda, Bogota and Santa Marta, Colombia (December 2014) (taught course on Introduction to United States Law)

Visiting Professor of Law, National Taiwan University, Taipei, Taiwan (November 2014) (taught course on Introduction to United States Law)

Panelist, American Bar Association, National Institute on Class Actions, Chicago, Illinois (October 23, 2014)

Visiting Professor of Law, East China University of Political Science and Law, Shanghai, China (October 2014) (taught U.S. Class Actions)

Visiting Professor of Law, Herzen State Pedagogical University of Russia, St. Petersburg, Russia (September 2014) (taught U.S. Class Actions)

Visiting Professor of Law, Royal University of Law and Economics, Phnom Penh, Cambodia (July 2014) (taught Introduction to United States Law)

Speaker on U.S. Legal Education, Universidad Sergio Arboleda School of Law, Bogota, Colombia (June 3 and 5, 2014)

Speaker on Class Actions, Superintendencia de Industria y Comercio, Bogota, Colombia (June 3, 2014)

Speaker on Class Actions and the Fukushima Nuclear Accident, Waseda University School of Law, Tokyo, Japan (January 24, 2014)

Speaker on Class Actions, Osaka Bar Association, Osaka, Japan (January 23, 2014)

Speaker on Class Actions, East China University of Political Science and Law, Shanghai, China (January 15, 2014)

Speaker on Class Actions, AmCham Shanghai, Shanghai, China (January 14, 2014)

Speaker on Development of Animal Law in the Legal Academy, 2013 Animal Law Conference, Stanford Law School, Palo Alto, California (November 25, 2013)

Speaker on U.S. Law and Legal Education, Royal University of Law and Economics, Phnom Penh, Cambodia (October 1, 2013)

Speaker on U.S. Law and Legal Education, Paññāsāstra University of Cambodia, Phnom Penh, Cambodia (October 1, 2013)

Speaker on U.S. Legal Education, International Association of Law Schools International Deans' Forum, National University of Singapore Law School, Singapore (September 26, 2013)

Speaker on Class Actions, Japan Federation of Bar Associations, Tokyo, Japan (September 19, 2013)

Speaker on Class Actions, Waseda University School of Law, Tokyo, Japan (September 19, 2013)

Speaker on Ethics of Aggregate Settlements, American Association for Justice Annual Meeting, San Francisco, California (July 22, 2013)

Speaker on the British Petroleum Class Action Settlement, International Water Law Conference, National Law University of Delhi, Delhi, India (May 31, 2013)

Speaker on U.S. Supreme Court Confirmation Process, Jewish Federation of Greater Portland's Food for Thought Festival, Portland, Oregon (April 21, 2013)

Speaker on Class Actions, Class Action Symposium, George Washington University Law School, Washington, D.C. (March 8, 2013)

Speaker on Class Actions, Impact Fund Class Action Conference, Oakland, California (March 1, 2013)

Speaker on Class Actions, Hong Kong University Department of Law (November 15, 2012)

Speaker on Class Actions, Fudan University Law School (Shanghai, China) (November 13, 2012)

Keynote Speaker, National Consumer Law Center Symposium, Seattle, Washington (October 28, 2012)

Speaker, American Bar Association, National Institute on Class Actions, Chicago, Illinois (October 25, 2012)

Speaker, Conference on Class Actions, Washington University St. Louis School of Law and the Institute for Law and Economic Policy (April 27, 2012)

Speaker, Conference on Class Actions, Loyola Chicago School of Law (April 13, 2012)

Panelist on leadership and world peace with Former South African President F.W. De Klerk, University of Portland (February 29, 2012)

Panelist on class actions before the Standing Committee on Rules of Practice and Procedure, Phoenix, Arizona (January 5, 2012)

Speaker on Class Actions Lawsuits in the U.S., University of the Philippines, College of Law, Quezon City, Philippines (August 2011)

Speaker on Environmental Class Actions, Kangwon University Law School, Chuncheon, South Korea (August 2011)

Speaker on Class Actions, Federal Judicial Center Conference on Class Actions, Duke University School of Law (May 20, 2011)

Speaker, Conference on Aggregate Litigation, University of Cincinnati College of Law (April 1, 2011)

Speaker on Class Actions, Seoul National University School of Law (May 18, 2010)

Keynote Speaker (addressing US Supreme Court confirmation process), Alaska Bar Annual Meeting (April 28, 2010)

Speaker, Conference on the Future of Animal Law, Harvard Law School (April 11, 2010)

Speaker, Conference on Aggregate Litigation: Critical Perspectives, George Washington University Law School (Mar. 12, 2010)

Speaker, U.S. Supreme Court Confirmation Process, Multnomah County Bar Association and City Club of Portland, (Sept. 30, 2009)

Speaker on Class Actions, American Legal Institutions, and American Legal Education at National Law Schools of India in Bangalore, Hyderabad, Calcutta, Jodhpur, and Delhi (August 2009)

Speaker, China/U.S. Conference on Tort and Class Action Law, Renmin University of China School of Law, Beijing, China (July 11-12, 2009)

Speaker on Class Actions, Southeastern Association of Law Schools annual meeting, Palm Beach, Florida (August 1, 2008)

Speaker on Class Actions, National Foundation for Judicial Excellence (meeting of 150 state appellate court judges), Chicago, Illinois (July 12, 2008)

Speaker on Class Actions, Practising Law Institute, New York, NY (July 10, 2008)

Speaker at Conference on Class Actions in Europe and North America, sponsored by New York University School of Law, the American Law Institute, and the European University Institute, Florence, Italy (June 13, 2008)

Speaker on Class Actions at the American Bar Association Tort and Insurance Section Meeting, Washington, D.C. (Oct. 26, 2007)

Speaker on Antitrust Class Actions at the American Bar Association's Annual Antitrust Meeting, Washington D.C. (April 18, 2007)

Chair, Organizer, and Moderator of Class Action Symposium at UMKC School of Law (April 7, 2006) (other speakers (26 in all) included, *e.g.*, Professors Arthur Miller, Edward Cooper, Sam Issacharoff, Geoffrey Miller, and Linda Mullenix, as well as several prominent federal judges and practicing lawyers)

Speaker on Class Actions, Missouri CLE (Nov. 18, 2005)

Speaker on Class Actions, Practising Law Institute (July 29, 2005)

Speaker on Class Actions, Kansas CLE (June 23, 2005)

Speaker on Class Actions at Bureau of National Affairs Seminar on the Class Action Fairness Act of 2005 (June 17, 2005)

Visiting Lecturer on Class Actions, Peking University (May 30-June 3, 2005)

Speaker on Oral Argument, American Bar Association 2005 Section of Litigation Annual Conference (April 22, 2005) (part of panel including Second Circuit Chief Judge Walker and several others)

Speaker on Class Actions, Federal Trade Commission/Organization for Economic Co-operation and Development, Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace (April 19, 2005)

Speaker at Antitrust Class Action Symposium, University of Western Ontario College of Law (April 1, 2005)

Speaker at Class Action Symposium, Mississippi College of Law (February 18, 2005)

Speaker on Class Actions, Practising Law Institute (July 30, 2004)

Visiting Lecturer on Class Actions, Peking University (June 2004)

Visiting Lecturer on Class Actions, Tsinghua University (June 2004)

Speaker at Class Action Symposium, Michigan State University (April 16-17, 2004)

Speaker on U.S. Supreme Court advocacy, David Prager Advanced Appellate Institute (Kansas City Metropolitan Bar Association) (Feb. 27, 2004)

Speaker on Class Actions, Institute of Continuing Legal Education in Georgia (Oct. 24, 2003)

Speaker on Class Actions, Practising Law Institute (July 31, 2003)

Speaker on Class Actions, Practising Law Institute (Aug. 5, 2002)

Speaker on Class Actions, Practising Law Institute (Aug. 16, 2001)

Speaker on many occasions throughout the country on "Sponsorship Strategy" (1990-present) and advocacy before the U.S. Supreme Court (1988-present)

OTHER PROFESSIONAL ACTIVITIES:

Member of American Bar Association Group Evaluating Qualifications of Merrick Garland to serve on the U.S. Supreme Court (reviewed Judge Garland's civil procedure opinions)

Member, Editorial Board of International Journal of Law in a Changing World (South Ural University, Chelyabinsk, Russia)

Board Member, The Judge John R. Brown Scholarship Foundation

Advisory Board, The Flawless Foundation (an organization that serves troubled children)

Member, Board of Directors, Citizens' Crime Commission (Portland, Oregon) (2007-2011)

Advisory Board Consulting Editor, *Class Action Litigation Report* (BNA)

Served on numerous UMKC School of Law committees, including Programs (Chair), Promotion and Tenure, Appointments, and Smith Chair Appointment

Chair of pro bono program for all 27 offices of Jones Day (2000-2004); also previously Chair of Washington office pro bono program (1992-2003)

Member, Board of Directors, Bread for the City (a D.C. public interest organization providing medical, legal, and social services) (2001-2003)

Master, Edward Coke Appellate Practice Inn of Court in Washington, D.C. (other participants include Ted Olson, Seth Waxman, Ken Starr, Walter Dellinger, and several sitting appellate judges) (2001-2003)

Member, Board of Directors, Washington Lawyers' Committee for Civil Rights and Urban Affairs (2000-2003); Advisory Board Member (2003-present)

Member, D.C. Court of Appeals Committee on Unauthorized Practice of Law (1997-2000)

Handled and supervised numerous pro bono matters (*e.g.*, death penalty and other criminal defense, civil rights, veterans' rights)

Played a major role in establishing a walk-in free legal clinic in Washington, D.C.'s Shaw neighborhood

VOLUNTEER WORK:

Numerous guest speaker appearances at public schools and retirement homes; volunteer at local soup kitchen; volunteer judge for Classroom Law Project.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MICHAEL VOGT, on behalf of himself and all others similarly situated, Plaintiffs, v. STATE FARM LIFE INSURANCE COMPANY Defendant.	)))))))))))	Case No. 2:16-CV-04170-NKL

ORDER

Class Counsel move for an award of attorneys' fees equal to one-third of the common fund at the time of distribution, as well as expenses, and a service award for the class representative, Mr. Vogt. Doc. 426. The common fund (the "Common Fund") in this case consists of the judgment in favor of the Class of $34,322,414.84, plus the additional prejudgment interest awarded by the Court pursuant to Plaintiffs' Motion for Application of Prejudgment Interest (Doc. 423), totaling $4,521,674.38, as well as post-judgment interest, which will continue to accrue until State Farm satisfies the judgment. For the reasons explained below, the motion is denied in part and granted in part.

I. NOTICE

1. On the date that Class Counsel filed the motion at issue, they posted the motion on the website that, prior to the dissemination of the litigation class notice previously approved by the Court, was created for class members. The link to the website was included in that notice. That notice also alerted class members to the possibility that "fees and expenses would be either deducted from any money obtained for the Class or paid separately by State Farm." The website

has been updated to keep class members apprised of the status of the litigation throughout these proceedings. The Court finds that, under the circumstances, publication of the notice on the website was a reasonable method of directing notice of Class Counsel's motion to the class in accordance with Rule 23(h)(1) of the Federal Rules of Civil Procedure. *See In re Int'l Air Transp. Surcharge Antitrust Litig.*, No. C06-01793, 2008 WL 4766824, at *3 (N.D. Cal. Oct. 31, 2008) ("[T]he Court ordered the parties to post notice of class counsel's motion for fees and costs on the settlement website and directed that class members be given until October 20, 2008 to make any objections."). The notice gave class members the opportunity to object, and instructions for doing so. The Court provided class members 28 days to submit any objections. No class member has objected to the requests by Class Counsel.

II. ATTORNEYS' FEES

2. Despite the absence of any objections, the Court has an obligation to determine if the requests are justified. Rule 23(h) permits the Court to award reasonable attorneys' fees authorized by law.

3. When a class action creates a common fund for the benefit of the class members, the Court may award class counsel reasonable attorneys' fees "equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation." *Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-CV-4321-NKL, 2015 WL 3460346, at *3 (W.D. Mo. June 1, 2015) (quoting *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244-45 (8th Cir. 1996)). "It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *see also In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) ("We have approved the percentage-of-recovery methodology to evaluate attorneys' fees in a common-fund settlement . . . .")

4. The judgment in this case, including the pre- and post-judgment interest, constitutes a common fund under the law. An award of attorneys' fees under the percentage-of-the-fund method therefore is appropriate.

5. In determining what percentage to award as attorneys' fees, the Court is guided by the following factors:

> (1) the benefit conferred on the class; (2) the risk to which plaintiffs' counsel was exposed; (3) the difficulty and novelty of the legal and factual issues of the case; (4) the skill of the lawyers, both plaintiffs' and defendants'; (5) the time and labor involved; (6) the reaction of the class; and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Tussey v. ABB, Inc., No. 06-CV-04305-NKL, 2019 WL 3859763, at *2 (W.D. Mo. Aug. 16, 2019) (quoting *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061–62 (D. Minn. 2010)).

6. With regard to the first factor, Class Counsel achieved an excellent result for the class in a case that was hard-fought by both sides through trial and an appeal. Class Counsel obtained close to the maximum damages requested at trial.

7. With regard to the second factor, Class Counsel took this case on a contingent-fee basis, bearing a risk of recovering nothing. The only appellate case law construing similar language in an insurance provision undermined the position that Class Counsel adopted in this case.

8. As for the third factor, the case presented some difficult and novel factual and legal issues, including with respect to interpretation of the Policy and the calculation of damages. The issues were weighty enough to draw amicus briefs from various parties on appeal.

9. With respect to the fourth factor, the attorneys on both sides were skilled and experienced. Class Counsel prevailed despite being opposed by very skilled lawyers from multiple national law firms.

10. As for the fifth factor, although Class Counsel had an incentive to be efficient because this is a contingent-fee case, Class Counsel spent over 8,600 hours prosecuting the claims and defending them on appeal.

11. With respect to the sixth factor, the fact that no class member objected to the request for fees weighs in favor of granting the motion.

12. The seventh factor requires consideration of fees awarded as a percentage-of-the-recovery in similar cases. As the Court has previously noted, "[c]ourts in this Circuit and this District have frequently awarded attorney fees of 33 1/3%–36% of a common fund." *Tussey*, No. 06-CV-04305-NKL, 2019 WL 3859763, at *4. *See, e.g., In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (finding no abuse of discretion in "$1.25 million fee award represent[ing] approximately 36% of the settlement fund); *Tussey*, 2019 WL 3859763, at *4 (approving $18,331,500 fee, equal to one-third of the common fund); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010) (finding $5,445,000 in attorneys' fees, representing 33% of settlement fund, to be in line with fees approved by Eighth Circuit); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. CIV 02-3780 JNE/JJG, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (approving fee of $5,325,000, which was equal to 35.5% of the settlement fund); *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 286 (D. Minn. 1997) (approving fee of one-third of $86 million recovery). Although some decisions have declined to award one-third of the recovery, the disputes in those cases were settled before trial. *See, e.g., Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 949–51 (D. Minn. 2016) (awarding fees totaling 20% of settlement fund, despite counsel's request for one-third of the settlement fund, where case "did not raise overly complex legal issues," was stayed within a year while the parties participated in mediation, and "did not necessitate a large time commitment by counsel"). Here, Class Counsel litigated not only class certification,

but also summary judgment, trial, post-trial motions, and multiple attempts to appeal decisions in their favor. A higher percentage of the recovery than was permitted in cases that settled at an earlier stage therefore is not unwarranted.

13. Courts often use a lodestar calculation to cross-check that the percentage-of-the-recovery method of awarding fees produces a reasonable fee. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (noting that "use of the 'lodestar' approach is sometimes warranted to double-check the result of the 'percentage of the fund'"); *see also Hashw*, 182 F. Supp. 3d at 950 ("This cross-check is intended to provide an approximation of a reasonable fee in order to 'alert[ ] the trial judge' if a percentage award is 'too great . . . .'" (ellipsis omitted, citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005)). Here, however, Class Counsel has not provided the Court with a lodestar figure or information concerning the rates and billable hours of the attorneys who worked on this case. Class Counsel has provided only a rough estimate of the number of hours they have expended on this case: 8,600. Even without post-judgment interest, the Common Fund currently equals $38,844,089.22. One-third of that amount would be $12,948,029.74. Assuming that the number of hours purportedly expended was reasonable, Class Counsel would have to charge rates of more than $1,505.58 to produce an equivalent lodestar figure. Such a rate is approximately two to four times the rates that Class Counsel from Stueve Siegel Hanson LLP typically claims to charge or could be expected to charge. *See, e.g.*, 2019 *Missouri Lawyers Media* Billing Rates publication. In other words, the lodestar figure is two to four times less than the proposed percentage-of-recovery figure. The fact that the percentage-of-recovery figure is higher is not by itself a problem: "a multiplier is justified for a number of reasons, including the risks inherent in contingent-fee litigation, which is the typical manner in which class actions are started." *Hashw*, 182 F. Supp. 3d at 951. Other decisions have found

multipliers in this range to have been reasonable. *See id.* (collecting cases approving percentage-based fees that totaled between 1.47 and 6.85 of the lodestar amount). Still, given the

14. Because this case was vigorously litigated, from class certification, to summary judgment motions, to motions in limine, through trial, post-trial motions, and multiple appeal attempts, and given the considerations discussed above, the Court finds that one-third of the common fund is a reasonable fee for Class Counsel.

III. EXPENSES

15. Class Counsel have also requested reimbursement of their expenses. It is commonly recognized that the Court can reimburse counsel from the common fund for expenses advanced on behalf of the class. Alba Conte, 1 Attorney Fee Awards § 2:19 (3d ed.); *see also Sprague v. Ticonic*, 307 U.S. 161, 166–67 (1939) (recognizing a federal court's equity power to award costs from a common fund). The Court has reviewed the requested expenses and finds that they were reasonably incurred on behalf of the Class, and that Class Counsel should be reimbursed $245,658.05.[1]

IV. SERVICE AWARD

16. Finally, Class Counsel request a service award for Mr. Vogt in the amount of $100,000.

[1] This amount excludes all expenses included on Plaintiffs' bills of costs (*see* Docs. 378, 428), to which State Farm did not file objections. The Clerk will enter a separate order billing State Farm for the unopposed costs, which shall be paid to Class Counsel as reimbursement of taxable expenses.

Plaintiffs also moved to shift certain costs incurred for noticing the Class, and future costs of distributing the judgment, to State Farm. Doc. 427. The Court now has denied that motion. Those costs for notice and distribution may be paid from the Common Fund (or to the extent already incurred by Class Counsel, reimbursed to them from the Common Fund).

17. State Farm did not file papers in opposition to Class Counsel's motion requesting a service award, but in opposing Plaintiffs' separate motion to shift the costs of providing notice to the class, State Farm directed the Court to a recent decision from the Eleventh Circuit holding that service awards are impermissible. *See* Doc. 434 at 4 (citing *Johnson v. NPAS Sols., LLC*, No. 18-12344, 2020 WL 5553312, at *7-9 (11th Cir. Sept. 17, 2020)). State Farm has no standing to oppose the requested award because the award is being paid from the Common Fund, in which State Farm has no interest. Nonetheless, the Court has an obligation to review the propriety of the requested award to protect the interests of the Class.

18. In *Johnson*, the Eleventh Circuit recently held that two Supreme Court decisions issued in the 1880s, *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885) "prohibit the type of incentive award . . . that compensates a class representative for his time and rewards him for bringing a lawsuit." *Johnson*, 975 F.3d at 1260. *Johnson* expresses concern that "incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain," *id.*at 1258 (quotation marks and citation omitted). However, the Court sees no indication that expectation of an incentive award led Mr. Vogt in this case to compromise the interest of the class for his personal gain. To the contrary, Class Counsel states that, "Mr. Vogt at no time considered settling the case individually, even when it would have been in his own self-interest to do so; instead, at all times he put the interests of the Class ahead of his own." Doc. 426, p. 20.

19. Moreover, the Eighth Circuit has expressly recognized the value of incentive awards. *See Tussey v. ABB, Inc.*, 850 F.3d 951, 962 (8th Cir. 2017) ("Incentive awards compensate lead plaintiffs for their work and the benefit they have conveyed on the rest of the class."). The

Eighth Circuit has repeatedly affirmed service awards to class representatives. *See In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (affirming $2,000 award to five representatives); *Tussey*, 850 F.3d at 961–62 (approving $25,000 incentive awards); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (finding no error in service award of $10,000). Given this precedent, which, unlike *Johnson*, is binding on the Court, and in the absence of a contrary directive from the Eighth Circuit or the Supreme Court, the Court declines to find service awards in general impermissible. *See Somogyi v. Freedom Mortg. Corp.*, No. CV 17-6546, 2020 WL 6146875, at *9 (D.N.J. Oct. 20, 2020) (declining to following *Johnson*, stating that, "[u]ntil and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances").

20. The Court turns next to the question of whether a service award is appropriate in this case, and the amount of the award. The Court must consider the following factors to "decid[e] whether the service awards were warranted: (1) actions the plaintiffs took to protect the class's interests, (2) the degree to which the class has benefitted from those actions, and (3) the amount of time and effort the plaintiffs expended in pursuing litigation." *Caligiuri*, 855 F.3d 860, 867 (8th Cir. 2017).

21. In this case, the class has benefited greatly from Mr. Vogt's participation in this case. Mr. Vogt did not settle his claims to his own benefit, but prosecuted his case from inception through trial and then through appeal, including through an attempt to have the case reheard by the Eighth Circuit *en banc*. In the process, Mr. Vogt responded to written discovery, sat for a deposition, and testified at trial. Despite suffering a detached retina 36 hours before he testified at trial, he was present for each day of trial to represent the Class before the jury.

22. Still, this case was not the kind of fact-intensive case in which large service awards might be justified. *Cf. Browne v. P.A.M. Transp., Inc.*, No. 5:16-CV-5366, 2020 WL 4430991, at *3 (W.D. Ark. July 31, 2020) (rejecting request for $50,000 service award in favor of $40,000 service awards for the named plaintiffs who each spent 400 hours helping counsel litigate the case, finding that "approximately $100 per hour" was "appropriate compensation" and any more "would constitute a windfall"); *Tussey*, 2019 WL 3859763, at **5–6 (awarding $25,000 incentive awards to named plaintiffs who were "actively involved" in the landmark litigation, which included a month-long trial and spanned 12 years); *see Galloway v. Kansas City Landsmen, LLC*, No. 4:11-1020-CV-W-DGK, 2015 WL 13297964, at *6 (W.D. Mo. Feb. 20, 2015), *aff'd*, 833 F.3d 969 (8th Cir. 2016) (declining to award $3,000 to plaintiff who had sat for deposition and consulted with class counsel because he "ha[d] not done a great deal in th[e] case," and instead awarding just $1,000). In this case, the Court granted summary judgment to the Class on threshold legal issues, and the trial centered on data and experts' damages calculations—issues that did not warrant or require any involved testimony from Mr. Vogt.

23. Because, despite its having been tried and appealed, and despite the magnitude of the damages award, Mr. Vogt's involvement in this case was not extensive, the Court finds that a service award in excess of $15,000 for Mr. Vogt would represent a windfall.

CONCLUSION

For the foregoing reasons, the Court grants Class Counsel's motion for a fee award of one-third of the Common Fund ($34,322,414.84, plus $4,521,674.38 in prejudgment interest, plus post-judgment interest, which continues to accrue) and reimbursement of their expenses, which total $245,658.05. The motion for a service award for Mr. Vogt is granted in part; Mr. Vogt is awarded $15,000 from the Common Fund.

IT IS SO ORDERED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: January 25, 2021
Jefferson City, Missouri