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

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	))))))))))))	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Honorable Jorge L. Alonso

SUPPLEMENTAL REPORT OF PROFESSOR CHARLES SILVER ON ATTORNEYS' FEES

I, Charles Silver, declare as follows:

I. INTRODUCTION AND SUMMARY OF OPINIONS

1. I first submitted a report in this case in 2013, at which time the Court was in the desirable position of having an opportunity to set the fee in this class action before the final outcome was known. As Judge Frank Easterbrook observed in the Synthroid litigation, "the best time to determine the rate is in the beginning of the case, not the end when hindsight alters the perception of the suit's riskiness ...." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). In 2013, the risks were palpable. The Defendants had appealed the trial verdict, and a decision in their favor would have meant at least a new trial and at worst an outright loss for the Class. With a judgment for nearly $2.5 billion on the line, the risks were clear to everyone.

2. In fact, the Defendants did win the appeal and a new trial was required. This development and several others strengthened my conviction, also expressed in my 2013 Report, that Lead Counsel should receive approximately one-quarter of the eventual recovery as fees.

3. Originally, I based this conclusion on several factors, one of which was the retainer agreement that Lead Counsel negotiated with the International Union of Operating Engineers Local No. 132 Pension Plan ("IUOE") near the outset of the case. Then as now, the retainer agreement promised Lead Counsel the fee that is sought.

4. The agreed fee was reasonable, I opined, for two reasons. First, when it was negotiated, the IUOE's own money was on the line. The IUOE stood to retain a larger share of its recovery by negotiating a lower fee percentage, so it had an interest in bargaining for the best terms it could get. Second, the agreed fee fell within the range that prevails in the private market for commercial litigation and securities fraud cases, which runs from 25 percent to 40 percent. Because the IUOE bargained for a fee at the low end of the scale, the reasonableness of its decision is beyond cavil. Again, the Seventh Circuit agrees. In *Silverman v. Motorola Solutions, Inc.*, 2013 WL 4082893 *1 (7th Cir. 2013), and many other cases,[1] it has held that reasonable common fund fee awards compensate class action lawyers at market rates, meaning rates that "willing buyers and willing sellers of legal services" typically agree to at the start of litigation. Actual agreements between sophisticated business clients and their lawyers provide the best evidence of market rates, and those agreements support the reasonableness of the fee set by the IUOE.

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[1] See, e.g., *In re Trans Union Corp. Privacy Litigation*, 629 F.3d 741, 744 (7th Cir. 2011); *In re Synthroid Mktg Litig.*, 325 F.3d 974, 975 (7th Cir. 2003) ("*Synthroid II*"); *Synthroid I,* 264 F.3d at 718; and *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

5. Lastly, in my 2013 Report I discussed fee awards in other class actions and concluded that *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), was the most comparable case. It was tried to a jury (twice), produced a verdict for the class (on the second go), lasted longer than 11 years, settled for over $1 billion, and produced a 31.3 percent fee award. A similar fee percentage was warranted here, I believed.

6. Now that a settlement for almost $1.6 billion is before the Court for approval, my opinion remains the same: Lead Counsel should receive a fee equal to the amount provided for in the retainer agreement with the IUOE, which works out to just less than one-quarter of the recovery. All of the considerations that justified the opinion expressed in my 2013 Report still apply, and they led me to conclude that Lead Counsel should reasonably receive over 24 percent of $2.5 billion. Now that a settlement for $1.6 billion—a smaller amount—is on the table, I see no reason for my opinion to change.

7. To the contrary, and as previously stated, subsequent events strengthen my conviction that the opinion expressed in my 2013 Report is correct. The Seventh Circuit's decision in favor of the Defendants demonstrated the riskiness of this litigation by requiring a new trial, which the Class might have lost. Preparing for the new trial required Lead Counsel to expend thousands of hours and to spend millions of dollars on experts and other services. The Seventh Circuit's decision also saddled Lead Counsel with responsibility for the Defendants' appellate litigation costs, which exceeded $13 million. Finally, the appeal delayed the resolution of the case for years. This litigation is now the fifth-longest lived securities fraud class action of all time—and it isn't over yet.

8. It was and continues to be my opinion, then, that Lead Counsel have done an extraordinary job for the Class and should be paid according to the terms of their agreement with

the IUOE, which entitles them to just under 25 percent of the recovery and to reimbursement of litigation expenses, which total approximately $34 million.

II. CREDENTIALS

9. My credentials appear in my 2013 Report. An updated resume is attached as Exhibit 1.

10. In the years that have passed since I submitted my 2013 Report, I have provided expert reports on requests for fee awards in other cases, several of which have important features in common with this one. The class actions to which I am referring all involved enormous recoveries, and two of them were tried. And in all, the presiding judges awarded fee percentages that were larger than the one Lead Counsel requests. The cases are: *In re Urethanes Antitrust Litigation*, MDL No. 1616, No. 04-MD-1616-JWL (D. Kansas July 29, 2016) (awarding fees equal to one-third of $974 million in settlements, including a final $835 million recovery secure following a trial verdict which, when trebled, exceeded $1 billion); *King Drug. Co. of Florence v. Cephalon, Inc.*, No. 2:06-cv-01797-MSG (E.D. Pa. Oct. 15, 2015) (awarding 27.5 percent fee on $512 million settlement); *In re U.S. Foodservice, Inc. Pricing Litig.*, No. 3:07-md-1894 (AWT) (D. Ct. Dec. 9, 2014) (awarding 36 percent fee on $297 million recovery); *San Allen, Inc. v. Buehrer, Admin., Ohio Bureau of Workers' Compensation* , CV-07-644950 (Common Pleas, Cuyahoga Cty, OH Nov. 25, 2014) (awarding 32.7 percent fee on $420 million settlement won after a bench trial that produced a judgment for $859 million, $651 million of which was preserved on appeal).

11. I have also updated and revised Table 5 in my 2013 Report, which listed cases with mega-fund settlements of at least $100 million and fee awards of at least 20 percent. The table now includes only mega-fund cases with fee awards of at least 25 percent. There are 64 of them.

III. DOCUMENTS REVIEWED

12. The documents I reviewed in the course of preparing my 2013 Report are identified therein. When preparing this Supplemental Report I also reviewed the documents listed below, all of which were prepared in the course of this lawsuit or relate to it in other ways, unless otherwise noted. I also rely on my knowledge of secondary sources, including articles published in law reviews and other journals, treatises, and other authorities.

- Report of Daniel R. Fischel
- Declaration of Spencer A. Burkholz in Support of Plaintiffs' Motion for Attorneys' Fees and Expenses ("Burkholz Dec.")
- Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order")
- Household International Securities Class Action Settlement (webpage)
- Stipulation of Settlement
- Notice of Proposed Settlement of Class Action
- *Glickenhaus & Co. v. Household International, Inc. et al.*, 787 F.3d 408 (7th Cir. 2015)
- Compendium of Media Articles Discussing the Proposed Settlement
- Report and Recommendation of the Special Master Relating to the Award of Attorneys' Fees and Expenses, p. 13, *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, MDL No. 1658 (SRC) (D. N.J., June 3, 2016)
- Judgment Approving Class Action Settlement, *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, MDL No. 1658 (SRC) (D. N.J., June 28, 2016)

IV. RECENT HISTORY OF THE LITIGATION

13. When I prepared my 2013 Report, Lead Counsel had tried the case to a jury and won a judgment for the Class in the amount of $2.46 billion. The verdict was on appeal, however, so there was a real risk that the verdict would be lost and judgment entered for the Defendants or that the Seventh Circuit would order a new trial, which the Class might lose. In either event, the Class would not recover and Lead Counsel would go unpaid.

14. In fact, and as described in the *Preliminary Approval Order*, the *Burkholz Dec.*, the Household International Securities Class Action Settlement webpage, and other places, the judgment was reversed. In mid-2015, the Seventh Circuit remanded the case for a new trial on loss causation, damages, and the Individual Defendants' authorship of statements upon which liability was predicated. The Seventh Circuit also held that the new jury would need to reapportion liability in light of the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders,* 131 S. Ct. 2296 (2011).

15. The loss in the Seventh Circuit had an enormous detrimental effect on Lead Counsel. In the first instance, it required Lead Counsel to reimburse the Defendants for more than $13 million in litigation costs. To protect the Class from insolvency risks, Lead Counsel had refused to agree to refrain from executing on the trial judgment unless Household posted a supersedeas bond in the amount of $2.5 billion, which Household did. When the Seventh Circuit reversed the trial court, Household became eligible under Federal Rule of Appellate Procedure 39(e) for reimbursement of the premiums that Household's parent company, HSBC North America Holdings, Inc., had paid for the bond. In November of 2015, the Court required the Named Plaintiffs to pay $13,281,282.00 in appellate costs, which Lead Counsel covered.

16. The Seventh Circuit's decision also elevated Lead Counsel's risk in other ways. Most obviously, it required Lead Counsel to retry part of the case and to do so before a new

judge. It also: created the possibility that pivotal issues, such as whether the leakage model could be presented to the jury, would be resolved against the Class on motions before the new trial occurred; required Lead Counsel to prepare an expert on loss causation and to depose the corresponding new experts put forward by the Defendants; and created the risk that the jury would reject the leakage model or select much lower damages, including possibly no damages. Lead Counsel also had to file offensive *Daubert* motions and motions *in limine* and oppose corresponding motions filed by the Defendants, attend a four day Pretrial Conference, move a team that included lawyers, a forensic accountant, and support staff from San Diego, California to Chicago, Illinois for the retrial, and provide all the other services that are described in the *Burkholz Dec*.

17. The magnitude of the risk is reflected in the hours Lead Counsel expended in connection with the Seventh Circuit appeal and thereafter, preparing for the second trial. All told, approximately 17.5 percent of Lead Counsel's hours were expended in connection with the appeal or after the Seventh Circuit issued its ruling.

18. On June 17, 2016, after fourteen years of litigation, the parties executed a stipulation of settlement that will create a cash settlement fund in the principal amount of $1,575,000,000, plus interest. Including the $1.5 million obtained from Arthur Andersen L.L.P. in 2006, the total recovery before interest is $1,576,500,000.

V. REVISED TABLE OF MEGA-FUND SETTLEMENTS WITH LARGE PERCENTAGE FEE AWARDS

19. In my 2013 Report, Table 5 identified a raft of class actions with recoveries of $100 million or more in which judges awarded fees at or above 20 percent of the recovery. A few more such cases came to exist in recent years, as I discuss in the next part of this Supplemental Report in greater detail. I therefore revised the table and raised the cutoff for

inclusion to 25 percent of the recovery, roughly the amount requested here. The new table includes 64 cases, more than enough to show that judges are willing to award fee percentages like the one requested here when lawyers incur sufficient risks and costs. A 65th case just missed the cutoff. In *Ethylene Propylene Diene Monomer Antitrust Litigation*, Civ. No. 3:03md1542 (D. Ct.), the total recovery was $107 million and the court-awarded fee was 24.50 percent.

TABLE 1: MEGA-FUND CLASS ACTIONS WITH FEE AWARDS OF 25% OR MORE			
	Case	**Recovery (millions)**	**Fee Award**
1	*In re TFT-LCD (Flat Panel) Antitrust Litig.*., 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013)	$1,080	28.60%
2	*Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006)	$1,060	31.33%
3	*In re Urethane Antitrust Litigation*, MDL No. 1616, No. 04-MD-1616-JWL (D. Kansas July 29, 2016)	$974	33.33%
4	*In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112 (N.D. Ill. Feb. 10, 2000)	$697	25.00%
5	*Kirk Dahl et al. v. Bain Capital Partners LLC et al.*, No. 1:07-cv-12388 (D. Mass. Jan. , 2015)	$590	33.00%
6	*In re Fructose Antitrust Litig.*, MDL No. 1087, Master File No. 94-1577 (C.D. Ill. Oct. 4, 2004)	$531	25.00%
7	*King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015	$512	27.50%
8	*In re Initial Pub. Offering Sec. Litig.*, 671 F.Supp.2d 467 (S.D.N.Y. 2009)	$510	33.30%
9	*Spartanburg Regional Health Services Dist., Inc., et al. v. Hillenbrand Industries, Inc. et al.*, No. 7:03-2141-HFF (D. S.C. Aug. 15, 2006)	$468	25.00%
10	*In re Air Cargo Shipping Servs. Antitrust Litig. ("Air Cargo 1"),* No. 06–MD–1775, 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009) ($85 million); *In re Air Cargo Shipping Services Antitrust Litig. (Air Cargo II)*, No. 06–MD–1775, MDL 1775, 2011 WL 2909162 (E.D.N.Y. July 15, 2011) ($153.8 million); & *In re Air Cargo Shipping Services Antitrust Litig. (Air Cargo III)*, No. 06–MD–1775, MDL 1775, 2012 WL 3138596 (E.D.N.Y. Aug. 2, 2012) ($183.4 million)	$422.20	25.00%
11	*San Allen, Inc. v. Buehrer, Admin., Ohio Bureau of Workers' Compensation*, CV-07-644950 (Common Pleas, Cuyahoga Cty, OH Nov. 25, 2014)	$420.00	32.70%
12	*In Re (Bank of America) Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330 (S.D. Fla. 2011)	$410	30.00%
13	*In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001)	$365	34.60%
14	*In Re Dynamic Random Access Memory (DRAM) Antitrust Litigation,* No. M:02-cv-01486-PJH, MDL-02-1486 (N.D. Cal. Nov. 1, 2006)	$326	25.00%
15	*In re Neurontin Marketing and Sales Practices Litig.*, Civil Action No. 04-10981-PBS (Nov. 10, 2014)	$325	28.00%

TABLE 1: MEGA-FUND CLASS ACTIONS WITH FEE AWARDS OF 25% OR MORE			
	Case	**Recovery (millions)**	**Fee Award**
16	*In re Rite Aid Corp. Sec. Litig. (Rite Aid I),* 146 F.Supp.2d 706 (E.D.Pa.2001)($193 million) & *In re Rite Aid Corp. Sec. Litig. (Rite Aid II),* 362 F.Supp.2d 587 (E.D.Pa.2005) ($126 million)	$319	25.00%
17	*In re Tricor Indirect Purchaser Antitrust Litigation,* C.A. No. 05-360, Order and Final Judgment Approving Settlement (Oct. 28, 2009); *In re Tricor Direct Purchaser Antitrust Litigation*, C.A. No. 05-340, Order and Final Judgment, 4/23/2009	$316	33.33%
18	*Cooper v. IBM Personal Pension Plan*, 2005 WL 1981501 (S.D. Ill. 2005)[1]	$314	28.30%
19	*In re Williams Sec. Litig.,* No. 02-cv-072-SPF-FHM (N.D. Okla. Feb. 12, 2007)	$311	25.00%
20	*Lauriello v. Caremark RX LLC*, 01-CV-2003-006630.00 (Circuit Ct. of Jefferson Cty, Ala, Aug. 15, 2016)	$310	40.00%
21	*DeLoach V. Phillip Morris Cos.,* No. 1:00CV01235, 2004 WL 5508762 (M.D.N.C. Mar. 31, 2005	$310	27.00%
22	*In re Oxford Health Plans, Inc. Sec. Litig.,* MDL 1222 (S.D.N.Y. June 2003)	$300	28.00%
23	*In re U.S. Foodservice, Inc. Pricing Litig.,* No. 3:07-md-1894 (AWT) (D. Ct. Dec. 9, 2014)	$297	33.33%
24	*Sullivan v. DB Investments, Inc.,* 04-CV-2819 (SRC) (May 22, 2008) (DeBeers antitrust litigation)	$292	25.00%
25	*In re Tricor Direct Purchaser Litig.*, D. Del. 05-340-SLR, Doc. No. 543	$250	33.33%
26	*In re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, MDL No. 834 (D. Ariz. July 24, 1990)[2]	$250	26.60%
27	*In re Comverse Technology, Inc. Securities Litig.,* 2010 WL 2653354, 6 (E.D.N.Y., 2010)	$225	25.00%
28	*In re Buspirone Antitrust Litig.,* No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003)[3]	$220	33.30%
29	*In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995)	$220	30.00%
30	*In re Linerboard Antitrust Litig.*, 2004 WL 1221350 (E.D. Pa. 2004)	$203	30.00%
31	*Silverman v. Motorola, Inc.,* No. 07 C 4507, 2012 WL 1597388 (N.D. Ill. May 7, 2012)	$200	27.50%
32	*In re Neurontin Antitrust Litigation*, D.N.J. 2:02-cv-01830, Doc. No. 114	$191	33.33%
33	*Weatherford Roofing Co., et al. v. Employers National Ins. Co.*, No. 91-05637 (116th Dist. Ct, Dallas, TX) (Dec. 1, 1995)	$190	31.60%

TABLE 1: MEGA-FUND CLASS ACTIONS WITH FEE AWARDS OF 25% OR MORE			
	Case	**Recovery (millions)**	**Fee Award**
34	*In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D.Tex.1999)[4]	$190	25.00%
35	*In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000)[5]	$185	40.00%
36	*In re Home-Stake Prod. Co. Sec. Litig.,* MDL No. 153 (N.D.Okla. Jan. 2, 1990)	$185	30.00%
37	*In re Relafen Antitrust Litig., No. 01-12239,* 2004 U.S. Dist. LEXIS 28801 (D. Mass. Apr. 9, 2004)	$175	33.33%
38	*Standard Iron Works v. Arcelormittal et al.*, No. 08-C-5214 (N.D. Ill., Oct. 22, 2014)	$164	33.33%
39	*In re Titanium Dioxide Antitrust Litig.,* 10-CV-00318 (D. Maryland, Dec. 13, 2013)	$164	33.33%
40	*Alaska Elec. Pension Fund v. Pharmacia Corp.,* No. 03-1519 (D.N.J. Jan. 30, 2013)	$164	27.50%
41	*In re: (Chase Bank) Checking Account Overdraft Litig.*, No. 1:09-MD-02036 (S.D. Fla. Dec., 19, 2012)	$162	30.00%
42	*Chieftain Royalty Co. v. QEP Energy Co.*, Case No. CIV-11-212-R (W.D. Okla. May 31, 2013)	$155	30.00%
43	*MBA Surety Agency, Inc. v. AT&T Mobility LLC*, No.1222-CC09746 (Mo. Cir. Ct. Mar. 7, 2013)	$152.60	25.00%
44	*In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. 2013)	$150	33.33%
45	*In re: Managed Care Litig.*, No. 00-MD-1334, MDL1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003	$150	29.00%
46	*In re Apollo Group Inc. Securities Litigation*, 2012 WL 1378677, at *9 (D.Ariz., April 20, 2012)	$145	33.00%
47	*In re: (Citizens Bank) Checking Account Overdraft Litig.*, No. 1:09-MD-02036 (S.D. Fla. Mar. 12, 2013)	$137.50	30.00%
48	*In re Computers assocs. Class Action Sec. Litig.*, CV-98-4839 (TCP) (E.D. NY 2003)[6]	$136	25.00%
49	*In re Informix Corp. Sec. Litig.,* Master File No. C-97-1289-CRB (N.D.Cal. Nov. 2, 1999)	$132	30.00%
50	*In re Combustion, Inc.,* 968 F.Supp. 1116 (W.D.La.1997)	$127	36.00%
51	*In re Infant Formula Antitrust.*, MDL No. 878, (N.D. Fla. Sept. 7, 1993)	$125	25.00%
52	*Kurzweil v. Philip Morris Co., Inc.,* Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123	30.00%
53	*In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475-NRB (S.D.N.Y.2005)	$120	28.00%

TABLE 1: MEGA-FUND CLASS ACTIONS WITH FEE AWARDS OF 25% OR MORE			
	Case	**Recovery (millions)**	**Fee Award**
54	*In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393 (S.D.N.Y.1999)	$116	27.50%
55	*In re OSB Antitrust Litig.*, Master File No. 06-826 (March 4, 2009)	$111	33.30%
56	*In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000)	$111	30.00%
57	*Klein v. O'Neal, Inc.*, 705 F.Supp.2d 632 (N.D.Tex. Apr. 9, 2010)	$110	30.00%
58	*In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, at 18-20 (E.D.Mich. Nov. 26, 2002)	$110	30.00%
59	*In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 912 F.Supp. 97 (S.D.N.Y.1996)	$110	27.00%
60	*In re Sunbeam Sec. Litig.*, 176 F.Supp.2d 1323 (S.D.Fla.2001)	$110	25.00%
61	*In re Automotive Refinishing Paint Antitrust* Litigation, MDL No. 1426 (E.D. Pa. Jan. 3, 2008)	$106	32.70%
62	*City of Greenville v. Syngenta Crop Protection,* No. 3:10-cv-00188 (S.D. Ill. Oct. 23, 2012)	$105	33.33%
63	*In re Prison Realty Sec. Litig.,* Civil Action No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D.Tenn. Feb. 9, 2001)	$104	30.00%
64	*In Re: Chase Bank USA, N.A. "Check Loan" Contract Litigation,* 3:09-md-02032-MMC (D. N.J. 2012)	$100	25.00%

[1] The Court awarded a graduated amount ranging from 17–29% of the recovery. After an appeal reversed a portion of the award, this table reflects the actual settlement and fee realized.

[2] The Court awarded an increasing graduated amount (25% of the first $150 million and 29% of any larger amount). This table reflects the values realized.

[3] The global settlement exceeded $500 million, of which $220 million was reserved for the Direct Purchaser Class. The trial court approved a fee equal to 33 1/3% of the Direct Purchaser fund.

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

[6] The settlement fund was paid in shares of stock. Class counsel received a percentage of the stock as fees.

20. Table 1 documents judges' willingness to award fee percentages of 25 percent or more in cases that generate enormous recoveries, including settlements that exceed $1 billion. It shows, in other words, that judges award fees that are warranted under the circumstances. They do not automatically reduce fee percentages as recoveries increase, as is sometimes said.

21. In fact, judges' track record of awarding fees of 25 percent or more in mega-fund cases is actually much stronger than Table 1 indicates because settlement values have not been adjusted for inflation. For example, a case with a 25 percent fee award that settled for $54 million settlement in 1990 would merit inclusion because $54 million in 1990 dollars is worth $100 million today. Because an inflation adjustment would make dozens more cases eligible for inclusion, perhaps even hundreds, the impact of Table 1 would strengthen greatly.

22. Adjusting for inflation would also have a second bolstering effect, because the size of many of the settlements that do appear in Table 1 would increase. For example, the $1.06 billion settlement in *Allapattah Services* (#2 in Table 1) would equal almost $1.3 billion today, and the $697 million recovery in *In re Brand Name Prescription Drugs Antitrust Litig.* (#4 in Table 1) would be worth almost $1 billion. Because the failure to adjust for inflation understates the size of the settlements, it also understates judges' willingness to award fees of 25 percent or more in cases that, at the time of settlement, truly were enormous.

VI. DISCUSSION OF FEE AWARDS IN RECENTLY SETTLED COMPARABLE CASES

23. In my 2013 Report, I offered several reasons for believing that "this case has no equal." The first three were that "few class actions are tried," many of the trials that have occurred have gone "badly for plaintiffs," and class action trials "with billion-dollar verdicts are unheard of." I also observed that, at 11 years of age and counting, this lawsuit was already

exceptionally old. Now, 3 years later, it is the 5th longest-lived securities fraud class action of all time. Securities Class Action Clearinghouse, *Top Ten by Longest Lawsuit*, http://securities.stanford.edu/top-ten.html?filter=longest_lawsuit (visited August 11, 2016).

24. After offering these observations, I suggested that the class action most comparable to this one was *Allapattah Services, Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185 (S.D. Fla. 2006), the only other class action with a billion-dollar verdict of which I knew. *Allapattah Services* was a breach of contract case that was tried to a jury (twice), produced a $1.3 billion verdict, and settled for $1.075 billion after a 14 year run. Because of the result obtained and the exceptional level of risk incurred, the judge who presided over *Allapattah Services* awarded class counsel 31.3 percent of the recovery as fees.[2] The fee requested in this case is much smaller, reflecting the fact that Lead Plaintiff IUOE negotiated better terms than the class members in *Allapattah Services*, most or all of whom signed contracts obligating them to pay their lawyers one-third of their recoveries.

25. Since filing my 2013 Report, I have been privileged to serve as an expert on fees in four other class actions that also share some important features with this one, including two that produced mega-fund settlements after being tried to favorable verdicts. The first tried case was *San Allen, Inc. v. Buehrer, Admin., Ohio Bureau of Workers' Compensation* , CV-07-644950 (Common Pleas, Cuyahoga Cty, OH Nov. 25, 2014), which yielded a $420 million recovery. The litigation was remarkable in several respects, one of which was that the complaint sought almost a billion dollars in damages from a sovereign state, an unheard of sum for a governmental entity to pay. The case resolved after 7 years of hard-fought litigation, during which class counsel prevailed on class certification after a contested trial court hearing, fended

[2] The court set aside $15 million of the gross recovery for reasons that, as a practical matter, are irrelevant. The fee was thus calculated as 31.3 percent of $1.06 billion.

off challenges to the class on appeal (twice), won a bench trial that lasted 7 days, and obtained a judgment in excess of $859 million, $651 million of which was preserved on appeal. The fee award was 32.7 percent.

26. The second tried case was *In re Urethane Antitrust Litigation*, MDL No. 1616, No. 04-MD-1616-JWL (D. Kansas July 29, 2016). There, the total recovery was $974 million, $835 million of which was wrested from a single defendant, The Dow Chemical Company ("Dow"), following a month-long jury trial that produced a $1.06 billion judgment (after trebling) for the class. The litigation lasted about 12 years, during which time class counsel fended off two rounds of dismissal motions, convinced the Court to certify an antitrust class for trial, defeated the defendant's efforts to have certification reversed on interlocutory appeal, undertook a staggering amount of discovery that included taking depositions in foreign countries and obtaining documents located abroad, and defended the verdict on appeal. There was also a sizeable risk that the Supreme Court would upset the applecart. It took Dow's petition for certiorari under advisement while considering *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. ____ (2016). A pro-defendant decision in *Tyson Foods* would have forced reconsideration of the class certification decision in *Urethane* and possibly wiped out the trial verdict. The parties settled for $835 million while *Tyson Foods* was pending. Recognizing the risk incurred and the result obtained, the court awarded class counsel one-third of the settlement as fees.

27. The third recent case was *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa.), one of a series of class-based antitrust lawsuits brought against name brand drug manufacturers who sought to extend the duration of their monopolies on patented drugs by entering into so-called "pay for delay" settlements with potential competitors that produced generics. Collectively, the series of 17 cases generated more than $1

billion in recoveries *King Drug*, which settled for $512 million, accounted for a disproportionate share of this amount. But in all of the cases, including *King Drug*, the presiding judges awarded high percentage fees, as shown in the table below.

TABLE 2. RECOVERIES AND FEE AWARDS IN PHARMACEUTICAL ANTITRUST CASES, SORTED BY SETTLEMENT DATE		
Case	**Recovery (millions)**	**Fee Award**
King Drug Company of Florence, Inc. v. Cephalon, Inc., No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015)	$512	27.5% plus expenses
In re Doryx Antitrust Litig., No. 12-3824 (E.D. Pa. Sept. 15, 2014)	$15	33⅓% plus expenses
In re Neurontin Antitrust Litig., No. 02-1830 (D.N.J. Aug. 6, 2014)	$191	33⅓% plus expenses
In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-cv-83 (E.D. Tenn. June 30, 2014)	$73	33⅓% plus expenses
In re Flonase Antitrust Litig., No. 08-cv-3149 (E.D. Pa. June 14, 2013)	$150	33⅓% plus expenses
In re Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012)	$37.50	33⅓% plus expenses
Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc., No. 07-142 (D. Del. May 31, 2012)	$17.25	33⅓% plus expenses
In re DDAVP Antitrust Litig., No. 05-2237 (S.D.N.Y. Nov. 28, 2011)	$20.25	33⅓% plus expenses
In re Wellbutrin SR Antitrust Litig., No. 04-5525 (E.D. Pa. Nov. 21, 2011)	$49	33⅓% plus expenses
Meijer, Inc. v. Abbott Labs., No. C07-5985 CW (N.D. Cal. Aug. 11, 2011)	$52	33⅓% plus expenses
In re Nifedipine Antitrust Litig., No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011)	$35	33⅓% plus expenses
In re Oxycontin Antitrust Litig., No. 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011)	$16	33⅓% plus expenses
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. April 23, 2009)	$250	33⅓% plus expenses
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	$75	33⅓% plus expenses
In re Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 43082 (S.D. Fla. Apr. 19, 2005)	$74	33⅓% plus expenses
In re Relafen Antitrust Litig., No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004)	$175	33⅓% plus expenses
In re Buspirone Antitrust Litig., No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003)	$220	33⅓% plus expenses
In re Cardizem CD Antitrust Litig., MDL No. 1278 (E.D. Mich. Nov. 26, 2002)	$110	30% plus expenses

28. The consistency of the fee percentages reflects the influence of several factors, one of which was the significant risk class counsel incurred. These were pioneering lawsuits that tested novel antitrust theories. Several cases in the series that are not listed in Table 2 ended badly for the plaintiffs too. But another factor may have been more important. In the listed cases, the plaintiff classes were unusually small. They contained 20 or so drug wholesalers, several of which were Fortune 500 companies (or better) and all of which were sophisticated clients engaged in repeat-play litigation. In each settlement, the wholesalers supported class counsel's fee requests. None objected, and many contributed letters or declarations in support. Seeing that these sophisticated clients believed that class counsel had earned the dollars they requested, the presiding judges gave great weight to the opinions of clients that were accustomed to hiring lawyers to handle large commercial litigations.

29. The last recent case I will mention is *In re U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT) (D. Ct.), a RICO class action that produced a $297 million settlement. The case merits inclusion for several reasons, one of which is that the named plaintiffs were sophisticated business clients that agreed that class counsel could be paid as much as 40 percent of the recovery. Another is that, over the case's 8 year life span, class counsel convinced the trial court to certify a nationwide RICO class for litigation and preserved the certification decision on appeal. When *U.S. Foodservice* was filed the number of RICO classes successfully certified for litigation was vanishingly small, reflecting the need for individualized proof of misrepresentation and reliance. Recognizing the risks class counsel overcame, the court awarded one-third of the recovery as fees.

30. The four cases just discussed, all of which settled after I completed my 2013 Report, provide solid support for my opinion that Lead Counsel's request for slightly less than 25

percent of the recovery as fees is reasonable. In the two tried cases—*San Allen* and *Urethane*—the fee awards were 32.7 percent and 33.33 percent, respectively. The cases thus fit nicely with *Allapattah Services*, until now (and perhaps still) the most comparable case, in which the court awarded 31.3 percent of the $1.075 billion recovery as fees. The other two cases—*King Drug* and *U.S. Foodservice*—were not tried but did produce mega-fund settlements after years of intensive litigation during which the lawyers for the plaintiff classes incurred and overcame serious risks. The fee awards—27.5 percent and 33.33 percent, respectively—provide additional evidence for the point made in my 2013 Report. Judges do not reduce fee percentages reflexively as recoveries rise; they award the percentages that, in their assessment, the circumstances warrant, including large percentages in mega-fund cases when lawyers overcome serious risks or bear sizeable costs.

VII. THE MAGNITUDE OF LEAD COUNSEL'S ACCOMPLISHMENT

31. In my 2013 Report, I characterized the results obtained as "spectacular." I said this partly because, if the judgment had been collected in full, the recovery would have been one of the top ten in the history of securities fraud litigation.

32. In fact, the proposed settlement, the total value of which is almost $1.6 billion, is a slight discount on the judgment. The existence of a discount is not surprising. Plaintiffs persuade defendants to settle by offering them the chance to save money. My research group quantified the frequency of settlement discounts on jury verdicts in tried medical malpractice lawsuits and found them to be exceedingly common. In fact, discounts occur in all types of lawsuits and are often large. All of the securities fraud class actions that produced plaintiff verdicts before this one were resolved on terms that were far less favorable than the trial results, as shown in my 2013 Report.

33. Still, "spectacular" continues to be the right word to describe the $1,576,500,000 recovery. The Securities Class Action Clearinghouse at the Stanford Law School already lists it as the 8th largest settlement in history. Securities Class Action Clearinghouse, *Top Ten by Largest Settlement,* http://securities.stanford.edu/top-ten.html (visited August 11, 2016). Using nominal dollars rather than dollars adjusted for inflation, this settlement would rank 7th.

34. The recovery also marks a distinct break from the recent past. In recent years, billion dollar securities fraud settlements have been scarce. In 2014, only one case settled in the mega-fund range, and it did not reach the billion-dollar level. In 2015, there were 14 mega-fund settlements. One fell just short of the billion-dollar level, while the others all settled for $500 million or less. Svetlana Starykh and Stefan Boettrich, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2015 FULL-YEAR REVIEW, Table 1, p. 30 (NERA, 2016).

35. One other billion-dollar securities fraud settlement has occurred in 2016, however. In that case, the defendant was Merck & Co., Inc., which stood accused of misrepresenting the safety of Vioxx, a pain reliever used by arthritis sufferers. The litigation lasted 12 years, much of which was spent on appeal after the trial court dismissed the plaintiffs' claims on statute of limitations grounds. The Supreme Court reversed this ruling in 2010 and the case settled for $1.062 billion this year, prior to trial. The court awarded 20 percent of the recovery as fees. *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, MDL No. 1658 (SRC) (D. N.J., June 28, 2016). By comparison, the reasonableness of the fee requested here is apparent. In this case, Lead Counsel bore far greater risk and recovered a far larger percentage of class members' damages.

36. When gauging the magnitude of Lead Counsel's accomplishment, it also helps to consider the recovery as a percentage of class members' estimated damages. It is well known

that, when securities class actions are not dismissed outright, they typically settle for pennies on the dollar. In 2015, over 75 percent of the settlements were for $20 million or less, while almost half came in at or below $5 million. Cornerstone Research, SECURITIES CLASS ACTION SETTLEMENTS: 2015 REVIEW AND ANALYSIS 5, Fig. 4 (2016). The median settlement in 2015 was $6.1 million. Id., p. 6, Fig. 5. When recoveries are this small, only a tiny fraction of investors' losses can possibly be recovered. Over many years, the median settlement has covered about 2 percent of investors' estimated losses. Id., p. 8, Fig. 7.

37. There is also a documented tendency of settlements to cover a smaller fraction of investors' losses as those losses grow in size. In other words, investors recoup the fewest pennies per dollar lost in the cases that involve the biggest financial frauds. Historically, when estimated losses have exceeded $1 billion, investors have recovered about1 percent. Id., p. 9, Fig. 8. The billion-dollar settlement of the Merck/Vioxx litigation, discussed above, was thought to be an excellent result, yet it recovered for investors only about 8 percent of their losses. Report and Recommendation of the Special Master Relating to the Award of Attorneys' Fees and Expenses, p. 13, *In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, MDL No. 1658 (SRC) (D. N.J., June 3, 2016).

38. Here, by contrast, investors will receive far more than average compensation, even though their estimated losses were large. For example, according to Lead Counsel, the traditional specific disclosure model of plaintiffs' damages puts the damages at $624 million. Taking that as the denominator, the Class will recover about 2.5 times the amount it lost—an unheard of accomplishment. Alternatively, one can employ the leakage model developed by the Plaintiffs and Professor Daniel R. Fischel that was presented to the jury at trial. Lead Counsel

represents that this model estimates the total damages at $2.08 billion, meaning that the recovery is 75 percent—again a terrific result.

VIII. FEE AGREED TO BY THE NAMED PLAINTIFF

39. In my 2013 Report, I opined that the fee agreement entered into between Lead Plaintiff IUOE and Lead Counsel set reasonable compensation terms for the Class as a whole. The agreement adopted the rising scale of percentages shown below. Both I and other writers have defended rising scales on the ground that they incentivize lawyers to hold out for higher dollar amounts, which are harder to obtain. Rising scales have also survived appellate review. See *In re AT&T Corp. Securities Litigation*, 455 F.3d 160 (3d Cir. 2006). Finally, at all recovery increments, the agreed percentages are at or below those that sophisticated clients pay the lawyers they hire to handle large commercial litigations.

TABLE 3: SCALE OF PERCENTAGES AGREED TO BY LEAD PLAINTIFF IUOE	
Recovery Increment	**Fee**
$1-$50 Million	19%
$50 Million-$150 Million	22%
> $150 Million	25%

40. In my 2013 Report, I also explained that other lead plaintiffs had used similar, rising fee schedules when retaining the law firm of Robbins, Geller, Rudman and Dowd LLP (“RGRD”) or one of its predecessors to handle securities fraud cases. Table 3 displayed 5 examples of them. In response to a request for additional examples, Lead Counsel provided several more, as shown in Table 4 below.

TABLE 4: SCALES OF PERCENTAGES USED IN OTHER SECURITIES CLASS ACTIONS			
	Case/Lead Plaintiffs	**Recovery Increment**	**Fee**
1	*In re Dollar General Corporation Securities Litigation* Teachers Retirement System of Louisiana Florida State Board of Administration	\$0-\$15 Million	15%
		\$15-\$30 Million	17.50%
		\$30-\$60 Million	20%
		> \$60 Million	22.50%
2	*Schwartz v. TXU Corp.* Plumbers & Pipefitters National Pension Fund	\$0-\$20 Million	18%
		\$20-\$40 Million	20%
		\$40-\$75 Million	22%
		> \$75 Million	24%
3	*Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Hanover Compressor Company, et al.* Plumbers & Steamfitters Local 137 Pension Fund	\$0-\$10 Million	14%
		\$10-\$25 Million	18%
		> \$25 Million	24%
4	*In re NorthWestern Corporation Securities Litigation* Carpenter's Pension Trust for Southern California	\$0-\$6 Million	17%
		\$6-\$12 Million	19%
		\$12-\$18 Million	23%
		> \$18 Million	27%
5	*In re Cardinal Health, Inc. Securities Litigation* Amalgamated Bank California Ironworkers Field Trust Fund PACE Industry Union-Management Pension Fund	\$0-\$50 Million	19%
		\$50-\$150 Million	23%
		> \$150 Million	25%
6	*Dana Corp. Securities Litigation* Plumbers & Pipefitters National Pension Fund SEIU Pension Plan Master Trust West Virginia Laborers Pension Trust Fund	\$0-\$5 Million	0%
		\$5-\$15 Million	16%
		\$15-\$25 Million	18%
		\$25-\$40 Million	20%
		\$40-\$150 Million	23%
		> \$150 Million	25%
7	*Doral Finanal Corp. Securities Litigation* West Virginia Investment Management Board	\$0-\$25 Million	0%
		\$25-\$50 Million	16%
		\$50-\$75 Million	18%
		\$75-\$125 Million	20%
		> \$125 Million	22%
8	*AT&T* New Hampshire Retirement System	\$0-\$25 Million	15%
		\$25-\$50 Million	20%
		> \$50 Million	25%
		\$7.5-\$12.5 Million	23%
		> \$12.5 Million	27.5%
9	*In re Sprint Corp. Securities Litigation* United Brotherhood of Carpenters Pension Fund Employer-Teamsters Local 505 & 175 Pension Trust Fund New England Health Care Employees Pension Fund Amalgamated Fund Plumbers & Pipefitters National Pension Fund PACE Industry Union-Management Pension Fund	\$0-\$25 Million	15%
		\$25-\$50 Million	20%
		> \$50 Million	25%

41. The entries in Table 4 show that Lead Plaintiff IUOE acted reasonably. This is true even though in other cases lead plaintiffs have used scales that declined at the margin or obtained more favorable terms. To be reasonable, a fee need not be the lowest amount that any client has ever paid in a comparable representation. It need only be freely negotiated by a client whose own money is at stake and fall within the broad range of terms that sophisticated business clients customarily pay. When lawyers and clients bargain over fees, some degree of variation is to be expected as the choice of percentages is tailored to the facts.

42. The point just made is important because the Private Securities Litigation Reform Act of 1995 ("PSLRA") gives lead plaintiffs control of fees. As my coauthors and I explained in an empirical study of fee awards that appeared in the Columbia Law Review in 2015:

> By enacting the PSLRA, Congress gave class-action procedure a substantial overhaul. Seeking to rely less on judges and objectors and more on incentives, it sought to put class actions under the control of sophisticated investors with large financial stakes. The hope was that these investors would seek to maximize their own net recoveries by maximizing the net recoveries for everyone. They would use contingent-fee arrangements to incentivize excellent attorneys to obtain good results, while using competition among lawyers to obtain bargain rates.

Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is The Price Right? An Empirical Study of Fee-Setting In Securities Class Actions*, 115 COLUMBIA L. REV. 1371, 1377-1378 (2015). The theory of the PSLRA, then, is that sophisticated investors with sizeable stakes, experience hiring attorneys, and good access to the market for legal services will serve as bargaining agents for entire classes. Judges are to serve as backstops and are to substitute their judgments for lead plaintiffs' only when lead plaintiffs clearly fail to do their job. No such failure occurred in this

case, however, Lead Plaintiff IUOE having bargained over fees early in the litigation and having agreed to a scale of fees that falls within the customary range.

43. Having mentioned my 2015 study, I will briefly summarize its findings and explain its bearing on this case. In hope of shedding light on the internal workings of the fee setting process, my coauthors and I studied the actual litigation documents that were filed in 431 securities fraud class actions that settled from 2007 to 2012. We were especially keen to learn whether fee agreements were playing the role that Congress expected them to play when it enacted the PSLRA. On the whole, we found that they were not. When applying for fee awards, class action lawyers infrequently included in their moving papers the fee agreements that they negotiated with lead plaintiffs at or near the start of litigation, and when they did judges sometimes deviated from the agreed terms for reasons that were hard to discern. We therefore proposed a set of procedural reforms that would require lead plaintiffs and class counsel to bargain over fees up front and make the terms of their bargains part of the official record, and that would require federal judges to set fee terms at or near the start of litigation too.

44. This case conforms more closely to the procedures we recommended than the vast majority of those we studied. Lead Plaintiff IUOE did bargain over fees early in the litigation, before there was any prospect of settling. Consequently, there is good reason to think that the fee scale it agreed upon reflects the risks and costs that the parties expected the litigation to entail. Lead Counsel also disclosed the terms of its engagement to the Court in 2013, when a tentative attempt was made to obtain a ruling on fees. The path taken in this case thus conforms more closely to the one provided for in the PSLRA than is typical.

45. Our study also found that the average and median fee awards were 24 percent and 25 percent of the recovery, respectively. Id., p. 1389, Table 1. Awards tended to be lower in

cases like this one where ex ante agreements fixed class counsel's compensation terms. Finally, and in contrast to other studies, we found that, in most federal districts, fee percentages held steady as recoveries climbed. Significant evidence that judges apply the so-called "increase/decrease rule," according to which larger settlements generate smaller percentage awards, was found only in the districts with the largest numbers of securities fraud cases: the Central and Northern Districts of California, and the Southern District of New York.

46. We also found that fee requests tended to be somewhat smaller in the Seventh Circuit than many others. Id., p. 1409 n. 152. This is interesting because doctrinally the Seventh Circuit might be thought to be pro-class counsel on fees. It has instructed district court judges to mimic the market for legal services and, consistent with that maxim, it has rejected both fee caps and the increase/decrease rule, neither of which has the market endorsed. See *Synthroid I,* 264 F.3d at 718 (rejecting a 10 percent fee cap and instructing the district court to "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case . . . when the risk of loss still existed"). But fee requests are lower, my coauthors and I surmised, because "the Seventh Circuit . . . has developed a reputation for closely scrutinizing fee requests[]." Id. Evidently, lawyers exercise moderation when they know that their fee requests will be compared to prevailing market rates.

47. Here, of course, we have a good idea about the terms that private bargaining at the start of litigation would have produced. Lead Plaintiff IUOE and Lead Counsel actually agreed on terms "while the risk of loss still existed." And they chose terms like those that sophisticated clients commonly use when hiring lawyers to handle high-stakes commercial lawsuits, as shown in my 2013 Report. Under both Seventh Circuit cases and the PSLRA, their agreement merits respect.

IX. THE RISK INCURRED

48. When asked to prepare this Supplemental Report, I was astounded to learn that Lead Counsel had shelled out more than $13 million to reimburse the Defendants for litigation costs they incurred in connection with the appeal of the trial verdict. The vast majority of that amount was attributable to the premium paid for the supersedeas bond on account of Lead Counsel's refusal to refrain from executing on the judgment during the appeal of the trial judgment.

49. To be clear, Lead Counsel did discuss a less expensive option with the Defendants: an escrow account secured by a parent guarantee from HSBC PLC that would have protected the Class from loss had Household (renamed HSBC Finance) declared bankruptcy and the trustee sought to capture the escrowed funds. Unfortunately, HSBC PLC refused to provide the guarantee, so Lead Counsel faced the difficult choice of proceeding without the guarantee or requiring the supersedeas bond. Believing that the latter option provided the best protection for the Class, Lead Counsel opted for it and, after the Seventh Circuit decided for the Defendants, bore the cost of that decision.

50. In the thirty years that I have studied class actions, I have never seen anything that compares to this. What law firm would willingly take a gamble that, if lost, would require it to write a check for more than $13 million? Yet, RGRD did just that. I cannot imagine better evidence of the riskiness of litigation than the Court has before it in this case, one of the few class actions ever to be tried and one of only three that I know of in which the trial concerned more than a billion dollars in liability.

51. In my 2013 Report, I explained that only a law firm like RGRD could have tried this to a successful conclusion. The costs and risks would have been too great for smaller, less accomplished firms to bear. I can now add that RGRD is one of only a handful of law firms in

the world that could have taken the gamble involving the supersedeas bond, lost it, and kept prosecuting the case zealously for the Class. Clearly, the Lead Plaintiffs were right to hire RGRD and to do so on the terms to which they agreed. Had they chosen a different firm, the case might have settled before trial much more cheaply or been lost altogether. Had they insisted on lower fee percentages, the costs might have discouraged RGRD from staying the course. In fact, the Lead Plaintiffs made good decisions that worked out incredibly well for the Class. It would be worse than wrong to second-guess those decisions at the end of the case.

X. CONCLUSION

52. Three years ago, I submitted a Report setting out the grounds for my opinion that the Court should set fee terms entitling Lead Counsel to just ender 25 percent of any recovery as fees. No settlement was on the table at the time. Instead, the parties were battling in the Seventh Circuit over the propriety of the enormous judgment that Lead Counsel secured by trying the case. I explained that the requested fee was reasonable because Lead Counsel had borne extraordinary risks, more of which were still to come, and because Lead Plaintiff IUOE had freely negotiated the fee when its own dollars were on the line. I added that the fee compared favorably to those commonly paid by sophisticated clients engaged in high-stakes commercial litigation.

53. It is now 2016, and the events that have transpired in the interim have confirmed my original assessment. Despite long odds and extraordinary costs—including the terrible $13 million burden attached to the decision to require the supersedeas bond that was needed to protect the Class—Lead Counsel have secured a spectacular recovery—the 8th largest in the history of securities litigation—that covers an unusually large fraction of Class Members' estimated damages. The fee scale agreed to by the Lead Plaintiff incentivized Lead Counsel to weather years of litigation by promising to reward Lead Counsel for succeeding. The

outstanding result for the Class is the best evidence that the fee structure was well designed. In my opinion, Lead Counsel should receive 24.68 percent of the settlement fund as fees.

XI. COMPENSATION

I received a flat fee of $35,000 for preparing this Report.

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

Executed on:

August 26, 2016	
Date	Charles Silver

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Yale Law School, JD (1987)
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PUBLICATIONS

A. SPECIAL PROJECTS

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2. "Compensating Persons Injured by Medical Malpractice and Other tortious behavior for Future Medical Expenses Under the Affordable Care Act," 25 Annals of Health Law 35 (2016) (with Maxwell J. Mehlman, Jay Angoff, Patrick A. Malone, and Peter H. Weinberger)

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 29, 2016.

s/ Spencer A. Burkholz
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