COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT

THOMAS GEANACOPOULOS, On Behalf of Himself and All Others Similarly Situated,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 98-6002-BLS1
PHILIP MORRIS USA INC.,	)	
Defendant.	)	

EXPERT AFFIDAVIT OF WILLIAM B. RUBENSTEIN IN SUPPORT OF PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

I, William B. Rubenstein, hereby declare as follows, under the pains and penalties of perjury:

1. I am the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law and practice. The law firm Shapiro Haber & Urmy LLP (hereafter "Class Counsel") has retained me to provide an expert opinion as to its pending request for attorney's fees. Under the applicable Massachusetts statute, M.G.L. c. 93A, a prevailing party is entitled to have the defendant pay its attorney's fees. The proper method for determining the fee is the lodestar method (the multiplication of counsel's hours by its rates) and lodestar awards may be enhanced to compensate counsel for the risk of nonpayment. After setting forth my qualifications to serve as an expert (Part I, *infra*), and briefly describing the underlying litigation (Part II, *infra*), I utilize quantitative empirical data and qualitative analysis

to assess the reasonableness of Class Counsel's fee request in light of the three relevant variables, reaching the following opinions:

- ***Class Counsel's rates are reasonable.*** To assess the reasonableness of Class Counsel's hourly rates, I developed a database consisting of several hundred rates from approved fee petitions in Massachusetts class actions over the past decade. These data enable me to demonstrate empirically that the hourly rates Class Counsel employ are fully consistent with "the average rate in the community for similar work by attorneys with the same years' experience."[1] (Section III(A), *infra*).

- ***Class Counsel's hours are reasonable.*** To assess the reasonableness of Class Counsel's hours, I again utilized the database of Massachusetts class action fee approvals. These data enable me to demonstrate empirically that the quantity of hours that Class Counsel expended on the case was reasonable.[2] One can also reach that conclusion with the simple computation that Class Counsel have spent about 1,085 hours/year (or half of a busy lawyer's annual billable time) in this case over the course of the past 17.5 years; given the quantity of litigation, including appeals and a full trial, this amount of time is eminently reasonable. (Section III(B), *infra*).

- ***Class Counsel's proposed risk enhancement is reasonable.*** Under Massachusetts law, "[i]n limited circumstances, statutory fee awards may be enhanced to compensate for the risk of nonpayment," [3] with courts looking to factors such as complexity, risk, novel legal issues, and wide impact to assess counsel's entitlement to an enhancement. My qualitative assessment of this litigation highlights 11 factors that support a risk enhancement, including the exceptional results achieved by Class Counsel (given that virtually every other light cigarette case in the country has failed), the remarkably protracted nature of this litigation, the novelty and complexity of issues that were litigated through many appeals, the wide impact that the case has had in Massachusetts and throughout the nation, and especially Class Counsel's extraordinary, and extraordinarily risky, monetary investment. It is difficult to imagine a situation more enhancement-worthy than this case. Given Class Counsel's entitlement to an enhancement, the only remaining question is what level of enhancement is appropriate. I survey empirical evidence of enhancement levels courts have

[1] *Killeen v. Westban Hotel Venture, LP*., 69 Mass. App. Ct. 784, 790, 872 N.E.2d 731, 737 (2007) (internal quotation marks and citations omitted).

[2] *Id.* (defining the appropriate hours for the lodestar analysis as the "the amount of time reasonably expended on the case") (internal quotation marks and citations omitted).

[3] *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 324, 613 N.E.2d 881, 891 (1993).

utilized and these data support the 1.5 enhancement Class Counsel seek here. (Section III(C), *infra*).

In short, Class Counsel's rates and hours are easily justified. Fee enhancements in fee-shifting case are exceptional, but, put simply, this is the exceptional case: Class Counsel have litigated this case for nearly two decades against one of the largest, and well-defended, corporations in the world; they secured class certification in the Supreme Judicial Court of Massachusetts 12 years ago; they helped secure a United States Supreme Court ruling to forestall this case from being pre-empted by federal law eight years ago; they have now shepherded the case through an entire trial in this Court – and they achieved all this by investing nearly $13 million of their own time and money on behalf of this class, without having been paid a penny throughout these 17+ years. Given the remarkable risks they took, the success they achieved, and the patience they have shown, it is my strong opinion that the enhancement they seek is fully warranted.

I.

BACKGROUND AND QUALIFICATIONS[4]

2. I am the Sidley Austin Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the

[4] My full c.v. is attached as Exhibit A.

District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

3. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my c.v., which is attached as Exhibit A). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*. For five years (2007-2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

4. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. For six years, the Judicial Panel on Multidistrict Litigation has invited me to give a presentation on the current state of class action law at the annual MDL Transferee Judges Conference; at the 2015 Conference, I gave a talk to the MDL judges on the topic of attorney's fees. The Ninth Circuit invited me to moderate a panel on class action law at the 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

5. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011-2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the 2001-2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996-1997 school year.

6. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

7. I have been retained as an expert witness in roughly 60 cases and as an expert consultant in about another 30 matters. These cases have been in state and federal courts throughout the United States, most have been complex class action cases, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification to the reasonableness of settlements and fees. I have been retained by counsel for plaintiffs, for defendants, for objectors, and by the judiciary: in 2015, the United States Court of Appeals for the Second Circuit appointed me to brief and argue for

affirmance of a district court order that significantly reduced class counsel's fee request in a large complex securities class action.

8. I have been retained in this case to provide an opinion concerning the issue set forth in the first paragraph above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation was in no way contingent upon the content of my opinion.

9. In analyzing these issues, I have discussed the case with counsel who retained me. I have reviewed documents from this and related litigations, a list of which is attached as Exhibit B. I have also reviewed applicable case law and scholarship on the topics of this Affidavit.

II.

THIS LITIGATION[5]

10. This is an extraordinary lawsuit, spanning nearly two decades, but with a simple claim at its core: that the defendant marketed its light cigarettes as being a healthy alternative to regular cigarettes with knowledge of the falsity of the claim.

11. *Commencement.* Plaintiffs Lori Aspinall and Thomas Geanacopoulos originally filed this suit as a putative class action on November 25, 1998, in the Superior Court for Suffolk County. They named as defendants Philip Morris, Inc., later incorporated as Philip Morris USA Inc., ("Philip Morris") and Philip Morris Companies, Inc., later incorporated as Altria Group, Inc. ("Altria"). Plaintiffs alleged that the defendants designed Marlboro Lights to achieve low levels of tar and nicotine in smoking machine tests, thus enabling them to advertise the product as "light" cigarettes, while knowing that the cigarettes would actually produce levels of tar and

[5] The facts in this section are culled from the documents listed in Exhibit B.

nicotine similar to their non-light cigarettes, Marlboro Reds, when smoked by actual consumers. The original complaint contained three counts alleging two substantive claims – an unfair trade practices claim under M.G.L. c. 93A and a common law unjust enrichment claim – and sought actual or statutory damages, declaratory and injunctive relief, and disgorgement of profits.

12. *Removal and remand.* On December 18, 1998, the defendants removed the case to the United States District Court for the District of Massachusetts alleging federal subject matter jurisdiction based on diversity of citizenship. The plaintiffs moved to have the case remanded to state court on the ground that the putative class members did not each have claims greater than the requisite amount in controversy and that their claims could not be aggregated to meet this jurisdictional threshold. By order dated April 6, 1999, the federal court agreed and remanded the case to this forum.

13. *Pleadings.* On September 9th, 1999, plaintiffs filed an amended complaint with similar allegations and claims. Throughout the subsequent year, the parties engaged in initial discovery focused on the class certification issues. The defendants took the depositions of the named plaintiffs in December, 2000. The plaintiffs filed a second amended complaint in April 2001 and a third amended complaint in October 2002. The latter document altered the class definition from Massachusetts-resident purchasers of Marlboro lights to all purchasers of Marlboro lights in Massachusetts during the class period. The third amended complaint also removed allegations of a failure to warn and it removed injunctive and equitable relief as a separate legal count.

14. *Defendants' preclusion argument based on the Master Settlement Agreement.* In the spring of 2001, the defendants moved for judgment on the pleadings, alleging that the

preclusive effect of the tobacco industry's Master Settlement Agreement foreclosed this action. Specifically, defendants argued that the terms of the Master Settlement Agreement precluded plaintiffs from advancing the claims asserted in their complaint in this matter. The plaintiffs demonstrated, in response, that the Master Settlement Agreement's release expressly reserved claims by individual citizens for private wrongs and this Court (Fahey, J.), accordingly, denied the motion by order dated October 3, 2001. *Aspinall v. Philip Morris Companies, Inc*., 2001 WL 35974452 (Oct. 3, 2001). The plaintiffs sought fees for their work opposing this motion on the grounds that it was frivolous. This Court stated by order dated June 12, 2002, that it was "inclined to find that the defendants' Motion was, in fact, frivolous, wholly insubstantial and brought in bad faith," but that the fee request was premature since the denial of the defendant's motion had not resolved the litigation.

15. *Class certification.* Contemporaneous to the time that the defendants pursued their preclusion motion in the spring of 2001, the plaintiffs filed a motion for class certification seeking to represent a class of all resident Massachusetts Marlboro Lights purchasers from 1971 to the present. The defendants vigorously contested the motion, arguing that a host of individual issues precluded aggregate litigation, as well as challenging the adequacy of the class representatives, the typicality of their claims, the ascertainability of the class, and the manageability and superior nature of a class suit. In a 15-page memorandum opinion issued on October 3, 2001, this Court (Kane, J.) denied class certification on plaintiffs' unjust enrichment claim but certified a class to pursue plaintiffs' c. 93A claim, defining it as "purchasers of Marlboro Lights cigarettes in Massachusetts during the four years preceding the filing of this complaint." The defendants then [1] moved for reconsideration, and for oral argument of their

motion for reconsideration, but both were denied; [2] asked this Court to certify the question to the Court of Appeals for interlocutory review, but the Court denied the request; and [3] sought interlocutory review in the Court of Appeals, [4] which a Single Justice granted, decertifying the class on May 27, 2003. [5] Following plaintiffs' request and another round of briefing, on August 22, 2003, that Justice then permitted the plaintiffs leave to appeal her interlocutory order to a three judge panel of the Appeals Court and, [6] over defendants' opposition, plaintiffs then secured direct review in the Supreme Judicial Court (October 22, 2003). The parties [7] then briefed the certification motions in the Supreme Judicial Court. By order dated August 13, 2004 – three years and some seven rounds of pleading later – the Supreme Judicial Court affirmed the trial court's certification of a class of "purchasers of Marlboro Lights cigarettes in Massachusetts during the four years preceding the filing of the complaint." *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381,402, 813 N.E.2d 476 (2004).

16. *Notice.* Following this Court's initial class certification decision, the parties began briefing how notice would be provided to the class. That topic was suspended during the appellate briefing of the class certification issue, but renewed in late 2004, following the Supreme Judicial Court's certification affirmance. In opposing the plaintiffs' plan, the defendant proffered testimony from a Philip Morris officer and an expert witness, both of whom the plaintiff then deposed in early 2005. The plaintiffs proposed to provide notice to the class via publication; the defendants sought notification by mail to class members who were in its Adult Smoker Database. The defendants raised concerns about the constellation of two legal factors – the fact that under Massachusetts's class action rules class members are not permitted to opt out of a certified class, and the fact that because some class members were out of state they were

arguably beyond the territorial jurisdiction of the state's courts. Therefore, by order dated December 6, 2005, this court (Lauriat, J.) limited the class to Massachusetts residents and "residents of surrounding states [defined as Connecticut, Maine, New Hampshire, New York, Rhode Island, Vermont] who regularly purchased Marlboro Lights in Massachusetts during the class period." *Aspinall v. Phillip Morris, Companies, Inc.*, No. 98-6002-H, 2005 WL 3629357, at *1 (Mass. Super. Dec. 7, 2005). The Court approved notice by publication and also approved notice to those in the defendants' Adult Smoker Database, but instructed the defendants to provide that notice, as produced by the plaintiffs, through an insert in their regular mailings to those in the Database.

17. *Class Definition.* Following the notice litigation's resulting change of the class definition, the plaintiffs sought two further changes in the class definition: [1] to remove the geographic restriction generated during the notice litigation and [2] to extend the class period forward to 2003, when the defendants removed "Lowered Tar and Nicotine" from Marlboro lights packaging. The defendants contested both. By order dated August 15, 2006, this Court (Lauriat, J.) denied the motion.

18. *Absent Class Member Discovery.* In May, 2005, the defendants filed a motion seeking a court order permitting it to depose as many as 624 randomly selected absent class members for three hours each. Defendants argued that depositions were necessary to understand what injuries the class members might have suffered and how advertising of Marlboro Lights may have affected them, with these questions speaking to both the damages and certification aspects of the case. The plaintiffs contested the motion. By order dated November 22, 2005, this Court (Lauriat, J.) ruled that since the plaintiffs each suffered the same economic injury,

defendants could depose up to 25 absent class members for two hours (plus an hour of plaintiff examination) or, in the alternative, the defendants could survey a representative sample of absent class members. *Aspinall v. Philip Morris Companies, Inc*., No. CIV.A. 98-6002-H, 2005 WL 3629358 (Mass. Super. Nov. 22, 2005). Defendants elected to go forward with the depositions in lieu of a survey. The parties ultimately submitted proposals for the protocol concerning locating, recruiting, and deposing the 25 absent class members, including arguments about the extent to which such absent class members would be represented by Class Counsel at the depositions. By order dated November 5, 2013, this Court (Billings, J.), defined the protocol, including noting that the absent class members were entitled to be represented by counsel, "provided s/he takes the initiative and can make satisfactory arrangements."

19. *Preemption.* On April 26, 2005, Defendants moved for summary judgment arguing that the permitted practices exception of c. 93A §3 barred plaintiffs' c. 93A claim and that federal law preempted these claims. The plaintiffs cross-moved for summary judgment on the same issues. Specifically, defendants argued that the Federal Trade Commission had consented to the labeling of cigarettes as "light" or "low in tar and nicotine" and that the Federal Cigarette Labeling and Adverting Act accordingly preempted the lawsuit. By order dated August 9, 2006, this Court (Lauriat, J.) rejected defendants' arguments and granted plaintiffs' motion for summary judgment, holding that "the Plaintiffs' claims are neither exempted from coverage under G.L. c. 93A nor preempted by federal law." *Aspinall v. Phillip Morris Cos., Inc.*, No. CIV.A. 98-6002, 2006 WL 2971490, at *11 (Mass. Super. Aug. 9, 2006). The defendants again sought interlocutory review in the Appeals Court, and the Supreme Judicial Court ultimately granted direct appellate review. After hearing argument on defendants' appeal, the

Supreme Judicial Court stayed the case, as the identical federal preemption question was then pending before the United States Supreme Court in a parallel action arising under Maine's consumer protection statute. In the Maine case, the Philip Morris defendants had secured dismissal on the same preemption grounds that they urged in this case. In order to ensure the perpetuation of this suit, Class Counsel herein [1] argued the First Circuit appeal of the Maine preemption dismissal, securing a victory vacating the lower court's decision. *See Good v. Altria Grp., Inc.*, 501 F.3d 29, 30 (1st Cir. 2007); [2] opposed defendants' petition for *certiorari* in the United States Supreme Court that followed; [3] assisted in the Supreme Court briefing; and [4] with several other firms, paid the fees of an experienced Supreme Court litigator to present the case to the Supreme Court. In a December 2008 decision, the Supreme Court affirmed the First Circuit's decision rejecting federal preemption of the Maine consumer protection statute, *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008). In March 2009, in light of the United States Supreme Court's decision in *Good*, the Supreme Judicial Court held that federal law did not preempt plaintiffs' c. 93A claims and simultaneously ruled that the defendants had "failed to meet their burden of showing that they were given affirmative permission to use the descriptors at issue here and that therefore, the statutory exemption applies." *Aspinall v. Philip Morris, Inc.*, 453 Mass. 431, 437, 902 N.E.2d 421, 426 (2009). The Supreme Judicial Court thus affirmed this Court's order granting summary judgment to the plaintiffs, and denying summary judgment to the defendants, on these issues.

20. *Plaintiffs' preclusion argument: DOJ.* In January 2010, the plaintiffs filed a motion seeking to take advantage of a federal judgment against the defendants in parallel litigation pursued by the United States Department of Justice, via application of non-mutual

offensive issue preclusion; specifically, the plaintiffs argued that the federal judgment precluded the defendants from re-litigating issues of their liability and that the case could proceed to trial on the issue of remedies. The defendants resisted application of non-mutual issue preclusion, arguing, *inter alia,* that although they had lost the Department of Justice case, they had prevailed in other actions and that such conflicting judgments prevented the application of non-mutual preclusion under the doctrine annunciated by the Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). By order dated March 14, 2012, this court (Lauriat, J.) denied plaintiffs' motion. *Aspinall v. Philip Morris Companies, Inc*., No. CIV.A. 98-6002-H, 2012 WL 3627421 (Mass. Super. Mar. 14, 2012).

21. *Remedies.* In preparation for the pending trial, the plaintiffs sought to clarify the remedial aspects of the case by a motion for partial summary judgment. Specifically, plaintiffs sought an order enabling them to pursue profit disgorgement should they fail to prove benefit of the bargain damages and an order holding that their c. 93A damages could be calculated per transaction rather than per class member. By order dated February 7, 2013, this Court (Kaplan, J.) denied the motion, ruling that: "(1) the plaintiffs cannot obtain disgorgement of profits as an additional equitable monetary remedy under G.L. c. 93A, § 9, and their recovery is limited to their actual damages, potentially doubled or trebled, or if that amount is not greater than $25, nominal damages of $25 per class member; and (2) if the plaintiffs cannot prove actual trebled damages of more than $25 per class member, the statutory damages under G.L. c. 93A, § 9(3) for "the injury suffered" shall be $25, for each class member." *Aspinall v. Philip Morris Companies, Inc*., No. SUCV1998-06002-BLS1, 2013 WL 7863290, at *10 (Mass. Super. Feb. 7, 2013). The plaintiffs' sought leave to take an interlocutory appeal, but the Court denied it.

22. *Experts.* Around February 2013, plaintiffs agreed to drop defendant Altria from the suit. Philip Morris, now the sole defendant, and the plaintiffs then underwent discovery of both side's expert witnesses. Plaintiffs provided four expert witnesses on the question of deceptive and unfair trade practices and two expert witnesses on proving injury and damages. The defendant deposed five of plaintiffs' six experts in November and December 2014. The defendant designated 11 expert witnesses; between January and April 2015, plaintiffs deposed 10 of these. The plaintiffs then served two rebuttal reports, with further depositions concerning the rebuttal reports in April, 2015.

23. *Injury.* As the trial neared, in May 2015, the defendant moved to exclude expert testimony about damages and for summary judgment on issues of injury and damages, arguing that a mere invasion of established legal right through unfair or deceptive acts is not sufficient to recover statutory damages of $25. By order dated August 11, 2015, this Court (Leibensperger, J.) denied the defendant's motion, stating: "That the less safe product actually received has a true market value less than the product as advertised is a reasonable inference. Thus, harm of at least a penny may be inferred." *Aspinall v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2015 WL 9999126, at *4 (Mass. Super. Aug. 11, 2015). The Court also ruled that expert testimony on damages should be heard before determining if the experts' testimony was reliable.

24. *Pretrial motion practice.* As trial approached, the parties engaged in extensive pre-trial motion practice encompassing 10 motions to strike testimony and/or motions *in limine*, and they submitted a joint pre-trial memorandum on September 4, 2015.

25. *Trial.* This Court held a non-jury trial between October 19, 2015, and November 23, 2015. Plaintiff Thomas Geanacopoulos and former plaintiff Lori Aspinall testified, as did six

experts for the plaintiffs, 12 Philip Morris executives and scientists (via deposition), 20 absent class members (via deposition), and three experts for the defendant. After the trial, in mid-December 2015, the parties submitted proposed findings of fact and conclusions of law.

26. *Motion to decertify class.* In conjunction with their proposed trial findings, the defendant moved to decertify the class, arguing that the factual and legal concerns that had provided the glue to hold the class together had been disproven by trial testimony.

27. *Trial decision.* By order dated February 19, 2016, this Court (Leibensperger, J.), found the defendant liable for deceptive trade practices under G.L. c. 93A. Specifically, the Court held [1] that the defendant intentionally and knowingly advertised Marlboro Lights to convey to consumers that Marlboro Lights were a safer cigarette than standard cigarettes like Marlboro Reds; [2] that consumers bought Marlboro Lights at least in part because of perceived health benefits; [3] that defendants knew that Marlboro Lights were not safer; [4] that class members suffered a harm because they bought Marlboro Lights that they valued as being safer than alternatives. *Geanacopoulos v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2016 WL 757536, at *12-*15 (Mass. Super. Feb. 24, 2016). Given these findings, the Court rejected the defendant's post-trial motion to decertify the class. *Id.* at *15. As to the plaintiffs' remedies, the Court found [1] that the plaintiffs had failed to meet their burden of proving actual damages; [2] that each class member was therefore entitled to $25 in statutory damages; and [3] that because plaintiffs had not proven actual damages, the $25 could not be trebled under governing precedent. *Id*. at *16-*21. The $25 statutory damages per class member resulted in an award of $4,942,500, plus prejudgment interest to date of approximately $10,270,000 to the class. *Id.* at

21. The Court also ruled that the class is entitled to an award of reasonable attorney's fees and costs.

28. *Fee petition*. By the present motion, the plaintiffs seek $17,661,694 in attorney's fees. Class Counsel report a lodestar of $11,821,106.75 million and seek an enhancement, or lodestar multiplier, of 1.5 for their work on all but the fee portion of this matter.

III.

COUNSEL'S FEE REQUEST IS REASONABLE

A.

Counsel's Right to A Fee

29. The law governing plaintiffs' fee petition is straightforward:

- Under Massachusetts law, a prevailing party in a c. 93A action is entitled to attorney's fees.[6]

- Massachusetts courts employ the lodestar method – counsel's hours times their hourly rates – in establishing the base fee,[7] and may also consider a series of factors including: "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases."[8]

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[6] Mass. Gen. Laws Ann. ch. 93A, § 9(4) (" If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action . . .").

[7] *Killeen*, 69 Mass. App. Ct. at 790 ("The basic measure of reasonable attorney's fees is a fair market rate for the time reasonably spent preparing and litigating a case. This approach to fee calculations is known as the 'lodestar' approach, and the results it produces should govern unless there are special reasons to depart from them.") (internal quotation marks and citations omitted).

[8] *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 429-30, 837 N.E.2d 1121, 1138 (2005). The Supreme Judicial Court has also noted that "[n]o one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." *Id.* (quoting *Berman v. Linnane*, 434 Mass. 301, 303, 748 N.E.2d 466 (2001)).

- In limited circumstances, Massachusetts law permits statutory fee awards to be enhanced so as to compensate counsel for the risk of nonpayment.[9]

30. There is no doubt that the plaintiff class is a prevailing party entitled to fees. The application of the lodestar method to the Class Counsel's fee request therefore requires an assessment of Class Counsel's hourly rates (Section III(A), *infra*); the quantity of hours they spent on the litigation (Section III(B), *infra*); and the enhancement factors (Section III(C), *infra*). Together, these sections attest to the reasonableness of the requested fee.

(A)
The Requested Hourly Rates Are Reasonable

31. Massachusetts law states that a "determination of a reasonable hourly rate begins with the average rates in the attorney's community for similar work done by attorneys of the same years' experience."[10]

32. For purposes of this Affidavit, I searched for reported fee decisions of Massachusetts courts (state and federal) in class action cases. I deemed this the appropriate comparison set given the nature of this case. Employing a neutral search sequence on Westlaw, I identified a total of 54 decisions since January 1, 2005. I read through all 54 decisions; some were not class action cases, some were not fee decisions, and some did not enable a review of the utilized hourly rates. A total of 18 of the cases met all these criteria and became the baseline for my rate study; a list of these 18 cases is appended as Exhibit C. These 18 decisions affirm fee

[9] *Fontaine*, 415 Mass. at 324.

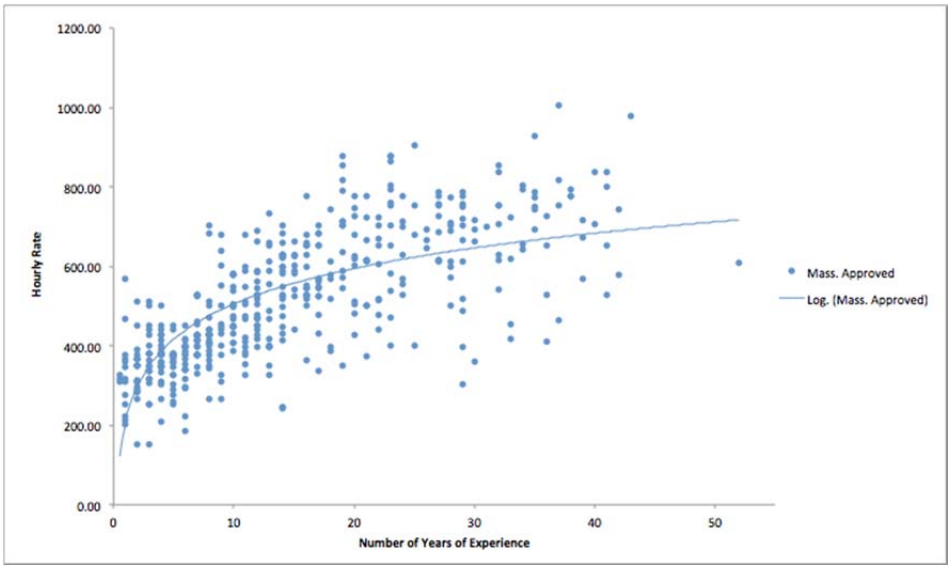
[10] *Haddad v. Wal-Mart Stores, Inc. (No. 2)*, 455 Mass. 1024, 1025-26, 920 N.E.2d 278, 282 (2010) (internal quotation marks and citation omitted) (emphasis added).

applications using 462 individual hourly rates.[11] For each time-keeper, I directed my research assistant to identify his/her initial year of admission to the bar either by using the information in the fee petition or, if the information was not listed therein, by examining the firm's website and/or the relevant state bar website. We adjusted all hourly rates to 2016 dollars using the American Institute for Economic Research's Cost of Living Calculator.[12] Once each time-keeper's experience level had been identified and all of the dollar amounts had been set at 2016 levels, we plotted the rates on an x-y axis, with the x-axis representing the years since the time-keeper's admission to the bar and the y-axis representing the time-keeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates in judicially-approved fee applications in Massachusetts; the blue logarithmic trend line sketches the trend of these rates across experience levels.

[11] In some of these 18 cases, counsel sought an award lower than their total lodestar and/or the court made an award lower than the total lodestar. So long as the court did not express concern about counsel's proposed billing rates in affirming the fee request, we coded these rates as affirmed, or judicially-approved, rates and included them in the data set. If a court explicitly lowered a specific billing rate, we utilized the lower rate in the data set.

[12] This can be found at this hyperlink: https://www.aier.org/cost-living-calculator. For each year prior to 2016, we calculated the differential between $1,000 in that prior year and $1,000 in 2016. We then used that differential to calculate the 2016 rate for the prior year. For example, the calculator showed that $1,000 in 2010 was the equivalent of $1,087.16 in 2016; accordingly, we multiplied all 2010 rates by 1.08716 to adjust them to 2016 values.

GRAPH 1
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTION CASES



33. I next directed my research assistant to similarly plot the rates utilized by Class Counsel in this matter. Class Counsel supplied us with a spreadsheet containing the names of 17 professional (non-paralegals), their year of admission to the bar, and their proposed hourly rates.[13] We plotted these rates onto the same type of x-y axis that we had employed for the Massachusetts comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Class Counsel's proposed billing rates, with the red logarithmic trend line sketching the trend of Class Counsel's rates across experience levels.

[13] Class Counsel utilize their current rates for all time spent in the litigation. The law supports using current rates as "an appropriate adjustment for delay in payment," *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). In my experience, this is typically how this issue is handled. It is my opinion that it is reasonable for Class Counsel, who have not been paid for more than 17 years, to use current hourly rates as an adjustment for the delay in payment.

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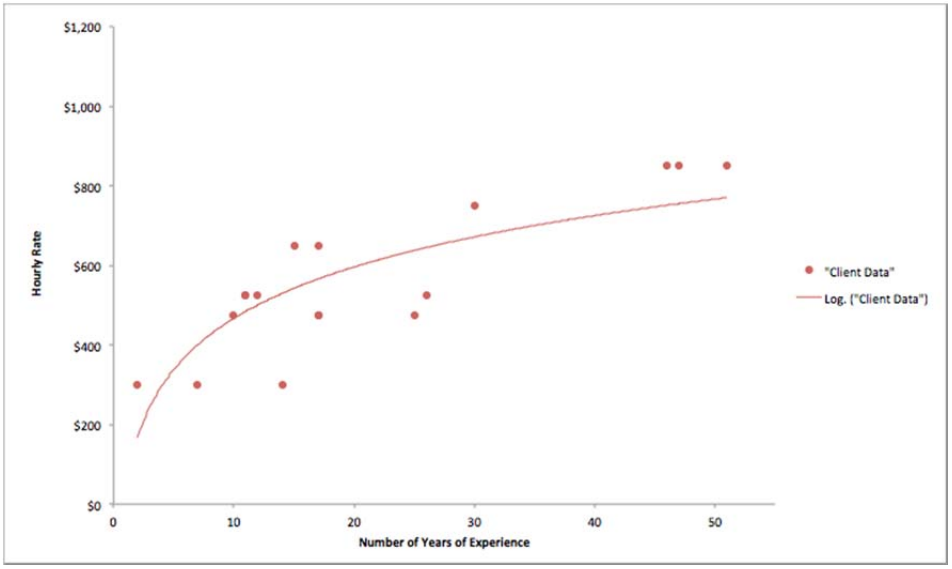
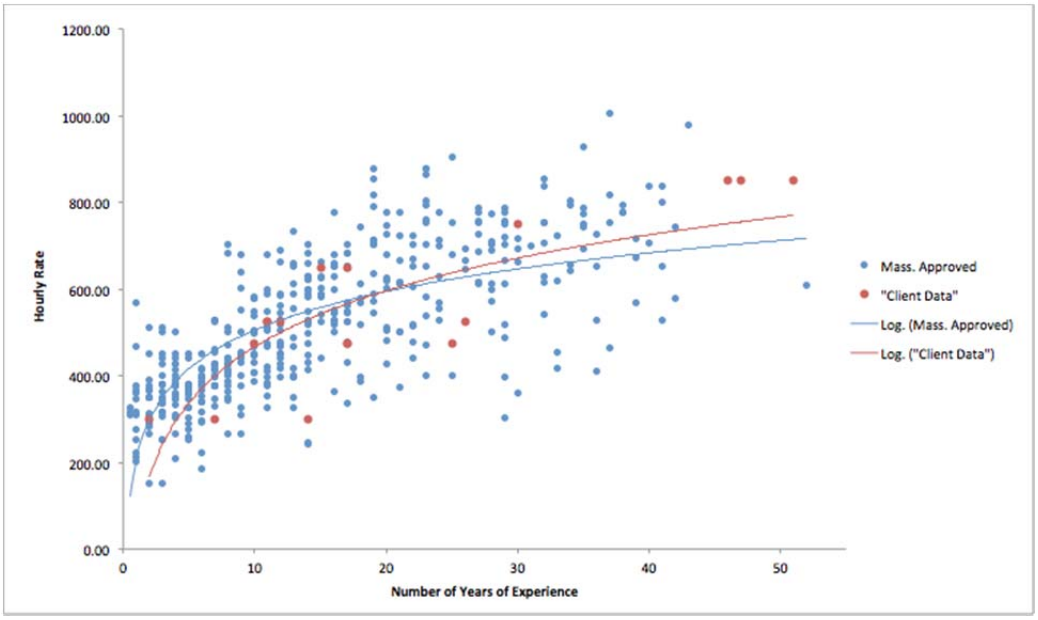
GRAPH 2
CLASS COUNSEL'S PROPOSED HOURLY RATES



34. Finally, we aggregated the data from Graphs 1 and 2 onto a single scatter plot that indicates the judicially-approved rates in Massachusetts with blue dots and a blue logarithmic line and Class Counsel's proposed rates with red dots and a red logarithmic line. These data appear in Graph 3, below.

GRAPH 3
CLASS COUNSEL'S PROPOSED HOURLY RATES COMPARED TO HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS



35. As Graph 3 demonstrates, the two logarithmic trend lines track one another closely. For lawyers with 20 years of experience or less, Class Counsel's trend line lies below the trend line for rates in approved Massachusetts class action fee petitions, and then among more senior lawyers, Class Counsel's trend line rises slightly above the trend line of the comparison group. The proposed rates for 11 of Class Counsel's 17 time-keeper's (65% of the time keepers) are below the Massachusetts trend-line. For the six time-keepers whose rates are above the trend line, on average, Class Counsel's trend line is 5.17% above the comparison trend line at those six points. For the 11 time-keepers whose rates are below the trend line, on average, Class Counsel's trend line is 8.48% below the approved rate trend line at those 11 points. When the differences between the trend lines are compared at all 17 points, Class Counsel's trend line is, on average, 3.66% below the trend line for rates in approved Massachusetts class action fee

petitions. This means that Class Counsel's proposed rates are, across the board, quite close to, and on average nearly 4% below, the rates that judges in Massachusetts have approved for similar work – other class action litigation – by similarly experienced attorneys.

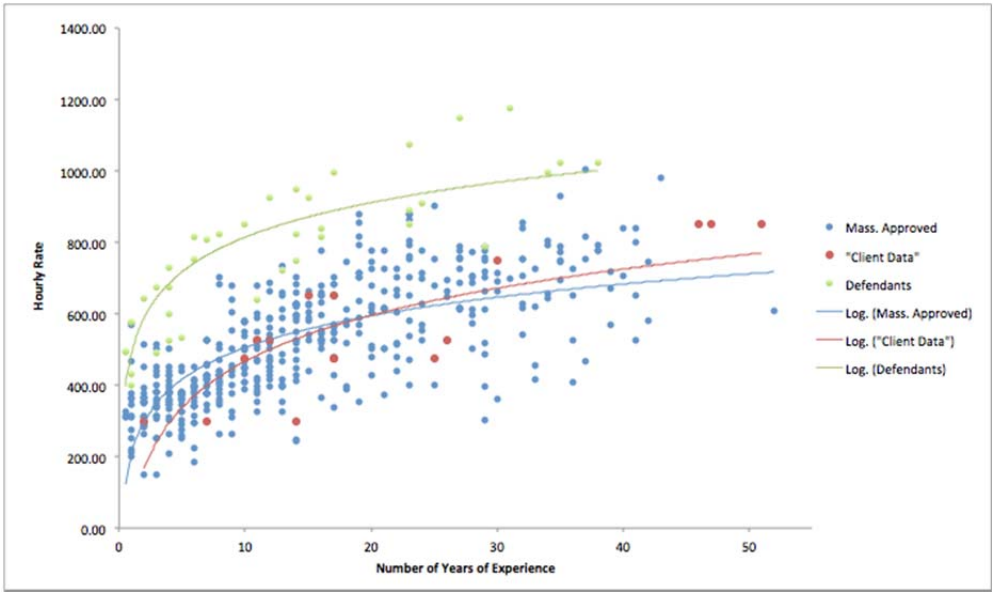
36. That Class Counsel's trend line across their senior lawyers in this case is roughly 5% above the average lawyers' trend line makes perfect sense for two inter-related reasons. *First*, as the Court can see by glancing at the scatter plot, Class Counsel's three senior-most lawyers are in a league of their own: their three red dots occupy a part of the graph that contains only one blue dot. This means that there is only one lawyer with their depth of experience in comparison group.[14] It also means that the comparison set – the blue trend line – is, at that end of the graph, just a trend line extending the earlier blue dots, as there is but one blue data point in that quadrant. *Second*, and more importantly, Class Counsel's senior lawyers are not just quantitatively in a league of their own, they are qualitatively so, as well: these lawyers are among, if not the, leading class action lawyers in the entire New England region. They possess years of remarkable experience, have track records of superb achievement, and can be counted among the elite of the profession generally and this area of law specifically. Accordingly, if there is any surprise in the data it is only that the trend line across these senior lawyers is but 5% above the trend line of the wide swath of lawyers with different skill levels who are represented in the comparison group.

37. Another relevant set of data concerning rates in the community "for similar work" would be the rates that the defendant is paying its counsel for its work in this case. Class

[14] These three attorneys, Class Counsel's named partners, have 144 years of experience among them, with Urmy having been admitted to practice law 51 years ago; Shapiro, 47 years ago; and Haber, 46 years ago.

Counsel inform me that they sought this information from defendant's counsel but were not provided with it. In the absence of information about this case specifically, Class Counsel have provided me with data concerning rates charged in other cases by the three firms that have provided the great bulk of the work in defending Philip Morris over the life of this case (Munger, Tolles & Olson LLP, Goodwin Procter LLP, and Latham & Watkins LLP). The data they provided me, attached hereto as Exhibit D, enabled me to identify 39 fee rates, nine from nine different Munger, Tolles & Olson lawyers, nine from five different Goodwin Procter lawyers, and 21 from 21 different Latham & Watkins lawyers. Using green dots and a green logarithmic trend line for defendant's counsel's rates, we plotted these rates onto the same x-y axis that contained the Massachusetts approved rates (in blue) and Class Counsel's rates (in red). The results are reflected in Graph 4, below.

GRAPH 4
DEFENDANT'S COUNSEL'S RATES COMPARED TO HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS AND TO CLASS COUNSEL'S PROPOSED HOURLY RATES



As is visually evident, the defendant's counsel's rates that Class Counsel provided me are significantly higher than the rates in judicially-approved fee applications for class action attorneys in Massachusetts and similarly far higher than the rates that Class Counsel propose herein. Although the data set enables only a limited comparison, it nonetheless seems fair to assume that the rates Class Counsel propose are likely below, plausibly far below, the rates that the defendant has already been paying its own lawyers in this litigation. Making such an assumption on these limited data seems especially fair in that Class Counsel sought, but were not provided, the more relevant data of the actual rates that the defendant paid its counsel in this case.

38. The Supreme Judicial Court has stated that a "determination of a reasonable hourly rate ***begins with*** the average rates in the attorney's community for similar work done by

attorneys of the same years' experience."[15] This rate study demonstrates empirically that the individual rates Class Counsel employ in their proposed lodestar are so consistent with "the average rate in the community for similar work by attorneys with the same years' experience," that the analysis can both begin and end with the average rates. However, as the Supreme Judicial Court has noted, average rates are a beginning point because a court must consider, as well, counsel's "skills, reputation, and level of experience."[16] In light of Class Counsel's superb skills, stellar reputation, and unparalleled level of experience, the rates that they propose – which manifest in a trend line averaging 4% below the trend line for rates in approved Massachusetts class action fee petitions – are surely reasonable.

(B)
Class Counsel Expended a Reasonable Quantity of Total Hours

39. Massachusetts law defines the appropriate hours for the lodestar analysis as the "the amount of time reasonably expended on the case."[17] Federal courts have long cautioned judges to avoid "engaging in an *ex post facto* determination of whether attorney hours were necessary to the relief obtained."[18] The issue "is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would

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[15] *Haddad*, 455 Mass. at 1025-26 (internal quotation marks and citation omitted) (emphasis added).

[16] *Id.*

[17] *Killeen*, 69 Mass. App. Ct. at 790 (internal quotation marks and citations omitted). In *Killeen,* the Appeals Court further noted that, "[i]n deciding whether the documented time was reasonably expended the judge may also consider factors such as "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, and the result obtained," noting that these factors had long guided Massachusetts fee decisions and holding that they "continue to be useful guides to determining time reasonably spent when applying the lodestar methodology." *Id.* at 791 (internal quotation marks and citations omitted).

[18] *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993).

have engaged in similar time expenditures."[19] Massachusetts takes a similar approach, as the Supreme Judicial Court has held that a judge is not required to "review each of the itemized descriptions of . . . voluminous attorney records," but rather entitled to "consider the bill as a whole."[20]

40. I examined the hours that Class Counsel bill in three ways: *first*, by a quantitative comparison to the hours expended in Massachusetts class actions cases (¶ 41, *infra*); *second*, by qualitative analysis of the tasks undertaken (¶ 42, *infra*); and *third*, by focusing in on three particular billed tasks (¶¶ 43-45, *infra*).[21]

41. *Quantitative Assessment.* As noted above, for purposes of this Affidavit, I developed a database of fee rates in class action cases decided by Massachusetts courts. Our database contained 18 class action cases. For each of those 18 cases, we were able to identify the length of the case (from filing to fee petition), in days. We also had data on the total hours that counsel reported in their lodestar in those cases. We plotted these data graphically by showing the number of hours counsel billed per day the case was pending (up to the fee petition). Graph 5 represents that information.

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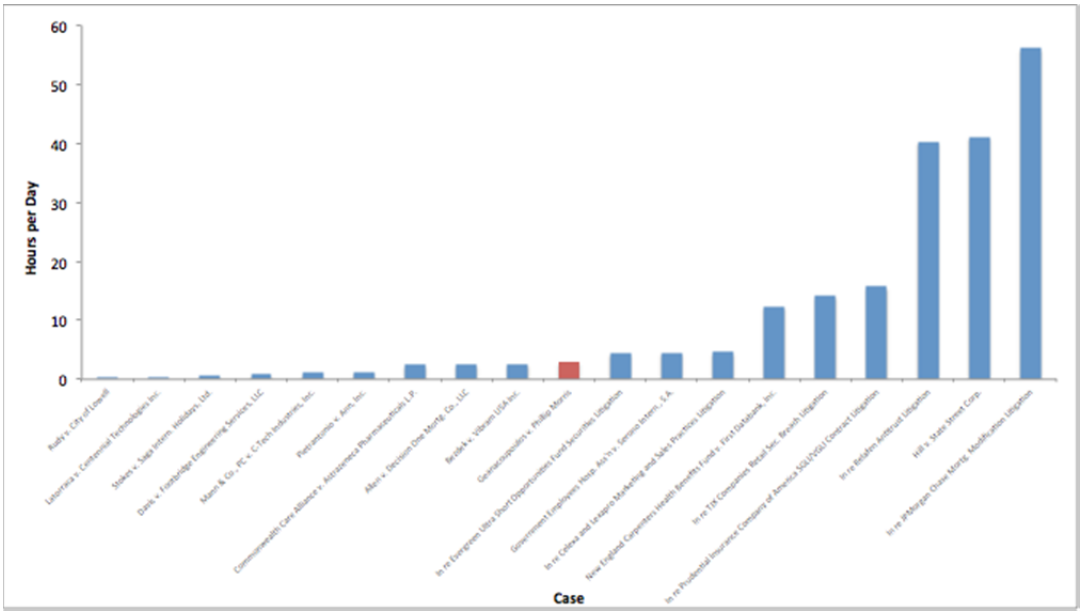
[19] *Id.*

[20] *Twin Fires*, 445 Mass. at 431 (quoting *Berman v. Linnane*, 434 Mass. 301, 303, 748 N.E.2d 466, 469 (2001). *See also Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1269-70 (D.C. Cir. 1993) (noting that "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" and "reiterat[ing] the Supreme Court's warning that '[a] request for attorney's fees should not result in a second major litigation'" (alteration in original) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983))).

[21] Class Counsel did not provide me – nor did I ask to see – a breakdown of each hour expended, as I generally do not undertake such a fine-grained lodestar audit in assessing the reasonableness of a fee award.

GRAPH 5
HOURS BILLED PER DAY CASE PENDING IN MASSACHUSETTS CLASS ACTION CASES



As is visually evident, Class Counsel's hours are in the middle of the bar graph, indeed, they are the median case. Moreover, the average number of hours billed per day in all of the cases other than the present case (the market mean) was 11.41 hours. Class Counsel billed 3.00 hours/day throughout the case, which is about a quarter of the mean (26.29%). This dispels any concern that Class Counsel padded their lodestar and suggests that they performed efficiently.[22]

42. *Qualitative Assessment.* Class Counsel's work dates back to its initial filing of a class action complaint on November 25, 1998. Given the research that preceded the filing of that

[22] Class Counsel have informed me that they understand that two other firms will request fees in this matter, with one having approximately 535 hours in its lodestar and the other approximately 1,300 hours in its lodestar. If these data are added to Class Counsel's hours, this case remains the median case in the study and the average hours/day for the case goes from 3.00 to 3.29, or 28.83% of the average for all cases. In other words, even including all billers herein, the amount of time the lawyers worked on this case per day it was pending remains far below the average time for class action lawsuits in Massachusetts.

complaint, this means that the firm has been working on this case for at least 17.5 years (September 21, 1998 is 17.5 years before the date of this Affidavit). In that time, Class Counsel report about 18,992 hours of total time, including time spent on this fee petition, or 1,085 hours/year (18,992/17.5). 1,085 hours/year is, roughly speaking, about half of a busy lawyer's billable hours per year. This means that in the aggregate, over the course of this case, counsel have billed about ½ lawyer/year in each year the case has been pending. A review of all of the various aspects of Class Counsel's work in this case supports the conclusion that these would have kept one lawyer busy for half of her time throughout the life of the case; these include:

- undertaking all the factual investigation required to substantiate filing the initial complaint;
- successfully combating defendants' efforts to remove this case to federal court;
- updating the initial pleadings on several occasions to reflect changes in the nature of the case;
- defeating defendants' arguments that the Tobacco Master Settlement Agreement precluded litigation of the individuals' claims in this case;
- securing class certification (a process which encompassed certification-related discovery as well as legal briefing) and defending that ruling through multiple appeals – all the way to the Supreme Judicial Court – and against attempts to re-litigate the issue even after it was resolved;
- engaging in extensive litigation over the appropriate means of notifying the class of the class certification decision and then pursuing the collateral questions of the class definition that grew out of that process;
- successfully litigating the question of absent class member discovery such that the discovery was limited to a fraction of the scope defendants sought and then participating in the discovery itself by defending the absent class member depositions;
- successfully combatting defendants' argument that federal law preempted this case, all the way through appeals to the Supreme Judicial Court;

- relatedly, assisting litigation in the First Circuit Court of Appeals and United States Supreme Court on the preemption question in the parallel Maine action;
- undertaking all of the expert preparation and discovery in preparation for trial;
- engaging in extensive pre-trial motion practice;
- litigating a full trial on the merits;
- preparing post-trial findings and responding to a post-trial motion to de-certify the class; and finally,
- preparing the present fee petition.

This partial list substantiates the conclusion that Class Counsel's half-lawyer/year of time billed throughout the arc of the case is reasonable. Indeed, it is rather shocking that this is all of the hours that counsel has billed given this list of tasks, including a full trial on the merits of the case.

43. *Particular tasks.* As noted above, Massachusetts law compensates counsel for the time that they "reasonably expended,"[23] and it takes a general approach to this assessment, encouraging courts to "consider the bill as a whole."[24] If particular items are selected out for special scrutiny, a federal appellate court has helpfully noted, in a related context, that, "The key question is whether the work was reasonably done in pursuit of the ultimate result. In other words, would a private attorney being paid by a client reasonably have engaged in similar time expenditures?"[25]

[23] *Killeen*, 69 Mass. App. Ct. at 790.

[24] *Twin Fires*, 445 Mass. at 431.

[25] *Goos v. Nat'l Ass'n of Realtors*, 68 F.3d 1380, 1386 (D.C. Cir. 1995) decision clarified on denial of reh'g, 74 F.3d 300 (D.C. Cir. 1996) (emphasis added).

44. Class Counsel have singularly focused on the ultimately successful litigation of the c. 93A claim, but they pursued several items in the course of the case that proved less successful. These include: [1] an effort to apply non-mutual offensive issue preclusion against the defendants; [2] an attempt to expand the definition of the class after it was narrowed during the notice proceedings; and [3] efforts to secure greater damages for the class, both as a legal and factual matter. It is my expert opinion that the time spent on each of these efforts was reasonably expended: as each was part and parcel of Class Counsel's successful efforts at establishing defendant's ch. 93A liability, it was reasonable for Class Counsel to undertake this work in pursuit of the ultimate result.

- As to the preclusion question: Class Counsel ended up securing findings at trial that were commensurate with those that they argued the defendant should be barred from re-litigating; their "loss" on the preclusion motion actually required them to spend more time proving their case than the trial plan (via preclusion) that they themselves had proposed. It hardly seems equitable to penalize them for the time they spent attempting to save the Court and the parties an effort that proved duplicative in the end, just as they predicted it would. Moreover, there is little doubt that a private attorney being paid by a client would reasonably have pursued this path as their adversaries in this very case similarly attempted to pursue a preclusion argument against the class – even when their argument for doing so was far more tenuous than was Class Counsel's.[26]

- As to the class definition: Class Counsel successfully litigated the class certification question all the way through the Supreme Judicial Court and defended it against various attempts at de-certification. The change in the original class definition that Class Counsel questioned was made by the Court, *sua sponte*, during the process of determining how to provide notice to the class. In my experience in class actions, it is entirely normal that the class definition would be re-visited at various points throughout the litigation when questions such as the notice program focus greater attention on it. It was a reasonable expenditure of effort for Class Counsel to continue to press for the definition that they had secured initially in the Supreme Judicial Court.

[26] This Court has deemed the defendants' effort to have been frivolous.

- As to the scope of damages: Class Counsel were successful in proving liability and injury at trial. Both in preparing for trial, and during trial, they pressed to secure the most significant quantity of damages that they could for the class. Their failure to secure the broadest damages to date (an issue that is subject to appeal) does not render their attempts to do so unreasonable, particularly given this Court's finding (over Philip Morris' strong objection) that the class suffered an injury under c. 93A in that the cigarettes sold were worth less than cigarettes as represented. Given Class Counsel's success in establishing the injury from which the Court's liability finding flowed, there is no serious question that their efforts to ensure the greatest possible recovery for the class were unreasonable.

Put simply, since day 1, nearly two decades ago, Class Counsel have been extraordinarily focused on a single clear goal – proving the defendants liable under the Massachusetts consumer protection statute – and the tasks they have undertaken along this long path have all been entirely and inextricably intertwined with their trial victory on that very claim and hence reasonable.

45. Class Counsel also include in their lodestar hours spent successfully defeating Philip Morris's preemption defense in *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008), which was identical to those defendants' preemption defense in this matter. There is little doubt that this was time well-spent for the present class, for had the Supreme Court ruled the other way on the federal preemption question in *Altria*, it would likely have been the death knell of this case; indeed, the Supreme Judicial Court stayed its consideration of this case for that very reason. Class Counsel's time and the expenses they incurred in that case were therefore critical to this case, obviously reasonably expended, and are accordingly compensable.[27]

[27] *See generally* 5 William B. Rubenstein, *Newberg on Class Actions* § 15:59 (5th ed. 2015) (collecting and discussing cases in which courts permit counsel to bill for time spent on collateral litigation that benefited the class in common fund class actions).

(C)
The Requested Risk Enhancement Is Reasonable

46. Courts may award prevailing parties' counsel a multiplied lodestar award, or fee enhancement, to take account of the contingent nature of their provision of legal services (risk multipliers) or superior performance or results (performance multipliers).

47. Contingent fee attorneys serve a critical social function in pursuing legal claims worth less than the cost of litigation (so-called "negative value claims"),[28] a function captured by the title often applied to class action lawyers in particular: "private attorneys general."[29] Fees are what incentivize an attorney to set up an entire legal practice around the pursuit of such negative value claims. Yet if the contingent fee attorney were paid at only her hourly rate, she would have no incentive to invest her time and money in prosecuting such "negative value" claims – she would take the far less risky path of representing clients who could presently pay her on an hourly basis, as most defendant's counsel are paid. The California Supreme Court has summarized the point by quoting two commentators:

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.[30]
>
> A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these

[28] For a discussion, see William B. Rubenstein, *Why Enable Litigation: A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. Rev. 709 (2006).

[29] For a discussion, see William B. Rubenstein, *On What a "Private Attorney General" Is — And Why It Matters*, 57 Vand. L. Rev. 2129 (2004) [hereinafter *Private Attorney General*].

[30] *Ketchum v. Moses*, 17 P.3d 735, 742 (Cal. 2001) (quoting Richard A. Posner, *Economic Analysis of Law* 534, 567 (4th ed. 1992)) (internal quotation marks omitted).

functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.[31]

48. Massachusetts law recognizes the importance of private attorneys general by explicitly enabling enhancements of counsel's lodestar in fee-shifting matters. In 1992, the United States Supreme Court held that *federal* fee-shifting law did not permit risk-based multipliers[32] (federal law does permit performance-based multipliers in certain circumstances).[33] The following year, litigants urged the Supreme Judicial Court to recognize the same limitation on risk-based multipliers in Massachusetts law,[34] but the Massachusetts High Court rejected that invitation. Characterizing state fees law as permitting "a more generous recovery than does

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[31] *Id.* (quoting John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 480 (1981)) (internal quotation marks omitted).

[32] *City of Burlington v. Dague*, 505 U.S. 557 (1992).

[33] Federal fee-shifting law permits multipliers based on the "quality of an attorney's performance or the results obtained," *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010), in at least three situations. *First*, "where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value," the trial judge may, in accordance with specific proof, increase the hourly rate to what an attorney would receive in a case not governed by a fee-shifting statute. *Id.* at 554-55. *Second*, "an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." *Id.* at 555. *Third*, a lodestar may be enhanced to account for an exceptional delay in the payment of fees, "particularly where the delay is unjustifiably caused by the defense." *Id.* at 556. The Supreme Judicial Court has never addressed these situations directly, but since Massachusetts has gone further in permitting risk enhancements than the Supreme Court, *a fortiori*, it is fair to assume that Massachusetts law would permit performance enhancements at least as generously as do these three federal principles.

[34] *See* Brief of Associated Industries of Massachusetts as Amicus Curiae in Support of Defendants-Appellees, in *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 613 N.E.2d 881 (1993), available at 1992 WL 12564485 at *16-20 (noting that the trial court had employed a lodestar analysis and arguing that "the Supreme Court's reasons for rejecting enhancement based on contingency are to great extent relevant here") (discussing *City of Burlington v. Dague*, 505 U.S. 557 (1992)).

Federal Law,"[35] the Supreme Judicial Court expressly held that under Massachusetts law, "In limited circumstances, statutory fee awards may be enhanced to compensate for the risk of nonpayment."[36] In that case, the Court affirmed the trial court's conclusions that the particular facts did not support a multiplier because the case was not complex, nor risky, the legal issues were not novel, and the case affected the individuals involved but not "a wider class of persons."[37] The implication of that passage is that risk enhancements are appropriate in the presence of [1] complexity, [2] risk, [3] novel legal issues and/or [4] wide impact.

49. Class Counsel herein seek a fee multiplier of 1.5 (for time expended on behalf of the class, but not for their time in seeking fees). I examine the reasonableness of that multiplier in two ways: *first*, by a review of the qualitative analysis of the risk factors just cited, I examine Class Counsel's *entitlement* to an enhancement (¶¶ 50–62, *infra*); and *second*, by a quantitative analysis of multipliers courts award in fee-shifting cases, I examine Class Counsel's proposed enhancement level (¶¶ 63-66, *infra*).

[35] *Fontaine*, 415 Mass. at 324 n.13.

[36] *Id*. at 324.

[37] *Id.* at 326. *See also Evans v. Lorillard Tobacco Co*., No. SUCV200402840, 2011 WL 7090715, at *3 (Mass. Super. Dec. 2, 2011) (characterizing earlier SJC case as permitting enhancement but circumstances lacking where "case was simple, had reasonably good chance of success, and involved no novel legal issues") (discussing *Fontaine*, 415 Mass. 309 (1993); *Clifton v. Massachusetts Bay Transp. Auth.*, No. CIV. A. 95-2686-H, 2000 WL 218397, at *17 (Mass. Super. Feb. 3, 2000) (2005) (noting that an enhancement "might by appropriate in a complex case where the rights sought to be vindicated are important but the likely damages are modest").

Qualitative Analysis of Enhancement Entitlement

50. Eleven attributes of this litigation demonstrate its complexity, risk, and novelty, and the impact of the case, generating an entitlement to a risk-based enhancement under Massachusetts' fee-shifting law.

51. ***Risk enhancement factor 1: This was a remarkably complex case in its breadth and scope***. In reviewing the history of this case I was struck by the fact that I could teach an entire complex litigation course based on this case alone. Every issue in such a course was litigated here – motions to dismiss, motions for class certification, motions for summary judgment, discovery motions, discovery of absent class members, notice, class definition, multiple preclusion issues, evidentiary trial-related issues, damages and remedies, preemption. All of that complexity speaks only to the *procedural* aspects of the case, but its *substance* was no less intricate. This is not a simple false advertising case: the nuances of establishing liability here required Class Counsel to master issues ranging from the entire history of tobacco marketing in the United States to complicated medical questions concerning the health and safety of cigarettes.

52. ***Risk enhancement factor 2: This was not a cookie-cutter case***. Many plaintiffs' lawyers handle the same types of cases – for example, asbestos cases, or securities class actions, or antitrust suits – repeatedly. While the facts of asbestos itself may be difficult to learn for the first case, these facts are generally the same for the hundredth or thousandth case, varied only by the particular client's specific situation. Often, the lawyers can therefore re-use information, pleadings, parts of briefs, etc. from prior actions. Further, many class actions are brought on the heels of government enforcement actions, such as class actions that follow SEC enforcement

actions or Department of Justice antitrust actions. In such "piggy-back" cases, the class lawyers can often employ issue preclusion to estop the defendants from re-litigating liability; all they must do, therefore, is litigate damages for the class. Neither of these work-relieving attributes characterizes this case. This was not one in a long line of light cigarette cases Class Counsel litigates on a regular basis. And, while Class Counsel did attempt to take advantage of findings from a government case through non-mutual preclusion, that case was commenced a year after this case, and, in any event, their attempt failed. That meant that Class Counsel had to re-try liability from square one, without the benefit of these prior findings. Moreover, while some of the issues in the case were litigated in similar cases throughout the country, Class Counsel alone bore the burden of winning under Massachusetts law and hence had to win each procedural and substantive point anew.

53. ***Risk enhancement factor 3: This is a novel, one-off case***. Not only was this case novel because Class Counsel could not re-cycle its old pleadings in pursuing this case, the pleadings they developed here will likely be unhelpful to them in the future. All of the time and money they invested in this case they invested solely on behalf of this class.

54. ***Risk enhancement factor 4: This case was so vigorously defended that it was far riskier than a standard contingent fee case.*** Most litigation settles. A lawyer bringing a well-founded basic contingent fee tort case has a high likelihood of assuming the case will settle; class action lawsuits that survive motions to dismiss or class certification fall into the same category. Following discovery, when both parties can accurately assess the value of their respective legal positions, rational litigants typically settle. Given this defendant's litigation strategy, this case had, literally, zero chance of settling – and this was particularly true given the

defendant's success in defeating similar cases in other states. There was a far greater likelihood here than in a standard case that the attorneys pursuing this matter would not prevail because the defendant had every reason to fight hard and to believe that it would succeed, as it has nearly everywhere else.

55. ***Risk enhancement factor 5: Counsel's adversaries had significant financial and legal resources***. Counsel litigated against one of the wealthiest corporations in the world (in 2003, Altria was number 11 on the Fortune 500) and against a long list of the most successful defense firms in the United States. This is truly a David and Goliath story, given the small nature of the single firm that led this litigation, with remarkable steadiness and stability, over the course of nearly two decades. One way this manifested itself is that the defendants spent enormous legal resources on the case, forcing Class Counsel to respond accordingly. If this case had a title it would be, *Everything Was Contested,* given the range of matters noted above; but even that would be an understatement as nearly everything was contested more than once: defendant regularly filed motions for reconsideration after losing issues and nearly every important question was appealed, on an interlocutory basis, throughout the history of the case. Counsel repeatedly faced the prospect of losing the entire case and demonstrated enormous perseverance in withstanding the continual onslaught of the defendant's vast resources. Yet against that onslaught, this single small firm held steady, with fewer than 20 lawyers billing time across these 17 years and with two lawyers accounting for half of the total lawyer-hours.

56. ***Risk enhancement factor 6: The case was extraordinarily expensive***. Class Counsel invested 18,992 hours of labor in this case, generating a lodestar of $11,821,106.75. In addition to that, Class Counsel seek reimbursement for $921,913 in out-of-pocket expenses.

What this means, quite simply, is that counsel loaned the class more than $12.7 million of its own money. Class Counsel risked losing all of that money on the outcome of this case and invested each penny of it when the case's outcome was uncertain. Class Counsel chose to invest their money in a risky, not safe, matter. Like any investor that takes risks, these risks entitle the firm to a higher-than-average rate of return on their investment.

57. ***Risk enhancement factor 7: Class Counsel bore the risk itself***. In most class action matters, particularly of this magnitude, the class is represented by a collection of plaintiffs' firms. This means that the lawyers are able to spread the risk among the various firms. Here, Class Counsel shouldered the risk of this complicated, novel, and expensive matter. While other firms have contributed to this effort from time to time, it is Class Counsel that has been involved for all 17.5 years, without significant regular assistance from other firms.

58. ***Risk enhancement factor 8: Class Counsel were precluded from taking other, simpler, paying work by virtue of their investment in this matter***. Given the amount of time counsel invested here, there is little doubt that these cases precluded them from working on other, plausibly less risky, matters.

59. ***Risk enhancement factor 9: This litigation has been significantly protracted.*** As discussed above, *see* note 32, *supra*, the United States Supreme Court has noted that a performance-based fee enhancement is available under federal fee-shifting law where "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." *Perdue,* 559 U.S. at 555. The facts of this case surely meet this standard as this small firm laid out roughly $12.7 million in its own monies and has not been paid in nearly 20 years.

60. ***Risk enhancement factor 10: Counsel achieved something legions of other lawyers have failed to achieve***. Perhaps no single fact demonstrates the riskiness of this case better than the fact that the defendants have defeated more than a dozen cases similar to this one throughout the United States over the past two decades. Class Counsel supplied me with a list of 19 similar cases (attached as Exhibit E). Class Counsel document therein that in 16 of these 19 cases, the plaintiffs were unable to secure or preserve a ruling on class certification, with a number of those cases being multi-jurisdictional matters. In two other cases, classes were certified but the plaintiff lost at summary judgment (in one) and a trial (in another). The one spectacularly successful matter – a $10.1 billion verdict in Illinois state court – was reversed on appeal and an ultimate plaintiff victory in that case remains elusive. (Several cases remain pending in other states as well.) This context of light cigarette litigation demonstrates that the lawyers in this case accomplished something that few lawyers, if any, have been able to accomplish in numerous attempts throughout the United States in the past few decades. This fact suggests that paying these lawyers only the market rate in the community would be under-paying them for their specific achievement in the context of this case.

61. ***Risk enhancement factor 11: This case has had a wide impact.*** This case is, of course, far more than a case between two parties over an individualized harm. Its impact is immense. *First*, it is a class action, with a class of nearly 200,000 light cigarette purchasers. While some of these purchasers are from out of state, the size of the class is nonetheless roughly 3% of the Massachusetts population, or the same as the population of Massachusetts's second largest city (Worcester). *Second*, as noted above, this is one of if not the only successful light cigarette case nationwide; in that sense, it sets a national precedent and will be a significant part

of the national debate over tobacco industry practices for many years. *Third,* the legal precedents that Class Counsel have established have already had a wide impact on Massachusetts law along several axes. The Supreme Judicial Court's decision in *Aspinall v. Philip Morris Companies, Inc*., 442 Mass. 381, 813 N.E.2d 476 (2004), for example, has assisted plaintiffs in later cases on issues of class certification,[38] standing,[39] and deceptive conduct.[40]

62. These 11 points demonstrate what seems incontestable – this case was novel, complex, extraordinarily risky, and has already had a wide impact. These factors entitle counsel to a risk-based enhancement.

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[38] In *Bellermann v. Fitchburg Gas & Elec. Light Co*., 470 Mass. 43, 18 N.E.3d 1050 (2014), for example, the Supreme Judicial Court affirmed the denial of class certification in a consumer case but noted in a footnote that the plaintiffs had not (yet) sought certification under the overpayment theory embraced in *Aspinall*. *Id.* at 54 n.10. Upon remand, the plaintiffs sought and were granted certification on this basis. *Bellerman v. Fitchburg Gas & Elec. Light Co*., No. WOCV200900023, 2015 WL 5255050 (Mass. Super. July 29, 2015).

[39] *See, e.g., Chenlen v. Philips Elecs. N. Am*., No. 050525, 2006 WL 696568, at *4 (Mass. Super. Mar. 1, 2006) (rejecting challenge to plaintiffs' standing because "[i]n light of the Supreme Judicial Court's decision in *Aspinall* [], Philips' argument is unpersuasive").

[40] *See, e.g., Gabriel v. Jackson Nat. Life Ins. Co.*, No. CA 11-12307-MLW, 2015 WL 1410406, at *17 (D. Mass. Mar. 26, 2015) ("This misrepresentation constituted 'deceptive' conduct in violation of Chapter 93A because it could reasonably have caused a person to act differently than he otherwise would have acted. *See Aspinall*, 442 Mass. at 394, 813 N.E.2d 476."); *Martin v. Mead Johnson Nutrition Co*., No. CIV A 09-11609, 2010 WL 3928707, at *2 (D. Mass. Sept. 30, 2010) (same); *Barrett v. Savarese*, 64 Mass. App. Ct. 1106, 833 N.E.2d 189 (2005) ("The landlord's deceptive statement concerning lead paint in the unit was the direct cause of the tenants' injury. *Cf. Aspinall v. Philip Morris Cos., Inc*., 442 Mass. at 394 (rejecting the proposition that "the purchase of an intentionally falsely represented product cannot be, by itself, an ascertainable injury" under c. 93A)."); *Kimiatek v. Mendelson*, No. 045129, 2007 WL 738700, at *1 (Mass. Super. Jan. 22, 2007) ("A successful G.L.c. 93A action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation ...") (citing *Aspinall v. Philip Morris Cos., Inc*., 442 Mass. 381, 394 (2004), citing *Slaney v. Westwood Auto, Inc*., 366 Mass. 688, 703 (1975)).

Qualitative Analysis of Enhancement Level

63. Counsel's entitlement to a risk-based enhancement poses the question of the proper level of that enhancement. This section examines available data on enhancements courts have provided in similar situations. These data demonstrate the reasonableness of counsel's requested 1.5 multiplier.

64. Counsel's requested multiplier is consistent with multipliers courts approve in appropriate circumstances:

- The three leading empirical studies of class action attorney's fees found the mean multipliers in all cases to be 1.45,[41] 1.81,[42] and 3.89.[43] The mean multiplier in the First Circuit is 2.1[44] and 1.82 in consumer cases.[45] These studies are somewhat inapposite in that they involve common fund cases, where fees are paid by the clients out of the fund, not fee shifting cases, such as this one, where the defendant is paying the plaintiffs' fees. However, there is scant evidence of the levels of fee enhancements in fee-shifting cases, so these numbers provide some relevant information.[46] They demonstrate that enhancements are commonly in the

[41] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34 (2010). This average encompasses cases using both a percentage method with a lodestar cross-check and pure lodestar cases.

[42] *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 tbl. 14 (2010). This multiplier data set excludes those cases that report a multiplier of 1. It is unclear if that data set includes only percentage of fund cases with lodestar cross-check or also pure lodestar cases.

[43] Stuart J. Logan, Beverly C. Moore & Jack Moshman, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167, 167 (2003). This multiplier data set appears to include cases that utilized a percentage of the fund method for calculating fees (without a lodestar cross-check), as well as those using a lodestar method and mixed methods. *Id.* at 169 (table headings).

[44] Eisenberg & Miller, *supra* note 41, at 272 tbl. 14.

[45] *Id.*

[46] One empirical study of class action fee awards between 1993-2008 is sometimes read to have provided empirical evidence of enhancements in fee-shifting cases and it found that multipliers averaged 1.38 in 66 cases. *Id.* at 273. The study did not actually capture pure fee-shifting cases, however, and was only distinguishing between class actions settlements where fee shifting statutes lurked "in the background" and settlements in which they did not. *Id.*

1-2 range, though as I have written elsewhere, there is a not insignificant set of (common fund) cases with much higher multipliers, well above 3.[47]

- Consistent with the last bullet point (and its limitations), Massachusetts's state courts grant fee multipliers in common fund cases. Two recent reported cases granted multipliers of 2[48] and 5.[49] In a third case, the defendant agreed to pay reasonable attorney's fees as part of a settlement agreement and the court, applying Massachusetts law, awarded class counsel a multiplier of 2 for its litigation of the case.[50]

- Massachusetts courts have also granted multipliers in ***fee-shifting*** cases, including a 1.2 multiplier in one reported case[51] and a 1.5 multiplier in another.[52] To be clear, there are many reported Massachusetts state cases in which courts have denied enhancements in fee-shifting cases; however, those denials were based on the facts of the case, not on the unavailability of enhancements under Massachusetts law. The point of this part of my review is to examine the level of multipliers courts do approve *assuming a multiplier is appropriate.*

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[47] *See* 5 William B. Rubenstein, *Newberg on Class Actions* § 15:89 (5th ed. 2015).

[48] *Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236, at *2 (Mass. Super. Aug. 5, 2013). I served as an expert witness for the fee petitioner in this case.

[49] *In re AMICAS, Inc. S'holder Litig.*, No. 10-174-BLS2, 2010 WL 5557444, at *4 (Mass. Super. Dec. 6, 2010). I served as an expert witness for the fee petitioner in this case.

[50] *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 171 (D. Mass. 2015). The court awarded class counsel no multiplier for its post-award litigation, *id.* at 178, and it awarded multipliers to two out of 12 non-class-counsel applicants for their work on the case, *id*. at 183-191, including a multiplier of 2 to Class Counsel in this case. *Id.* at 183.

[51] *Walsh v. Carney Hosp. Corp.*, No. 942583, 1998 WL 1284167, at *3 (Mass. Super. June 10, 1998) (granting enhancement because case "was not a 'simple' discrimination case in terms of the risk assumed by the attorneys, the respectability in the community of the defendant, the length of the trial and the difficult legal and factual issues involved. Indeed, in this case, enhancement is logical," and because "[t]he basic lodestar calculation does not take into consideration plaintiff's difficulty in obtaining representation; the legal and factual complexity of the case; the unpopularity of plaintiff's cause because of traditional homophobia; problems inherent in suing a respected Boston charitable institution; the strength of the Catholic Church; and the risk that the entire effort would be for naught (the risk of nonpayment)," and because "plaintiff's attorneys demonstrated imagination and perseverance in pursuing their goal").

[52] *Hejinian v. General American Life Ins. Co.*, 2009 WL 6056957 at *1 (Mass. Super. July 3, 2009).

- Given the dearth of data on this topic, I asked my research assistant to identify fee-shifting cases from around the United States in which courts have awarded fee enhancements or multipliers and to note the level of the enhancement in the case (without cherry-picking cases based on high enhancements). That search identified 30 such cases, a list of which is attached as Exhibit F. The multipliers in those cases generally ran from 1-2, with the mean across the 30 cases 1.6. As noted in the last point, obviously not all fee-shifting cases manifest enhancements; this research simply identifies the levels courts employ when they have found enhancements to be warranted.

65. These data points all suggest that a 1.5 multiplier is entirely consistent with the norms in those common fund and fee-shifting cases in which courts have decided to award an enhancement. Moreover, while the two Massachusetts fee-shifting cases awarded multipliers of 1.2 and 1.5, and the 30 nationwide fee-shifting cases averaged a 1.6 multiplier, a comparison of the facts of this case to those other cases suggests that Class Counsel here are entitled to at least the level of enhancement these others courts have granted. In short, it is my expert opinion that a multiplier of 1.5 is entirely reasonable given the extraordinary circumstances of this case.

66. The level of Class Counsel's fee award, particularly if enhanced, may outstrip the quantity of damages that the class is receiving in this case. Fee-paying defendants occasionally aim to circumvent an analysis of whether counsel's hours were reasonably expended with an argument that fee awards cannot be disproportionate to the client's recovery. These efforts reflect a misunderstanding of the policy concerns that justify fee-shifting statutes. Such statutes are enacted precisely to enable litigation that is either non-monetary in nature or that involves monetary recoveries that are so small that a fee cannot be taken from them. For this reason, the fact that a plaintiff's recovery is less than the proposed fee means that fee-shifting is needed, not

that it is unreasonable.[53] The Supreme Court thus explicitly rejected the "disproportionality" challenge to shifted fees 30 years ago: it affirmed a fee award of $245,456.25 for the recovery of $33,350 over Chief Justice Burger's dissenting statement that "it would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages."[54] The First Circuit has amplified the Supreme Court in stating that:

> The law . . . does not demand strict proportionality between fees and damages. This rule makes eminently good sense: a strict proportionality requirement would overlook entirely the value of other important litigation goals. That kind of rigidity would frustrate the core purpose that underlies many fee-shifting statutes, which are designed to afford private parties the opportunity to vindicate rights that serve some broad public good.[55]

For these reasons, the First Circuit has concluded that an "emphasis on 'proportionality' as determinative of reasonableness runs directly counter to fundamental precepts of Massachusetts

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[53] *Stratos v. Dep't of Pub. Welfare*, 387 Mass. 312, 323, 439 N.E.2d 778, 786-87 (1982) ("The very reason for § 1988, however, is to encourage suits that are not likely to pay for themselves, but are nevertheless desirable because they vindicate important rights . . . The fact that the fee is high in relation to damages, or that the suit did not confer broad benefits on the public, should not result automatically in major restrictions on compensable hours.").

For the same reason, a so-called "percentage cross-check" on lodestar-based fee awards – which is what a proportionality approach implies – is generally illogical and rarely utilized. For a discussion, see 5 William B. Rubenstein, *Newberg on Class Actions* § 15:52 (5th ed. 2015).

[54] *City of Riverside v. Rivera*, 477 U.S. 561, 587 (1986) (Burger, C.J., dissenting).

[55] *Spooner v. EEN, Inc.*, 644 F.3d 62, 69 (1st Cir. 2011)(citations omitted). *Accord Kassim v. City of Schenectady*, 415 F.3d 246, 252 (2d Cir. 2005) (stating that "a rule calling for proportionality between the fee and the monetary amount involved in the litigation would effectively prevent plaintiffs from obtaining counsel in cases where deprivation of a constitutional right caused injury of low monetary value," and noting that it had "repeatedly rejected the notion that a fee may be reduced merely because the fee would be disproportionate to the financial interest at stake in the litigation").

law.[56] It is, of course, true that excessive time spent on minor matters may indicate time not reasonably expended; but proportionality alone is not a good proxy for, and does not displace, the only pertinent legal question: whether counsel's time was reasonably expended.[57] In my opinion, documented throughout this Affidavit, Class Counsel's time in this case was reasonably – and successfully – expended on a matter of great, indeed national, significance and they should be paid accordingly.

* * *

[56] *Diaz v. Jiten Hotel Mgmt., Inc*., 741 F.3d 170, 178 (1st Cir. 2013) (interpreting Massachusetts fee-shifting law) (citing *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co*., 445 Mass. 411, 429–30, 837 N.E.2d 1121 (2005)); *see also Black v. Coastal Oil New England, Inc*., 57 Mass. App. Ct. 696, 700, 785 N.E.2d 708, 711 (2003) ("[T]he judge correctly ruled that proportionality predicated on the amount recovered is not a requirement.").

[57] Thus, in the leading Massachusetts case on point, the Supreme Judicial Court affirmed an award of $1 million in fees and costs in a case recovering $118,950 in treble damages under c. 93A. *Twin Fires*, 445 Mass. at 433. In doing so, it rejected the defendant's proportionality approach and instead focused on whether it had been reasonable for counsel to expend hours on a damages theory that ultimately proved unsuccessful. *Id.* at 431. The Supreme Judicial Court concluded that given ambiguity in the law, counsel's strategy had been viable and it therefore affirmed the trial judge's decision that "it was reasonable for the plaintiffs' counsel to have valued the case as having the potential for a multimillion dollar award and to have expended effort in the litigation commensurate with that potential." *Twin Fires*, 445 Mass. 411, 431.

67. I have testified that the requested fee is reasonable for three inter-related reasons:

- the requested hourly rates are reasonable;
- the hours expended on the litigation are reasonable; and
- the multiplier counsel seek is both warranted in fact and reasonable in amount.

In sum, it is my expert opinion that the Court should approve Class Counsel's request that the defendant be ordered to pay them $17,661,694 million in attorney's fees.

Signed under the pains and penalties of perjury this 21st day of March, 2016.

William B. Rubenstein

EXHIBIT A

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ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Sidley Austin Professor of Law 2011-
Professor of Law 2007-2011
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Visiting Professor of Law 2003-2004, 2005-2006
Lecturer in Law 1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law 2002-2007
Acting Professor of Law 1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

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Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

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Visiting Professor Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel 1987-1995

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk 1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

◊ *Sole Author,* NEWBERG ON CLASS ACTIONS (4th ed. updates since 2008 and 5th ed. (2011-2016))

◊ *Invited Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law and related topics (2010-2015))

◊ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

◊ *Author, Amicus* brief filed in the United States Supreme Court on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

◊ *Special counsel,* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action (*In re Indymac Mortgage-Backed Securities Litigation*, Civ. 15-1310 (2d Cir. 2015)).

◊ "*Expert's Corner*" (Monthly Column)*, Class Action Attorney Fee Digest,* 2007-2011

◊ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

◊ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

◊ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

Expert Witness

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation matter (2016)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (KFB), U.S. Dist. Ct.., S.D.N.Y. (2015))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re*

High-Tech Employee Antitrust Litig., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

♢ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554, U.S. Dist. Ct., D.R.I. (2015))

♢ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Asghari v. Volkswagen Group of America, Inc.,* No. CV13-02529, U.S. Dist. Ct., C.D. Cal. (2015))

♢ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF, U.S. Dist. Ct., S.D.N.Y. (2015))

♢ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424, U.S. Dist. Ct., C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

♢ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629, U.S. Dist. Ct., D. Mass. (2014))

♢ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

♢ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

♢ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (***Herke v. Merck,*** No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*), U.S. Dist. Ct., E. D. La. (2013))

♢ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (***Henderson v. Acxiom Risk Mitigation, Inc.,*** Case No. 3:12-cv-00589-REP, U.S. Dist. Ct., E.D. Va. (2013))

♢ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel (***White v. Experian Information Solutions, Inc.,*** Case No. 05-CV-1070, U.S. Dist. Ct., C.D. Cal. (2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of "net expected value" of settlement benefits (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

♢ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (***Anaya v. Quicktrim, LLC,*** Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

♢ Submitted expert witness affidavit concerning fee issues in common fund class action (***Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,*** Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

♢ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action (***CVS Caremark Corp. v. Lauriello,*** 175 So. 3d 596, 610 (Ala. 2014))

♢ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (***Rational Strategies Fund v. Jhung,*** Case No. BC 460783, California Superior Court, Los Angeles County (2012))

♢ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (***KB Home v. K&L Gates, LLP,*** Case No. BC484090, California Superior Court, Los Angeles County (2011))

♢ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (***Simon v. Metropolitan Property and Cas. Co.,*** Case No. CIV-2008-1008-W, U.S. Dist. Ct., W.D. Ok. (2011))

♢ Retained, deposed, and testified in court as expert witness in fee-related dispute (***Blue, et al. v. Hill***,Case No. 3:10-CV-02269-O-BK, U.S. Dist. Ct., N.D. Tex. (2011))

♢ Retained as an expert witness in fee-related dispute (***Furth v. Furth***, Case No. C11-00071-DMR, U.S. Dist. Ct., N.D. Cal. (2011))

♢ Submitted expert witness declaration concerning interim fee application in complex environmental

class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

♢ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657, U.S. Dist. Ct., E.D. La. (2010))

♢ Submitted expert witness declaration concerning fee application in securities case (*In re Amicas Inc. Shareholder Litigation,* Civil Action No. 10-412BLS2, Massachusetts Superior Court (2010))

♢ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160 (C.D. Cal. 2010))

♢ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, MassachusettsSuperior Court (2010))

♢ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222, U.S. Dist. Ct., C.D. Cal. (2010))

♢ Submitted an expert witness declaration concerning fairness of settlement provisions and processes (*White v. Experian Information Solutions, Inc.,* Case No. 05-CV-1070, U.S. Dist. Ct., C.D. Cal. (2010), *relied upon in Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

♢ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute (*Elihu v. Toshiba America Information Systems, Inc.,* Case No. BC328566, California Superior Court, Los Angeles County (2009), *discused in Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 160 Cal. Rptr. 3d 557 (2d Dist. 2013))

♢ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811, U.S. Dist. Ct., E.D. Mo. (2009))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No. 1735, U.S. Dist. Ct., D. Nev. (2009))

♢ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, MDL Docket No. 1796, U.S. Dist. Ct., D. D.C. (2009))

♢ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842, U.S. Dist. Ct., D. R.I. (2009))

♢ Submitted an expert witness declaration and supplemental declaration concerning common benefit

fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

♢ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, U.S. Dist. Ct., D. D.C. (2008))

♢ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action(*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

♢ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB, U.S. Dist. Ct., E.D. Ky. (2008))

♢ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

♢ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS, U.S. Dist. Court, D. Mass. (2007))

♢ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al.*, No. 07-39 (WOB) U.S. Dist. Court, E. D. Ky. (2007))

♢ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

♢ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

♢ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

◊ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL, U.S. Dist. Court, C.D. Cal. (2006))

◊ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

◊ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

◊ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

◊ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C, U.S. Dist. Ct., W.D. Ok. (2002))

◊ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

◊ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389, U.S. Dist. Ct., S.D.N.Y. (2015))

◊ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

◊ Retained by a Fortune 100 Company as an expert consultant on class certification issues

◊ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. #: 2:13-cv-00074-ABJ, U.S. Dist. Ct., D. Wy. (2013))

◊ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693, U.S. Dist. Court, C.D. Cal. (2013))

◊ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

◊ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*,No. 2:13-cv-00192-JAK-MRW, U.S. Dist. Ct., C. D. Cal. (2013))

◊ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, U.S. Dist. Court, E.D. La. (2012))

◊ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No.

2:12-md-02323-AB, U.S. Dist. Ct., E.D. Pa. (2012))

♢ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102, U.S. Dist. Court, S.D. N.Y. (2009))

♢ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733, U.S. Dist. Court, S.D. Iowa (2008))

♢ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 CAS (VBKx), U.S. Dist. Court, C.D. Cal. (2008))

♢ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194, U.S. Dist. Court, E.D. Pa. (2008))

♢ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit)

♢ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

♢ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

♢ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

♢ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

♢ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re Diet Drugs (Phen/Fen) Products Liability Litigation*, U.S. Dist. Court, E. D. Pa. (2006))

♢ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

♢ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, Case No. CV-98-00402-CBM, U.S. Dist. Ct., C.D. Cal.)

♢ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

♢ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, U.S. Dist. Ct., C.D. Cal., *appeal dism. as moot*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (20013))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (20011))

♢ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

♢ NEWBERG ON CLASS ACTIONS (sole author of supplements to 4th edition since 2008 and of 5th edition (2011-2016))

♢ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

♢ *Procedure and Society: An Essay for Steve Yeazell,* 61 U.C.L.A. REV. DISC. 136 (2013)

♢ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

♢ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

♢ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

♢ *The Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

♢ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

♢ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

♢ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle,* 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

♢ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

♢ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

◊ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

◊ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

◊ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

◊ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

◊ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

◊ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

◊ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

◊ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

◊ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

◊ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

◊ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

◊ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

◊ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel,* 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

◊ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

◊ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

◊ *The "Lodestar Percentage:" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

◊ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

◊ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

♢ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

♢ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

♢ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

♢ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

♢ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

♢ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

♢ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

♢ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

♢ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

♢ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Alan Hirsch)

♢ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

♢ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

♢ *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

♢ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

♢ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

♢ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

♢ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) *(*excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

♢ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016 (forthcoming)

♢ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

♢ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

♢ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

♢ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

♢ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

♢ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

♢ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

♢ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

♢ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National
Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

◊ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

◊ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

◊ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (*Rosebrock v. Hoffman*, 135 S. Ct.1893 (2015))

◊ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors

concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))

♢ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))

♢ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

Consumer Class Action

♢ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.,* 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

♢ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation,* 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

♢ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

♢ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

♢ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

♢ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))

♢ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

♢ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

♢ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

◊ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

◊ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

◊ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

◊ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

◊ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994))

Racial Equality

◊ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

Securities Class Actions

◊ Authoring brief in support of affirmance of district court fee decision in complex securities class action at request of U.S. Court of Appeals for the Second Circuit (*In re Indymac Mortgage-Backed Securities Litigation*, Civ. 15-1310 (2d Cir. 2015)).

SELECTED OTHER PUBLICATIONS

Editorials

◊ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005

◊ *Play It Straight*, NEW YORK TIMES, October 16, 2004

◊ *Hiding Behind The Constitution*, NEW YORK TIMES, March 20, 2004

◊ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)

◊ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993

◊ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

- ♢ Massachusetts (2008)
- ♢ California (2004)
- ♢ District of Columbia (1987) (inactive)
- ♢ Pennsylvania (1986) (inactive)
- ♢ U.S. Supreme Court (1993)
- ♢ U.S. Court of Appeals for the First Circuit (2010)
- ♢ U.S. Court of Appeals for the Second Circuit (2015)
- ♢ U.S. Court of Appeals for the Fifth Circuit (1989)
- ♢ U.S. Court of Appeals for the Ninth Circuit (2004)
- ♢ U.S. Court of Appeals for the Eleventh Circuit (1993)
- ♢ U.S. Court of Appeals for the D.C. Circuit (1993)
- ♢ U.S. District Courts for the Central District of California (2004)
- ♢ U.S. District Court for the District of the District of Columbia (1989)
- ♢ U.S. District Court for the District of Massachusetts (2010)
- ♢ U.S. District Court for the Northern District of California (2010)

EXHIBIT B

EXHIBIT B

Partial List of Documents Reviewed by Professor Rubenstein
(other than case law and scholarship on the relevant issues)

Docket of *Thomas Geanacopoulos vs. Philip Morris USA, Inc.*, No. 98-6002-BLS1

Original Complaint

1. Class Action Complaint
2. Answer of Defendant Philip Morris Companies Inc. to Plaintiffs' Class Action Complaint
3. Answer of Defendant Philip Morris Incorporated to Plaintiffs' Class Action Complaint

Removal and Remand

4. Notice of Removal to United States District Court
5. Memorandum in Support of Plaintiffs' Motion to Remand
6. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Remand
7. Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion to Remand
8. Memorandum and Order Remanding to Suffolk Superior Court

Amended Complaints and Answers

9. First Amended Class Action Complaint
10. Defendant Philip Morris Companies Inc.'s Answer to Plaintiffs' First Amended Class Action Complaint
11. Defendant Philip Morris Incorporated's Answer to Plaintiffs' First Amended Class Action Complaint
12. Second Amended Class Action Complaint
13. Defendant Philip Morris Companies Inc.'s Answer to Plaintiffs' Second Amended Class Action Complaint
14. Defendant Philip Morris Incorporated's Answer to Plaintiffs' Second Amended Class Action Complaint
15. Motion for Leave to Amend Complaint
16. Third Amended Class Action Complaint
17. Defendants' Response to Plaintiffs' Motion to Amend the Complaint
18. Plaintiffs' Reply Memorandum in Support of Motion for Leave to Amend Complaint
19. Order Allowing Motion for Leave to Amend Complaint
20. Answer, Defenses, and Jury Demand of Philip Morris USA Inc. to Plaintiffs' Third Amended Class Action Complaint

Defendant's Motion for Judgment on the Pleadings Based on *Res Judicata* and Related Motion for Costs

21. Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings on the Basis of *Res Judicata*
22. Plaintiffs' Memorandum in Opposition to Defendants' "Motion for Judgment on the Pleadings" on the Basis of *Res Judicata*
23. Defendants' Reply Memorandum in Support of Motion for Judgment on the Pleadings
24. Plaintiffs' Sur-reply in Opposition to Defendants' "Motion for Judgment on the Pleadings" on the Basis of *Res Judicata*
25. Defendants' Response to Plaintiffs' Sur-reply in Opposition to Defendants' Motion for Judgment on the Pleadings
26. Order Denying Defendants' Motion for Judgment on the Pleadings on the Basis of *Res Judicata*
27. Plaintiffs' Memorandum in Support of their Motion for Attorneys' Fees, Costs and Expenses
28. Defendants' Opposition to Plaintiffs' Motion for an Award of Attorneys' Fees, Costs and Expenses
29. Memorandum of Decision and Order on Plaintiffs' Motion for Attorneys' Fees, Costs and Expenses

Plaintiff's Motion for Class Certification

30. Plaintiffs' Memorandum of Law in Support of Motion for Class Certification
31. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification
32. Plaintiffs' Memorandum in Reply to the Defendants' Opposition to the Plaintiffs' Motion for Class Certification
33. Defendants' Sur-Reply in Opposition to Plaintiffs' Motion for Class Certification
34. Defendants' Supplemental Sur-Reply in Opposition to Plaintiffs' Motion for Class Certification
35. Memorandum of Decision and Order on Plaintiffs' Motion for Class Certification
36. Defendants' Motion for Reconsideration of the Court's October 11, 2001 Class Certification Order
37. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Reconsideration of the Court's Class Certification Order
38. Order Denying Defendants' Motion for Reconsideration of the Court's October 11, 2001 Class Certification Order

Single Justice Appeal regarding Class Certification Decision

39. Defendants' Request for Report of the Court's October 11, 2001 Class Certification Order

40. Plaintiffs' Opposition to Defendants' Request for Report of the Court's Class Certification Order
41. Defendants' Petition for Interlocutory Review pursuant to Mass. Gen. L. C. 231, § 118 (First Paragraph)
42. Memorandum in Support of Defendants' Petition for Interlocutory Review pursuant to M.G.L. c. 231, § 118 (First Paragraph)
43. Defendants' Memorandum concerning the Timeliness of their Petition for Interlocutory Review
44. Plaintiffs' Memorandum in Opposition to Defendants' Petition for Interlocutory Review
45. Plaintiffs' Memorandum concerning the Timeliness of Defendants' Petition for Interlocutory Review
46. Memorandum from Judge Kane Declining to Report the Case to the Appeals Court
47. Appeals Court: Defendants' Supplemental Memorandum
48. Appeals Court: Plaintiffs' Memorandum regarding Standards
49. Appeals Court: Order on Interlocutory Petition (Vacating Order Denying Reconsideration of the Order for Class Certification)

Plaintiff's Request to Report Single Justice Decision regarding Class Certification to Full Court

50. Appeals Court: Plaintiffs' Motion for Reconsideration or, in the Alternative, for Leave to Appeal or Report
51. Appeals Court: Defendants' Opposition to Plaintiffs' Motion for Reconsideration or, in the Alternative, for Leave to Appeal or Report
52. Appeals Court: Plaintiffs' Memorandum in Reply to Defendants' Opposition to Motion for Reconsideration or, in the Alternative, for Leave to Appeal or Report
53. Appeals Court: Memorandum and Order on Appeal from Single Justice Interlocutory Order Vacating and De-certifying Class

Application for Direct Appellate Review regarding Class Certification

54. Application for Direct Appellate Review
55. Opposition to Application for Direct Appellate Review
56. Notice of Allowance of Application for Direct Appellate Review

Appeal to Supreme Judicial Court regarding Class Certification

57. Brief of Plaintiffs-Appellants Lori Aspinall and Thomas Geanacopoulos
58. Brief of Defendants-Appellees
59. Reply Brief of Plaintiffs Lori Aspinall and Thomas Geanacopoulos
60. Defendants' Motion to Strike Portions of Plaintiffs' Reply Brief
61. Opposition of Plaintiffs/Appellants to Motion of Defendants/Appellees to Strike Portions of Plaintiffs' Reply Brief
62. Supreme Judicial Court Decision regarding Class Certification

Litigation regarding Class Notice

63. Plaintiffs' Motion with respect to Notice of Certification of Class Action
64. Defendants' Response to Plaintiffs' Motion with respect to Notice of Certification of Class Action
65. Plaintiffs' Reply to Defendants' Opposition to their Motion regarding Notice of Class Certification
66. Memorandum of Decision and Order on Plaintiffs' Motion with respect to Notice of Certification of Class Action
67. Letter Enclosing Plaintiffs' Assented-to Motion to Approve Form of Notice
68. Plaintiffs' Assented-to Motion to Approve Form of Notice
69. Proposed Notice of Marlboro Lights Class Action
70. Approval of Form of Notice
71. Defendant Philip Morris USA Inc.'s Memorandum in Support of its Motion for Partial Reconsideration of the Court's December 6, 2005 Order with Respect to Class Notice
72. Plaintiffs' Response to Defendant's Motion for Partial Reconsideration of the Court's December 6, 2005 Order with Respect to Class Notice
73. Superior Court Order Granting Defendant's Motion for Partial Reconsideration

Plaintiffs Motion to Reconsider the Class Definition

74. Memorandum in Support of Plaintiffs' Motion (1) to Reconsider Those Aspects of the Court's December 6, 2005 Order That Limited the Class to Massachusetts Residents and Residents of Surrounding States Who Regularly Purchased Marlboro Lights Cigarettes in Massachusetts during the Class Period and (2) to Redefine the Class as Consisting of "All Persons Who After November 25, 1994 Purchased Packs or Cartons of Marlboro Lights Cigarettes in Massachusetts That Displayed the Legend 'Lowered Tar & Nicotine'"
75. Defendant's Opposition to Motion to Reconsider
76. Plaintiffs' Reply Memorandum in Support of Their Motion for Reconsideration
77. Memorandum of Decision and Order on Plaintiff's Motion (1) to Reconsider Those Aspects of the Court's Order That Limited the Class and (2) to Redefine the Class

Defendant's Motion to Take Absent Class Member Depositions

78. Memorandum in Support of Defendant's Motion for Leave to Take Absent Class Member Discovery
79. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Leave to Take Absent Class Member Discovery
80. Defendant's Reply in Support of Motion for Leave to Take Absent Class Member Discovery
81. Plaintiffs' Motion for Leave to File Sur-Reply to Defendant's Motion Seeking Absent Class Member Discovery
82. Memorandum of Decision and Order on Defendants' Motion for Leave to Take Absent Class Discovery

Defendant's Motion for Summary Judgment regarding Preemption

83. Memorandum of Law in Support of Defendant Philip Morris USA Inc.'s Motion for Summary Judgment: Federal Preemption and Mass. Gen. Laws C. 93A, § 3
84. Plaintiffs' Memorandum of Law in Opposition to Philip Morris' Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment: Federal Preemption and Mass. Gen. Laws C. 93A, §3
85. Plaintiffs' Motion for Summary Judgment Dismissing Defendants' Federal Preemption and Mass. Gen. Laws CH. 93A, §3 Defenses
86. Reply Memorandum in (1) Support of Defendant Philip Morris USA Inc.'s Motion for Summary Judgment: Federal Preemption and Mass. Gen. Laws C. 93A, § 3; and (2) Opposition to Plaintiffs' Cross-Motion for Summary Judgment
87. Plaintiffs' Reply Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment: Federal Preemption and Mass. Gen. Laws C. 93A, §3
88. Philip Morris USA Inc.'s Response to Plaintiffs' Reply Memorandum regarding Summary Judgment: Federal Preemption and Mass. Gen. Laws C. 93A, § 3
89. Defendant's Letter Submission of 2005 Illinois Supreme Court Decision in *Price*
90. Plaintiffs' Supplemental Memorandum concerning *Price v. Philip Morris, Inc.*, in Opposition to Defendant's Motion for Summary judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment
91. Philip Morris USA Inc.'s Submission concerning the Illinois Supreme Court's Decision in *Price*, and in Support of its Motion for Summary Judgment: Federal Preemption and Mass. Gen. Laws C. 93A, § 3
92. Memorandum of Decision and Order on (1) Defendant Philip Morris USA Inc.'s Motion for Summary Judgment: Federal Preemption and Mass. Gen. Laws C. 93A, § 3, and Plaintiffs' Motion for Summary Judgment Dismissing Defendants' Federal Preemption and Mass. Gen. Laws CH. 93A, § 3 Defenses

Defendants' Request to Report and Petition for Interlocutory Review regarding Preemption

93. Defendant Philip Morris USA Inc.'s Memorandum in Support of its Motion for Partial Reconsideration of the Court's Decision on Cross-Motions for Summary Judgment, or in the Alternative, to Report the Court's Summary Judgment Decision to the Appeals Court
94. Appeals Court: Defendant Philip Morris USA Inc.'s Petition for Interlocutory Review pursuant to G.L. C. 231, § 118 (First Paragraph)
95. Appeals Court: Memorandum of Law in Support of Defendant Philip Morris USA Inc.'s Petition for Single Justice Review
96. Plaintiffs' Opposition to Defendants' Motion for Partial Reconsideration of the Court's Decision on Cross-Motions for Summary Judgment or, in the Alternative, to Report the Court's Summary Judgment Decision to the Appeals Court
97. Defendant Philip Morris USA Inc.'s Reply Memorandum in Support of its Motion for Partial Reconsideration of the Court's Order on Cross-Motions for Summary Judgment
98. Order on Defendant's Motion for Partial Reconsideration

99. Report from Judge Lauriat to Appeals Court

Application for Direct Appellate Review regarding Preemption

100. Plaintiffs' Application for Direct Appellate Review
101. Response of Defendant-Appellant Philip Morris USA Inc. to Plaintiffs' Application for Direct Appellate Review
102. Notice of Allowance of Application for Direct Appellate Review
103. Reply Brief of Appellant Philip Morris USA Inc.

Appeal to Supreme Judicial Court regarding Preemption

104. Brief of Appellant Philip Morris USA Inc.
105. Brief of Plaintiffs-Appellees Lori Aspinall and Thomas Geanacopoulos
106. (Proposed) Sur-Reply Brief of Plaintiffs-Appellees Lori Aspinall and Thomas Geanacopoulos
107. Notice of Docket Entry: Order: Parties Invited to File Submissions regarding a Stay in light of Supreme Court Grant of Certiorari Petition in *Good v. Altria*
108. Notice of Docket Entry: Supreme Judicial Court Order Staying Appellate Proceedings
109. Heyman to Clerk of the Supreme Judicial Court regarding 2008 *Good* Decision
110. Letter Attachment: Syllabus, Opinion, and Dissent in *Good*
111. Letter Attachment: Brief for the United States Amicus Curiae Supporting Respondents (*Good*)
112. Notice of Docket Entry: Order Inviting Submissions on Issues Remaining given the Supreme Court's Decision in *Good*
113. Defendant to Clerk of the Supreme Judicial Court in Response to the Court's December 23, 2008 Order regarding the *Good* Decision
114. Urmy Response to Court Order
115. Supplemental Brief of Appellees-Plaintiffs Lori Aspinall and Thomas Geanacopoulos pursuant to the Court's Order of January 22, 2009 regarding *Altria Group, Inc. v. Good*, 129 S.Ct. 538 (2008)
116. Supreme Judicial Court Decision regarding Preemption

Good v. Altria

117. Good v. Altria Group, Inc., 436 F.Supp.2d 132 (D. Maine 2006)
118. Good v. Altria Group, Inc., 501 F.2d 29 (1st Cir. 2007)
119. Altria Group, Inc. v. Good, 552 U.S. 1162 (2008)
120. Altria Group, Inc. v. Good, 555 U.S. 70 (2008)

Plaintiff's Motion for Summary Judgment regarding Collateral Estoppel

121. Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment against Defendants Philip Morris USA, Inc. and Altria Group, Inc.
122. Philip Morris USA Inc.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment against Defendants Philip Morris USA, Inc. and Altria Group, Inc.

123. Memorandum of Law of Defendant Altria Group, Inc. in Opposition to Plaintiffs' Motion for Partial Summary Judgment
124. Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment against Defendants Philip Morris USA, Inc. and Altria Group, Inc.
125. Plaintiffs' Statement of Facts with Defendants' Responses and Defendants' Statement of Additional Facts with Plaintiffs' Responses
126. Memorandum of Decision and Order on Plaintiffs' Motion for Partial Summary Judgment against Defendants Philip Morris USA and Altria Group, Inc. (Paper # 137)

Protocol for Absent Class Depositions

127. Memorandum of Decision and Order on Proposed Case Management and Scheduling Order Concerning Depositions of Absent Class Members

Plaintiffs' Motion regarding Available Remedies

128. Plaintiffs' Memorandum In Support of Motion for Partial Summary Judgment Re Available Remedies
129. Plaintiffs' Rule 9A(b)(5) Statement In Support of Motion for Partial Summary Judgment RE: Available Remedies
130. Defendant Philip Morris USA, Inc's Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding Available Remedies
131. Plaintiff's Reply In Support of Motion for Partial Summary Judgement Re: Available Remedies
132. Defendant Philip Morris USA, Inc.'s Sur-Reply in Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding Available Remedies
133. Memorandum of Decision and Order on Plaintiffs' Motion for Partial Summary Judgment Regarding Available Remedies
134. Order Denying Plaintiffs' Request for Report on the Court's February 7, 2014 Partial Summary Judgment Order

Plaintiffs' Expert Reports

135. Expert Report of David M. Burns, M.D.
136. Expert Report of J. Michael Dennis, PH.D
137. Revised Tables of 2014 Jeffrey E. Harris Geanacopoulos Report
138. Expert Report Submitted by Robert N. Proctor
139. Expert Report of Peter G. Shields, M.D.

Defendants' Expert Reports

140. Expert Report of Dr. Peter C. English
141. Expert Report of Pascal Fernandez
142. Declaration and Expert Report of Janette Thomas Greenwood, PH.D.
143. Expert Report of Nancy Haley PH.D.
144. Expert Report of Richard Jupe
145. Expert Report of Nancy A. Mathiowetz, PH.D.
146. Expert Report of Kevin M. Murphy
147. Expert Report of David W. Stewart, PH. D
148. Expert Report of Dr. Christopher M. Teaf

149. Expert Report of Dr. Peter A. Valberg
150. Expert Report of William Wecker

Plaintiffs' Rebuttal Reports

151. Rebuttal Report of Jeffrey E. Harris
152. Supplemental Report of Peter Shields

Defendant's Motion for Summary Judgment regarding Injury

153. Defendant Philip Morris USA Inc.'s Memorandum in Support of Motion for Summary Judgment
154. Plaintiff's Memorandum in Opposition to Defendant Philip Morris USA Inc.'s Motion for Summary Judgment
155. Defendant Philip Morris USA Inc.'s Statement of Undisputed Material Facts and Plaintiff's Response to Defendant Philip Morris USA Inc.'s Statement of Undisputed Material Facts
156. Defendant Philip Morris USA Inc.'s Reply In Support of its Motion for Summary Judgment
157. Memorandum and Order on Defendant's Motion for Summary Judgment and Motion to Exclude Plaintiffs' Damages Experts

Pretrial Evidentiary Motions

158. Defendant Philip Morris USA, Inc.'s Memorandum in Support of Its Motion to Strike Expanded Class and Profit Data From Plaintiffs' Expert Reports
159. Plaintiff's Opposition to Defendant's Motion to Strike Portions of Plaintiff's Expert Reports
160. Order Allowing in Part and Denying in Part Motion (Paper No. 173) of Philip Morris USA Inc. to Strike Expanded Class and Profit Data From Plaintiffs' Expert Reports
161. Memorandum in Support of Plaintiff's Motion to Admit Prior Testimony From Dr. William A. Farone
162. Defendant Philip Morris USA Inc.'s Memorandum in Support of Its Motion Exclude Expert Testimony From Dr. David Burns and Dr. Peter Shields that Marlboro Lights are More Dangerous Than Marlboro Reds
163. Defendant Philip Morris USA Inc.'s Memorandum in Support of its Motion to Exclude the Expert Testimony of J. Michael Dennis and Jeffrey E. Harris
164. Defendant Philip Morris USA Inc.'s Opposition to Plaintiffs' Motion to Admit Prior Testimony from William A. Farone
165. Reply Memorandum in Support of Plaintiff's Motion to Admit Prior Testimony from Dr. William A. Farone
166. Plaintiff's Memorandum in Opposition to Defendant Philip Morris USA Inc.'s Motion to Exclude Expert Testimony from Dr. David Burns and Dr. Peter Shields That Marlboro Lights are More Dangerous Than Marlboro Reds
167. Plaintiff's Memorandum in Opposition to Defendant Philp Morris USA Inc.'s Motion to Exclude the Expert Testimony of J. Michael Dennis and Jeffrey E. Harris
168. Defendant Philip Morris USA Inc.'s Reply In Support of Motion to Exclude Expert Testimony From Dr. David Burns and Dr. Peter Shields That Marlboro Lights are More Dangerous That Marlboro Reds

169. Defendant Philip Morris USA Inc.'s Reply In Support of Motion to Exclude Expert Testimony of Michael Dennis and Jeffrey Harris
170. Order on Plaintiffs' Motion to Admit Prior Testimony from Dr. William A. Farone (Paper No. 181) and Defendant's Motion to Exclude Expert Testimony from David Burns and Dr. Peter Shields that Marlboro Lights are More Dangerous than Marlboro Reds (Paper No. 185)
171. Memo In Support of Plaintiff's Motion to Exclude Prior Testimony from Out-of-State Smokers in Other Cases
172. Defendant Philip Morris USA Inc.'s Memorandum in Opposition to Plaintiffs' *Motion In Limine* to Exclude Prior Testimony from Out-Of-State Smokers in Other Cases
173. Order Allowing Plaintiffs' Motion to Exclude Prior Testimony From Out-Of-State Smokers in Other Cases
174. Defendant Philip Morris USA Inc.'s *Motion In Limine* to Preclude Expert Testimony Regarding the Meaning and Intent of Company Documents
175. Defendant Philip Morris USA Inc.'s Notice of Motion *In Limine* To Preclude Evidence or Argument Regarding Petitioning Activities Protected By 1st Amendment Under the *Noerr-Pennington* Doctrine
176. Memorandum In Support of Plaintiff's Motion *in Limine* to Exclude Prior Testimony of Defendant's Witness Barbro L. Goodman
177. Defendant Philip Morris USA Inc.'s Notice of Motion and Motion *In Limine* To Preclude Evidence and Argument Alleging That It Deceived Federal Agencies.
178. Defendant Philip Morris USA Inc.'s Memorandum in Support of Its Motion *in Limine* to Preclude Evidence and Argument Alleging That It Deceived Federal Agencies
179. Defendant Philip Morris USA Inc.'s Notice of Motion and Motion *In Limine* To Exclude Certain Deposition Testimony of Joseph F. Cullman III .
180. Defendant Philip Morris USA Inc.'s Memorandum in Support of Its Motion *In Limine* to Exclude Deposition Testimony of Joseph F. Cullman III
181. Defendant Philip Morris USA Inc.'s Opposition to Motion *in Limine* to Exclude Prior Testimony of Barbro Goodman.
182. Memorandum of Law in Support of Plaintiff's Motion *in Limine* for an Order Striking Certain of Defendant Philip Morris's Deposition "Counter-Designations"
183. Defendant Philip Morris USA Inc.'s Opposition to Motion *In Limine* To Exclude Prior Testimony of Barbro Goodman
184. Plaintiff's Opposition to Defendant's Motion *in Limine* to Exclude Deposition Testimony of Joseph F. Cullman
185. Plaintiff's Opposition to Philip Morris's Motion *In Limine* to Preclude Evidence and Argument Alleging Philip Morris Deceived Federal Agencies
186. Plaintiff's Opposition to Defendant's Motion in *Limine* to Preclude Expert Testimony Regarding The Meaning or Intent of Company Documents
187. Plaintiff's Opposition to Philip Morris's Motion *In Limine* to Preclude Evidence and Argument Regarding Petitioning Activities Protected by the 1st Amendment Under the *Noerr-Pennington* Doctrine
188. Defendant Philip Morris USA Inc.'s Opposition to Plaintiffs' Motion *In Limine* for An Order Striking Certain of Defendant Philip Morris's Counter-Designations
189. Order Denying Plaintiff's Motion *in Limine* for An Order Striking Certain of Defendant Philip Morris's Deposition "Counter Designations"

Joint Pretrial Memorandum

190. Joint Pre-Trial Memorandum
191. Stipulation and Proposed Order Concerning Pretrial Exchange of Proposed Exhibits, Deposition Designations, Motions *In Limine*, and Other Pretrial and Trial Protocols

Proposed Findings and Conclusions

192. Plaintiff's Request for Proposed Findings of Fact and Conclusions of Law
193. Addendum A to Proposed Findings "A Chronology of Key Documents/Events
194. Philip Morris USA's Proposed Statement of Decision
195. Corrected Pages 12-15 from Plaintiff's Proposed Finding of Fact and Conclusions of Law Filed on December 18, 2015
196. Plaintiff's Response to Defendant's Proposed Statement of Decision

Defendant's Motion to Decertify the Class

197. Defendant Philip Morris USA Inc.'s Motion To Decertify the Class.
198. Defendant Philip Morris USA Inc.'s Memorandum in Support of Its Motion to Decertify the Class
199. Plaintiff's Opposition to Defendant's Motion to Decertify the Class
200. Defendant Philip Morris USA Inc.'s Reply in Support of Its Motion to Decertify Class
201. Defendant Philip Morris USA Inc.'s Memorandum in Reply to Plaintiffs' Response to Defendant's Proposed Statement of Decision
202. Order Denying Defendant Philip Morris USA Inc.'s Motion to Decertify the Class

Decision

203. Findings of Fact and Conclusions of Law After Trial

EXHIBIT C

EXHIBIT C

Cases Used in Massachusetts Fee Study

1. *Bezdek v. Vibram USA Inc.*, 79 F.Supp.3d 324 (D. Mass. 2015)
2. *Hill v. State Street Corp.*, No. 09–12146–GAO, 2015 WL 127728 (D. Mass. Jan. 8, 2015)
3. *In re Prudential Insurance Company of America SGLI/VGLI Contract Litigation*, No. 11–md–02209–MAP, 3:10–cv–30163–MAP, 3:11–cv–30058–MAP, 3:11–cv–30059-MAP, 3:11–30060–MAP, 2014 WL 6968424 (D. Mass. Dec. 9, 2014)
4. *In re Celexa and Lexapro Marketing and Sales Practices Litigation*, No. 09–2067–NMG, 2014 WL 4446464 (D. Mass. Sept. 8, 2014)
5. *Pietrantonio v. Ann Inc.*, No. 13–cv–12721–RGS, 2014 WL 3973995 (D. Mass. Aug. 14, 2014)
6. *In re JPMorgan Chase Mortg. Modification Litigation*, 18 F.Supp.3d 62 (D. Mass. 2014)
7. *Commonwealth Care Alliance v. Astrazeneca Pharmaceuticals L.P.*, No. CIV.A. 05–0269 BLS 2, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013)
8. *In re Evergreen Ultra Short Opportunities Fund Securities Litigation*, No. 08–11064–NMG, 2012 WL 6184269 (D. Mass. Dec. 10, 2012)
9. *Rudy v. City of Lowell*, 883 F.Supp.2d 324 (D. Mass. 2012)
10. *Latorraca v. Centennial Technologies Inc.*, 834 F.Supp.2d 25 (D. Mass. 2011)
11. *Davis v. Footbridge Engineering Services, LLC*, No. 09cv11133–NG, 2011 WL 3678928 (D. Mass. Aug. 22, 2011)
12. *Allen v. Decision One Mortg. Co., LLC*, No. 07–11669–GAO, 2010 WL 1930148 (D. Mass. May 12, 2010)
13. *Mann & Co., PC v. C-Tech Industries, Inc.*, No. 08–11312–RGS, 2010 WL 457572 (D. Mass. Feb. 5, 2010)
14. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05–11148–PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)
15. *In re TJX Companies Retail Sec. Breach Litigation*, 584 F.Supp.2d 395 (D. Mass. 2008)
16. *Government Employees Hosp. Ass'n v. Serono Intern., S.A.*, 246 F.R.D. 93 (D. Mass. 2007), *see also* ECF No. 128 (Final Approval Order, Dec. 12, 2007)
17. *In re Relafen Antitrust Litigation*, 231 F.R.D. 52 (D. Mass. 2005)
18. *Stokes v. Saga Intern. Holidays, Ltd.*, 376 F.Supp.2d 86 (D. Mass. 2005)

EXHIBIT D

EXHIBIT D
Defendants' Hourly Rate Data

A. Munger, Tolles & Olson LLP: Docket of *In re Energy Future Holdings Corp.*, No. 14–10979 (CSS):
    a. ECF No. 3414 (First Monthly Fee Statement), Exhibit B:
        1. John W. Spiegel, 1977, $1,025.00
        2. Thomas B. Walper, 1980, $1,025.00
        3. Stephen D. Rose, 1991, $910.00
        4. Todd J. Rosen, 1999, $840.00
        5. Brett J. Rodda, 1999, $815.00
        6. Seth Goldman, 2002, $720.00
        7. Bradley R. Schneider, 2004, $640.00
        8. Sam Greenberg, 2010, $535.00
        9. Jennifer M. Broder, 2012, $490.00
B. Goodwin Proctor LLP: Docket of *In re USA Discounters, Ltd.*, No. 15–11755 (CSS):
    a. 2015 Rates: ECF No. 386 (Application for Approval of Ordinary Course Professional Fees in Excess of the Cap Amount):
        1. David L. Permut, 1993, $850.00
        2. Benjamin P. Saul, 2002, $750.00
        3. Lindsay L. Raffetto, 2012, $525.00
        4. Ewurabena S. Hutchful, 2015, $400.00
    b. 2016 Rates: ECF No. 482 (Application for Entry of an Order Authorizing Employment and Retention of Goodwin Proctor LLP as Special Counsel to the Debtors):
        1. David L. Permut, 1993, $890.00
        2. Benjamin P. Saul, 2002, $825.00
        3. Joseph F. Yenouskas, 1987, $790.00
        4. Lindsay L. Raffetto, 2012, $600.00
        5. Ewurabena S. Hutchful, 2015, $430.00
C. Latham & Watkins LLP: Docket of *In re Tuscany International Holdings (U.S.A.) Ltd.*, No. 14–10193 (KG)[1]:
    a. ECF No. 483 (Final Fee Application of Latham & Watkins):

[1] Isabel C. Bello and the Latham & Watkins paralegals are omitted from the below timekeepers as they have not passed the bar.

1. David A. Hammerman, 2007, $810.00
2. Keith A. Simon, 1999, $925.00
3. Annemarie V. Reilly, 2010, $730.00
4. Mitchell A. Seider, 1987, $1,150.00
5. Paul A. Serritella, 2006, $825.00
6. David F. McElhoe, 2012, $645.00
7. Christopher Harris, 1997, $995.00
8. Marc A. Zelina, 2014, $495.00
9. Michael J. Kuh, 2004, $850.00
10. Emily B. Menchel, 2008, $755.00
11. Jocelyn F. Noll, 2002, $925.00
12. Jacob K. Johnson, 2013, $575.00
13. Jonathan J. Nasca, 2014, $495.00
14. Kimberly M. Coppola, 2011, $675.00
15. Sabina Jacobs, 2010, $675.00
16. J. Christopher Dorian, 1980, $995.00
17. Sarah C. Chandrika, 2013, $575.00
18. G. Andrew Lundberg, 1983, $1,175.00
19. Eugene P. Mazzaro, 2000, $950.00
20. Joseph M. Kronsnoble, 1991, $1,075.00
21. Austin T. Ozawa, 2008, $815.00

EXHIBIT E

EXHIBIT E

Lights Class Actions against Phillip Morris
(list and headings supplied by Class Counsel)

Certification Denied or Class Decertified

1. *Pearson v. Philip Morris, Inc.,* 361 P.3d 3, 33 (Or. 2015)
2. *Cabbat v. Philip Morris USA. Inc.,* Civil No. 10-162 DKW/BMK, 2014 WL 32172 at *10 (D. Haw. Jan 6, 2014)
3. *Phillips v. Philip Morris Companies Inc.,* 298 F.R.D. 355, 365 (N.D. Ohio 2014)
4. *Wyatt v. Philip Morris USA, Inc.,* Case No. 09-C-0597, 2013 WL 4046334 at *3 (E.D. Wisc. Aug. 8, 2013)
5. *Lawrence v. Philip Morris USA, Inc.* 53 A.3d 525 (N.H. 2012)
6. *In re Light Cigarettes Marketing Sales Practices Litig.* 271 F.R.D. 402 (D. Me. 2010) (rejecting certification of California, Illinois, Maine, and Washington, D.C. Lights claims), *petition for interlocutory review denied,* No. 10-8042 (1st Cir. 2011)
7. *Cleary v. Philip Morris USA, Inc.,* 265 F.R.D. 289 (N.D. Ill. 2010), *affd,* 656 F.3d 511, 520, fn. 6 (7th Cir. 2011)
8. *Schwab* aka *McLaughlin v. American Tobacco Co.* 522 F.3d 215 (2d Cir. 2008)
9. *Stern v. Philip Morris, USA Inc.,* MID-L-2584-03, 2007 WL 4841057 (N.J. Super. Ct. Nov. 16, 2007)
10. *Benedict v. Altria Group, Inc.,* 241 F.R.D. 668 (D. Kan. 2007)
11. *Mulford v. Altria Group, Inc.* 242 F.R.D. 615 (D.N.M. 2007)
12. *Davies v. Philip Morris USA Inc.,* 04-2-08174-2, 2006 WL 1600067 (Wash. Super. Ct. May 26, 2006)
13. *Huntsberry v. R.J. Reynolds Tobacco Co.,* slip op. (Wash. Super. Ct. 2006)
14. *Philip Morris USA Inc. v. Hines,* 883 So. 2d 292 (Fla. Ct. App. 2003)
15. *Cocca v. Philip Morris Inc.,* CV 1999-008532, 2001 WL 34090200 (Ariz. Sup. Ct. July 24, 2001)
16. *Oliver v. R.J. Reynolds Tobacco Co.,* No. 9803-0268, 2000 WL 33598654 (Pa. Ct. Com. Pl. Dec. 19, 2000)

Certified but Unsuccessful

1. *Curtis v. Altria Group, Inc.,* 813 N.W.2d 891 (Minn. 2012) (upholding grant of summary judgment in favor of Philip Morris)
2. *Brown* aka *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 192 Cal. Rptr. 3d 881 (2015) (case won by Philip Morris on merits)

Pending with Negative Outlook

1. *Price v. Philip Morris, Inc.* (Ill. 2005) 848 N.E.2d 1, 53 (reversing class judgment on the merits, while expressing "reservations about the existence of individual issues that might make class certification inappropriate"; the class certification ruling, while not the reason for the reversal, was not affirmed on appeal)
   -*Price v. Philip Morris, Inc.*, 2015 IL 117687, 397 Ill. Dec. 726, 43 N.E.3d 53 (clarifying proper procedure for re-opening the case; inviting plaintiffs to file motion to recall the mandate of the Illinois Supreme Court)
   -Case pending in Supreme Court as of March 2016.

EXHIBIT F

EXHIBIT F

Lodestar Multiplier Levels in Cases Finding Enhancement Appropriate

CALIFORNIA

1. *Lunada Biomedical v. Nunez*, 178 Cal. Rptr. 3d 784 (Cal. Ct. App. 2014), review denied (Jan. 21, 2015) (affirming a lodestar multiplier of 1.25 to the defendants' counsel in action by a dietary supplement seller seeking declaratory relief regarding violations of a consumer protection act because of the contingent nature of the fees).

2. *Pellegrino v. Robert Half Int'l, Inc*., 106 Cal. Rptr. 3d 265 (Cal. Ct. App. 2010) (affirming a lodestar multiplier of 1.75 in an employment class action because of the extraordinary legal skill used to obtain a favorable judgment for the plaintiffs; but reversing application of the multiplier for fee litigation hours).

3. *Good Nite Inn Mgmt., Inc. v. Ahmed*, No. A129488, 2011 WL 2565257 (Cal. Ct. App. June 29, 2011) (affirming a lodestar multiplier of 1.5 in a employee compensation action because of the case's novelty and complexity, as well as a delay in payment) (Note: Unpublished and non-citable).

4. *Lopez v. Bimbo Bakeries USA, Inc*., No. A119263, 2009 WL 1090375 (Cal. Ct. App. Apr. 23, 2009) (affirming a lodestar multiplier of 1.5 in a wrongful termination action because of a risky contingency agreement and excessive delay in closing the case) (Note: Unpublished and non-citable).

5. *Bernardi v. Cty. of Monterey*, 84 Cal. Rptr. 3d 754 (Cal. Ct. App. 2008) (affirming a lodestar multiplier of 1.25 in a records request action in recognition of a contingency fee arrangement for a higher amount, extended delay before the counsel could receive compensation, and the presence of unique issues).

6. *Krumme v. Mercury Ins. Co*., 20 Cal. Rptr. 3d 485 (Cal. Ct. App. 2004) (affirming a lodestar multiplier of 1.5 in an unfair competition action against an insurer because the plaintiff enforced an important right affecting public interest).

FLORIDA

7. *TRG Columbus Dev. Venture, Ltd. v. Sifontes*, 163 So. 3d 548 (Fla. Dist. Ct. App. 2015), reh'g denied (Apr. 30, 2015) (affirming a lodestar multiplier of 2.0 in a breach of contract action because the counsel worked on a contingency fee agreement when evidence suggested other attorneys were unwilling to do so).

8. *Allstate Ins. Co. v. Regar*, 942 So. 2d 969 (Fla. Dist. Ct. App. 2006) (affirming a lodestar multiplier of 1.75 in a third-party bad faith action against an insurer because of contingency risk).

9. *Mercury Cas. Co. v. Flores*, 905 So. 2d 179 (Fla. Dist. Ct. App. 2005) (affirming a lodestar multiplier of 1.5 in a uninsured motorist benefits action).

10. *Holiday v. Nationwide Mut. Fire Ins.,* 864 So. 2d 1215 (Fla. Dist. Ct. App. 2004) (affirming a lodestar multiplier of 2.0 in an insurance claim action because of contingency risk).

11. *Island Hoppers, Ltd. v. Keith*, 820 So. 2d 967 (Fla. Dist. Ct. App. 2002) (affirming a lodestar multiplier of 2.3 in a wrongful death action because of contingency risk) (disapproved of by Sarkis v. Allstate Ins. Co., 863 So. 2d 210 (Fla. 2003) (Florida Supreme Court approves different reading of applicable statutory provisions)).

12. *Pirelli Armstrong Tire Corp. v. Jensen*, 752 So. 2d 1275 (Fla. Dist. Ct. App. 2000) (affirming a lodestar multiplier of 2.5 in a products liability action because of contingency risk) (disapproved of by Sarkis v. Allstate Ins. Co., 863 So. 2d 210 (Fla. 2003) (Florida Supreme Court approves different reading of applicable statutory provisions)).

MISSOURI

13. *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223 (Mo. 2013) (affirming a lodestar multiplier of 2.0 in a constitutional action for a declaratory judgment because of the risk of the contingent agreement, the opportunity cost of undertaking the representation, and the impact of the representation on other the counsel's cases; multiplier level identified in the trial opinion: Zweig v. The Metropolitan St. Louis Sewer Dist., 2011 WL 4852925 (Feb. 3, 2011)).

14. B*erry v. Volkswagen Grp. of Am., Inc*., 397 S.W.3d 425 (Mo. 2013) (affirming a lodestar multiplier of 2.0 in a consumer class action because the class counsel had accepted a risky contingency fee arrangement, which delayed their other work because of considerable time commitments).

NEW JERSEY

15. *Williams v. Asbury Park Bd. of Educ.*, No. A-3389-13T3, 2015 WL 6394475 (N.J. Super. Ct. App. Div. Oct. 23, 2015) (affirming a lodestar multiple of 1.4 in an employment discrimination action because the plaintiff's counsel had assumed inherent risk by working on a contingency basis).

16. *Walker v. Giuffre*, 35 A.3d 1177 (N.J. 2012) (affirming a lodestar multiple of 1.5 on appeal in a civil rights action because of significant contingency risk, and the equitable nature of the sought remedy).

17. *Heusser v. New Jersey Highway Auth.,* No. A-0622-05T3, 2008 WL 731498 (N.J. Super. Ct. App. Div. Mar. 20, 2008) (affirming an administrative determination of a lodestar multiplier of 1.1 in a disability discrimination action because the case advanced the public interest).

18. *Jefferson v. City of Camden*, No. CIV. 01-4218 (RBK), 2006 WL 1843178 (D.N.J. June 30, 2006) (awarding attorneys lodestar fees multiplied by 1.1 and 1.2 in an employment discrimination action because the attorneys assumed considerable risk in taking the case on a contingency fee basis).

19. *Schmoll v. J.S. Hovnanian & Sons, LLC*, No. BUR-C-00141-02, 2006 WL 1520751 (N.J. Super. Ct. Ch. Div. Feb. 9, 2006) aff'd, 394 N.J. Super. 415, 927 A.2d 146 (N.J. Super. Ct. App. Div. 2007) (applying a lodestar multiple of 1.2 in a class action for equitable relief requiring a builder to inspect homes for state code violations because the case was taken on a contingency agreement with significant risk, as only equitable relief was sought).

20. *Lockley v. Turner*, 779 A.2d 1092 (N.J. Super. Ct. App. Div. 2001) aff'd as modified sub nom. *Lockley v. State of New Jersey Dep't Of Corr*., 828 A.2d 869 (N.J. 2003) (affirming a lodestar multiplier of 1.6 in a sexual harassment action because of a contingency agreement, and the public interest served through the litigation).

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21. *Signora v. Liberty Travel, Inc.*, 886 A.2d 284 (Pa. Super Ct. 2005) (affirming a lodestar multiplier of 1.5 in a employment compensation class action because the case was taken on a contingency fee basis, and the quality of the attorneys' work was high).

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22. *Toshiba Mach. Co., Am. v. SPM Flow Control, Inc*., 180 S.W.3d 761 (Tex. App. 2005), review granted, and remanded by agreement (Mar. 31, 2006) (affirming a multiple of about 2.25 the calculated lodestar ($1.5 million approved for $667,114 in lodestar) in an action for breach of contract on the ground that the fee was reasonable given both the risk incurred by the plaintiff's attorneys, and the delay in payment).

23. *Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398 (Tex. App. 2002) (affirming a lodestar multiplier of 2 in a same-sex employer harassment action

because the case involved novel and difficult issues, and the plaintiff's counsel had worked on a contingency agreement).

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24. *Miller v. Kenny*, 325 P.3d 278 (Wash. Ct. App. 2014) (affirming a lodestar multiplier of 1.5 in an insurance bad faith action because the court found this was one of the rare contingency fee cases in which an enhancement was justified due to an all-or-nothing risk of payment, eight years without payment, and public policy supporting the litigation).

25. *Washington State Commc'n Access Project v. Regal Cinemas, Inc*., 293 P.3d 413 (Wash. Ct. App. 2013) (affirming a lodestar multiplier of 1.5 in a public accommodation discrimination action because the counsel had worked on a contingency fee arrangement, and the counsel was as successful as it could have been in the litigation).

26. *Collings v. City First Mortgage Servs., LLC,* 317 P.3d 1047 (Wash. Ct. App. 2013) (holding a lodestar multiplier of 1.2 was appropriate in a foreclosure rescue scheme action because of the contingency risk borne by the plaintiffs' counsel).

27. *Miller v. Dep't of Labor & Indus*., 152 Wash. App. 1019 (2009) (affirming a lodestar multiplier of 1.5 in a workers' compensation action because of the high quality of the attorneys' trial work, the experience of the attorneys, and the risky contingency nature of the fee agreement).

28. *Bloor v. Fritz*, 180 P.3d 805 (Wash. Ct. App. 2008) (affirming a lodestar multiplier of 1.2 in a misrepresentation action because of the complexity of the case, the novelty of the issues raised, a contingency arrangement, the high quality of representation, and the opportunity cost of the counsel in taking the case in lieu of other work).

29. *Carlson v. Lake Chelan Cmty. Hosp*., 75 P.3d 533 (Wash. Ct. App. 2003) (affirming a lodestar multiplier of 1.5 in an employment discrimination action because of a risky contingency fee agreement, as well as excellent and efficient representation by the counsel).

30. *MHLTA Ethridge v. Hwang*, 20 P.3d 958 (Wash. Ct. App. 2001) (affirming a lodestar multiplier of 1.25 in a tenant-landlord action because of the risk involved with taking the case on a contingency basis, the difficulty of the case, and the quality of work).