IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TIM P. BRUNDLE, on behalf of the Constellis Employee Stock Ownership Plan, **Plaintiff,** **v.** **WILMINGTON TRUST, N.A., as successor to WILMINGTON TRUST RETIREMENT AND INSTITUTIONAL SERVICES COMPANY,** **Defendant.**	**Civil Action No. 1:15-cv-1494 (LMB/IDD)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS, AND PLAINTIFF'S COUNSEL'S MOTION FOR ATTORNEY'S FEES AND REIMBURSEMENT OF EXPENSES

Plaintiff Tim P. Brundle, on behalf of the Constellis Employee Stock Ownership Plan (the "Plan" or "ESOP"), by counsel, and Plaintiff's Counsel ("Counsel") respectfully move the Court for entry of an order: (1) awarding Plaintiff and the Plan attorneys' fees and costs pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g), and Local Civil Rule 54(D); and (2) awarding Counsel attorneys' fees pursuant to the common fund doctrine and reimbursement of expenses reasonably incurred in prosecuting this action to judgment.

I. INTRODUCTION

Plaintiff and Counsel in this ERISA action obtained a great judgment on behalf of the Plan in the amount of $29,773,250.00. The amount recovered increases Plan assets for the benefit of Plan participants by approximately 140%, a huge boost to retirement savings. Plaintiff and Counsel

achieved this tremendous result after months of hard work. Counsel overcame a multitude of legal and procedural hurdles, including fending off Defendant Wilmington Trust's motions to dismiss and for summary judgment, and achieved an extraordinary result in a six-day trial against a corporate defense firm more than twenty times the size of Counsel's firm. Counsel undertook this litigation on a contingent basis, advancing all expenses and accepting all risk, including the very real possibility that they could receive no compensation or reimbursement whatsoever after accruing millions of dollars in fees and hundreds of thousands of dollars of expenses.

By this motion, Plaintiff and Counsel seek distinct forms of relief:

- First, Plaintiff seeks attorney fees and costs for himself and as representative of the Plan, to be paid by the Defendant, to be offset against the amount Counsel seeks from a common fund award. Plaintiff is entitled to this relief under the fee-shifting provision at Section 502(g) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(g). Plaintiff requests the Court award the Plaintiff $2,815,729.50 in attorney fees, and $1,227.28 in costs, amounts that are fair and reasonable under the standards for determining reasonable fees and costs. Plaintiff is concurrently filing a Bill of Costs, in the form provided on the Court's website, pursuant to Local Civil Rule 54(D) and 28 U.S.C. §§ 1920 and 1924.

- Second, under the common fund doctrine that this Court and others apply when awarding fees to counsel in representative actions, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Here, Counsel requests a fee of one-third of the common fund, consisting of the judgment amount ($29,773,250.00), but not including any attorney's fees recovered by Plaintiff. One-third of the judgment is $9,924,416.67. Counsel also seeks payment of $643,584.50 in expenses, paid from the funds the Defendant pays to the common fund, offset by any costs recovered for the Plaintiff.

After payment of a common fund fee and expenses, and assuming the recovery of attorneys' fees and costs, the net amount to be paid to the Plan for subsequent distribution to the participants will be $22,022,205.60.

In support, Plaintiff submits the declaration of Counsel and the declaration of University of Texas School of Law Professor Charles Silver. "Silver Dec." is attached hereto as Exhibit A. Professor Silver has studied, taught, written about, and testified regarding attorney fees, class actions, and legal ethics for 30 years. Based on his experience and education, Professor Silver opines that Plaintiff's requested hourly rates and costs are reasonable, as is Counsel's request for fees and expenses from the common fund. See Silver Dec., *passim*.

II. PROCEDURAL BACKGROUND

After more than a year of hard-fought litigation, including a six-day trial, Plaintiff Brundle won a nearly $30 million judgment against Defendant. Plaintiff recovered this money on behalf of the employee stock ownership plan in which he and hundreds of other once and current employees participate. The Plaintiff's claims in this case, which Andrew Halldorson filed on November 10, 2015, arose from Defendant's decision to cause the Plan to purchase $200 million-plus of Constellis Group, Inc. stock at an inflated price, in violation of its ERISA duties as Plan trustee.

The work on this case began pre-suit with Counsel's investigation of the facts and drafting of the complaint. Counsel worked with Plaintiff Halldorson on fact development and filings. (Dkt. 57, Halldorson Dec. at ¶¶ 5–7). The Plaintiffs' primary claim against Wilmington Trust alleged a violation of the prohibited transaction rule at ERISA § 406(a)(1)(A), which prohibits a fiduciary from causing a plan to engage in a sale or exchange of any property (including securities) with a party in interest. 29 U.S.C. § 1106(a)(1)(A). This claim, and the main defenses thereto, dominated the litigation, particularly throughout the discovery period, and was so prominent that by the time it filed its motion for summary judgment Defendant had forgotten that the Plaintiff had asserted

other claims.[1] Defendant addressed only the § 406(a)(1)(A) claim in its summary judgment motion, making no arguments against the § 406(a)(1)(B) or § 406(b) claims. (Dkt. 163, Def.'s Mem.). Only after being reminded of those claims by Plaintiff Brundle's own Rule 56 motion did Defendant, improperly and for the first time, argue for judgment on the § 406(a)(1)(B) and § 406(b) claims in its opposition to Brundle's motion. (Dkt. 194, Def.'s Opp.).

Plaintiff's Counsel advocated for their clients in many motions in this case. On April 16, 2016, Plaintiff withstood a hard-fought motion to dismiss under Fed. R. Civ. P. 12(b)(6). (Dkt. 88, 89). The Court, however, dismissed Plaintiff Halldorson as a plaintiff under Rule 56 on the ground that he had signed a release of claims in exchange for severance benefits. (Dkt. 88, 89, 95, 96). But the litigation continued when Plaintiff Brundle stepped in as named plaintiff and the Court granted Plaintiff's motion to amend the complaint to add Mr. Brundle, which Defendant opposed. (Dkt. 48, 88, 89). Plaintiff, through Counsel, engaged in further motion practice, filings and negotiations, including: negotiating a Protective Order (Dkt. 45, 47); moving for class certification (Dkt. 54); moving to compel the production of documents, which the company initially opposed but on the eve of oral argument it agreed to produce (Dkt. 109–115, 124–126); taking an appeal on the denial of class certification and summary judgment against Plaintiff Halldorson (Dkt. 116)[2]; filing briefs on many motions to seal; and amending the complaint, culminating with the final Third Amended Complaint filed on July 5, 2016 (Dkt. 136). Most significantly, Plaintiff Brundle

[1] The Plaintiffs also asserted a claim alleging that Defendant caused a prohibited transaction by authorizing the Plan to take loans from parties in interest in violation of ERISA § 406(a)(1)(B), and claims that Defendant itself engaged in prohibited transactions by acting on behalf of a party adverse to the Plan and by receiving consideration for its own account, in violation of ERISA § 406(b)(2) and (b)(3). An ERISA § 406(a)(1)(E) claim was removed by an amended complaint because it was redundant of the § 406(a)(1)(A) claim.

[2] Plaintiff's Counsel has not included time spent on the appeal in the fee motion.

addressed complex ERISA issues in his motion for partial summary judgment and opposition to Defendant's motion for summary judgment. (Dkt. 145–147, 185, 224). The Court granted Brundle's motion on his primary claim, his loan claim and on certain affirmative defenses, and denied Defendant's motion in its entirety. (Dkt. 257, 258, 261). Plaintiff also successfully opposed Defendant's motion to exclude his expert. (Dkt. 257, 258, 261).

Counsel engaged in written discovery with Defendant, deposed nine fact witnesses, and defended the depositions of the two Plaintiffs. Counsel issued eight subpoenas *duces tecum* to non-expert third-party companies. Counsel also oversaw production of Plaintiff's expert reports, deposed Defendant's expert witness, and defended the deposition of Plaintiff's expert.

Counsel prepared pre-trial filings to the Court (Dkt. 139, 143, 272), prepared for trial, and participated in a six-day trial in November to December 2016. The Court awarded a judgment of $29,773,250.00 to Plaintiff, on behalf of the Plan, and against Defendant. (Dkt. 294, 295, 297). Holding that the Plan overpaid $29,773,250.00 in its purchase of Constellis, the Court explained that Defendant did not meet its due diligence duties under ERISA by relying uncritically on the valuation report of Stout Risius Ross ("SRR"):

> Wilmington has not demonstrated that its reliance on SRR's report was "reasonably justified" in light of all the circumstances because it has not shown that it thoroughly probed the gaps and internal inconsistencies in that report. Four major failures stand out: the failure to consider the 2013 McLean report; the failure to probe SRR's reliance on management's representations and projections; the failure to investigate the appropriateness of SRR increasing the value of Constellis by applying a control premium; and the failure to probe SRR's practice of rounding numbers up, thereby increasing Constellis' value.

(Dkt. 294, Mem. Op., at 39). In short, Defendant conducted a "lackluster due diligence" and did not give itself "sufficient time to complete its work thoroughly." *Id.* at 44, 53. The Court found other problems with Defendant's review as well, for example: "Wilmington's failure to assure

itself of Constellis' intent [to create a permanent plan] is further evidence of its tendency to rubber stamp whatever Constellis and SRR put in front of it, thereby violating its fiduciary duty to exercise prudence." *Id.* at 52.

III. ARGUMENT

A. ERISA § 502(g) Permits Plaintiff to Recover Fees and Costs from Defendant.

As exceptions to the American Rule, fee-shifting statutes are specifically designed to encourage private litigation to enforce important rights, without burdening either taxpayers or individuals whom the legislature intended to protect.[3] *See Bond v. Blum*, 317 F.3d 385, 399 (4th Cir. 2003) (purpose of fee-shifting statutes is "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights") (quoting *Kay v. Ehrler*, 499 U.S. 432, 437 (1991)); *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (if "plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest").

1. The statute Defendant violated entitles Plaintiff to a fee award.

Under § 502(g)(1), ERISA's fee-shifting provision, a district court may award "a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). "In an ERISA action, a district court may, in its discretion, award costs and reasonable attorneys' fees to either party under 29 U.S.C. § 1132(g)(1), so long as that party has achieved some degree of success on the merits." *Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 634 (4th Cir. 2010) (*citing Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 130 S. Ct. 2149 (2010)). "The purpose of ERISA's fee shifting provision, like other fee shifting statutes, is to encourage the bringing of meritorious . . . claims which might otherwise be abandoned because of the financial imperatives surrounding the

[3] Under the American Rule, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

hiring of competent counsel." *Feldman's Med. Ctr. Pharmacy, Inc. v. CareFirst, Inc.*, 898 F. Supp. 2d 883, 896 (D. Md. 2012), *aff'd*, 541 F. App'x 322 (4th Cir. 2013) (citation omitted).

The Fourth Circuit has recognized a two-step attorneys' fees analysis: (i) the party seeking fees must have "achieved some degree of success on the merits" (*Hardt*, 130 S. Ct. at 2158-59) and (ii) the five factors listed in *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1029 (4th Cir. 1993).

a. Plaintiff's Counsel Achieved "Some Degree of Success on the Merits"

There is no dispute that Plaintiff's Counsel achieved "some degree of success on the merits." Plaintiff filed a one count complaint alleging that Defendant violated, among other things, the prohibited transaction rule at ERISA § 406(a)(1)(A), which prohibits a fiduciary from causing a plan to engage in a sale or exchange of any property (including securities) with a party in interest. 29 U.S.C. § 1106(a)(1)(A). The Court granted summary judgment for Plaintiff on that claim and left the question of whether Defendant could establish an affirmative defense for trial. The Court ultimately concluded that Defendant had not proved a defense and awarded a judgment of $29,773,250.00 to Plaintiff, on behalf of the Plan, and against Defendant. (Dkt. 294, 295, 297). *See also Viera v. Life Ins. Co. of N. Am.*, No. CIV.A. 09-3574, 2013 WL 3199091, at *2 (E.D. Pa. June 25, 2013) (finding that where ERISA plaintiff prevailed after a bench trial, "there is no question that Plaintiff has achieved success on the merits"); *LaScala v. Scrufari*, 859 F. Supp. 2d 509, 512-13 (W.D.N.Y. 2012) (finding "it is beyond dispute that plaintiffs have achieved a substantial measure of success on the merits" in ERISA breach of fiduciary duty case after a successful bench trial).

b. *Quesinberry* Factors Weigh in Favor of a Fee Award

The Fourth Circuit has outlined five factors that guide a district court's exercise of discretion to award attorneys' fees in ERISA cases. The court is to consider: (i) the degree of the opposing party's culpability or bad faith; (ii) the ability of the opposing party to satisfy an award of attorneys' fees; (iii) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (iv) whether the movant sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (v) the relative merits of the parties' positions. *Quesinberry*, 987 F.2d at 1029. These factors are not a "rigid test," but more appropriately are considered as "general guidelines" to facilitate the exercise of the court's discretion. *Id.*

In evaluating these factors, the Fourth Circuit has stated that the remedial purposes of ERISA require that "a prevailing individual beneficiary 'should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust." *Quesinberry*, 987 F.2d at 1029 (quoting *Reinking, v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210, 1218 (4th Cir. 1990)); *see also Denzler v. Questech, Inc.*, 80 F.3d 97, 104 (4th Cir. 1996) (describing remedial purposes of ERISA).

The first factor weighs in favor of awarding attorneys' fees because Defendant is culpable for failing to "ask questions, probe its own experts, and jealously guard its independence." Order (Dkt. 294) at 55. The Court ruled that Defendant failed to demonstrate that its reliance on SRR's report was justified because it had not "thoroughly probed the gaps and internal inconsistencies in that report." Order at 39. Specifically, Defendant failed to investigate a previous (and much lower) valuation; failed to probe SRR's reliance on management's projections and representations; failed to investigate the appropriateness of a control premium; and failed to probe SRR's practice of

rounding numbers up in the sellers' favor. Order at 39. Taken together, the Court concluded that Defendant "was not sufficiently engaged in the Constellis transaction, which was to be rushed to be completed by the end of 2013." Order at 39. Among the Court's specific findings establishing Defendant's culpability:

- No one from Wilmington Trust even asked to see, much less question, the previous valuation report that would support a much lower price. "A prudent trustee should have, at least, questioned the basis for the significant difference in value and more closely scrutinized the projections management provided to SRR and the assumptions underlying SRR's analysis." Order at 40.

- Despite several red flags, Wilmington Trust failed to probe SRR's reliance on projections prepared by Constellis' management. Constellis' management had incentives to inflate projections; the indemnification provision regarding a potential $62 million liability was substantively meaningless; Constellis had risky contract concentration issues; and evidence of possible over-billing by Constellis undermined the reliability of management projections. Order at 41-44.

- Wilmington Trust's "lackluster due diligence" was not ameliorated by the representations and warranties issued by Constellis as opposed to the selling shareholders. "[T]here was no external source of money to protect the ESOP's investment in the company" because Wilmington Trust never "pressed the Sellers to make their own representations about the financial health of the company they were selling, or indeed that Wilmington ever expressed any concern about this arrangement." Order at 44-45.

- Wilmington Trust "should have recognized that Constellis must have prepared previous projections" and that an investigation into one such set of projections "would have revealed that Constellis had inflated its projections" to a previous buyer. "Wilmington's failure to request those previous projections resulted in a number of missed opportunities to appreciate some of the risks behind the projections relied upon by SRR." Order at 45.

- Wilmington Trust's failure to "understand[] the basic premises of the valuation expert's analysis, and probing internal inconsistencies like these, are basic duties of the fiduciary" and Defendant failed to "live up to those duties." Order at 46.

- "Despite being aware of the lack of control the ESOP would have, Wilmington never probed SRR's use of a control premium." The Court found "there was no reasonable basis for SRR's decision to apply the control premium as it did and that Wilmington breached its fiduciary obligation in failing to vigorously question this aspect of SRR's report. Its failure to ask SRR even one question about the appropriateness of the premium is inexplicable." Order at 47.

- Wilmington never asked SRR to provide an explanation of its decision to always round numbers up even though it "does not make sense" why "SRR would round up, rather than

down, when representing the buyer." The Court concluded that "omission compounds Wilmington's other oversights and further undermines its contention that it reasonably relied on SRR's valuation." Order at 47-48.

- Wilmington Trust's fiduciary services sub-committee—the group tasked with approving or rejecting the transaction—was "not fully engaged." It only met a few times, all of the members were not present during these meetings, and none lasted longer than 90 minutes. Order at 53.

- There were several other pieces of "circumstantial evidence of Wilmington's neglect" in this transaction. It failed to investigate the motivations of Constellis and the selling shareholders to establish the ESOP and it failed to obtain a legal opinion as to the eligibility of the ESOP. Those failures were "further evidence of [Wilmington Trust's] tendency to rubber stamp whatever Constellis and SRR put in front of it." Order at 50-52.

- Wilmington Trust failed to act as prudent trustee in "the way in which it negotiated the per share price it agreed to pay." Indeed, the Court noted it was not even an "economically rational actor[]." The Court noted that its failure to negotiate as an economically rational actor "may have been motivated by its significant business relationship with CSG, which refers more ESOP business to Wilmington than all other firms combined" and those "long-term business relationships support the conclusion that Wilmington had become complacent in relying upon SRR's evaluation, and may have had an incentive to maintain its lucrative relationship with CSG." The Court noted the dangers of this "excessive familiarity" including that Wilmington had never declined to approve an ESOP transaction after it was formally engaged to act as trustee." Order at 53-55.

Defendant's numerous failures during this process—and particularly in light of its motivations to a maintain business relationship with its largest referral source, CSG—establish that it was much more than negligent and was in fact culpable. This factor examines not whether Defendant's failures were intentional or deliberate, just that its conduct was wrongful. *Clark v. Metro. Life Ins. Co.*, 384 F. Supp. 2d 894, 898 (E.D. Va. 2005) (citation omitted); *see also Williams*, 609 F.3d at 636 (affirming district court's decision to award attorneys' fees where defendant was "more than merely negligent"); *Quesenberry v. Volvo Grp. N. Am., Inc.*, No. 1:09CV00022, 2010 WL 2836201, at *6 (W.D. Va. July 20, 2010), *report and recommendation adopted*, No. 1:09CV00022, 2010 WL 3521996 (W.D. Va. Sept. 3, 2010) (rejecting argument that the first factor was not present where defendant did not act in bad faith and concluding that first factor was established because defendant did violate the terms of the agreement at issue). Given

the Court's litany of Defendant's failures, there is no question its behavior rises to that standard. This factor favors an award of fees.

The second *Quesinberry* factor also weighs in favor of awarding attorneys' fees. That factor "instructs the court to consider the ability of the non-moving party to satisfy an award of attorney fees, and to balance that party's ability to pay with the hardship to be imposed on the moving party if an award of fees is denied." *Reinking*, 910 F.2d at 1218. "Failure to award fees in such a circumstance would significantly undermine the ability of potential beneficiaries to protect their rights in federal court." *Id.* Defendant, a wholly-owned division of M&T Bank Corporation, which as of 2014 was the 17th largest commercial bank holding company in the country, is able to pay Plaintiff's attorneys' fees. *See* Kline, Allissa, "M&T climbs to 17th among nation's largest banks", Buffalo Business First (December 10, 2014).

The third *Quesinberry* factor also supports the award of attorneys' fees because such an award would deter other and future fiduciaries from engaging in the sort of lackluster due diligence that Defendant employed in this case. Other ESOP fiduciaries would know they have to take an active role with advisors during the due diligence process and negotiate as would a typical buyer, not under some lesser ESOP-buyer standard. *See Wheeler v. Dynamic Eng'g, Inc.*, 62 F.3d 634, 641 (4th Cir. 1995); *Reinking*, 910 F.2d at 1218 (noting award of fees would force plan administrator to act differently in the future thus avoiding the conduct giving rise to litigation); *Byner v. E.I. DuPont de Nemours & Co.*, 950 F. Supp. 2d 840, 848 (E.D. Va. 2013) (in light of defendant's culpability, an award of fees would deter future defendants from engaging in comparable conduct).

The fourth factor, whether Plaintiff's lawsuit "sought to benefit all participants and beneficiaries," also weighs in favor of an award. *Quesinberry*, 987 F.2d at 1029. The Court may

consider "the extent to which the moving party has benefitted other participants and beneficiaries of the employee benefits plan." *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 422 (4th Cir. 1993). Plaintiff brought this lawsuit on behalf of the Plan, and for the benefit of all the Plan's participants and beneficiaries. Plainly, the judgment here benefits all participants in the Plan. The judgment amount increased Plan assets by 140%, thus increasing the retirement benefits of all the hundreds of participants and beneficiaries. The factor also supports an award of fees because this case "clarifies the nature and scope of the rights and obligations imposed by ERISA." *Jenkins v. Moses H. Cone Mem'l Health Servs. Corp.*, No. 5:15-CV-34-FL, 2015 WL 6449296, at *10 (E.D.N.C. Oct. 23, 2015); *Snead v. UNUM Life Ins. Co.*, 824 F. Supp. 69, 75 (E.D. Va. 1993) (awarding fees where resolution of significant question would assist in determination of future cases on the merits). Fiduciaries will now know they are held to the standards explicated by the Court's decision and cannot offload their responsibilities to third parties without active oversight.

The final *Quesinberry* factor, examining the relative merits of Plaintiff's claim, also supports the award of fees. Plaintiff's success at trial leaves no doubt regarding the merits of his position. The Court listed the numerous ways that Defendant failed to act as a prudent fiduciary and thereby injured the participants and beneficiaries in the Plan.

Although every single *Quesinberry* factor favors the award of fees in this case, the Court may also consider the remedial purposes of ERISA to protect employee rights and secure effective access to federal courts. *See Williams*, 609 F.3d at 636.[4] Preventing future fiduciaries from engaging in only cursory due diligence or passing oversight of those tasked with such roles will

[4] "Congress' "crucible of … concern" in enacting ERISA "was misuse and mismanagement of plan assets by plan" fiduciaries. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985). Congress therefore placed on fiduciaries "the highest [duties] known to the law" to protect retirement and other plan assets. *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

further Congress's intent to protect participants in ERISA-governed ESOPs. In sum, an award of fees to Plaintiff's Counsel meets all the requisite *Quesinberry* considerations and is appropriate to promote the legislative intent of ERISA.

2. The requested attorneys' fees and expenses are reasonable and appropriate and should be awarded to Plaintiff.

The law governing the determination of reasonable attorneys' fees is well-settled. "In calculating an award of attorneys' fees, a court must first determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate." *Robinson v. Equifax Info. Servs., LLC,* 560 F.3d 235, 243-44 (4th Cir. 2009) (citation omitted).

Here, Plaintiff requests a lodestar award as follows:

Name	**Position**	**Hourly Rate**	**Hours**	**Fee**
Brian Glasser	Partner	$750.00	221.8	$166,350.00
Benjamin Lajoie	Associate	$225.00	85.8	$19,305.00
Denise Milhoan	Paralegal	$175.00	15.8	$2,765.00
Gregory Porter	Partner	$750.00	899.5	$674,625.00
Loc Le	Paralegal	$200.00	129.5	$25,900.00
Melissa Kestner-Clay	Paralegal	$200.00	739.3	$147,860.00
Melissa Chapman	Paralegal	$175.00	104.3	$18,252.50
Pratik Budhdev	Business Analyst	$300.00	91.84	$27,552.00
Patrick Muench	Senior Associate	$400.00	875.5	$350,200.00
Ryan Jenny	Partner	$550.00	1332.7	$732,985.00
Thanos Basdekis	Partner	$550.00	1181.7	$649,935.00
			5677.74	$2,815,729.50

To determine whether this request is reasonable, the Court is guided by the following twelve non-exclusive factors:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the out-set of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which

> the suit arose; (11) the nature and length of the professional relationship between attorney and client; (12) attorneys' fees awards in similar cases.

Robinson, 560 F.3d at 243–44. Consideration of these factors demonstrates the requested attorneys' fees are reasonable.

a. The time and labor expended to litigate the suit.

"The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Consistent with this obligation, Plaintiff submits herewith the Declaration of Gregory Y. Porter at Exhibit B. As the Declaration reflects, Plaintiff has not included in the request: hours billed by timekeepers who billed fewer than ten hours to the lawsuit; work performed by summer associates; work performed in connection with Mr. Halldorson's appeal; time for more than one attorney appearing at a deposition; and time spent on this fee motion. Porter Dec. ¶ 9. The hourly rates of the timekeepers reflect the hourly rates that they bill in similar matters and engagements. Porter Dec. ¶ 11. Had Plaintiff included all time billed to this matter, the total hours would have been 6,317 and the fees would have totaled approximately $3.15 million. Porter Dec. ¶ 12. After the adjustments identified above, Plaintiff seeks a fee award for his benefit and the benefit of the Plan in the amount of $2,815,729.50. *Id.*

As in virtually any case litigated under a contingent fee agreement, Plaintiff's Counsel only spent the time necessary to effectively prosecute this case, and attempted to avoid duplication of efforts. Porter Dec. ¶ 13. The more ministerial work that could be performed by paralegals at lower hourly rates was performed primarily by Ms. Kestner-Clay. *See Missouri v. Jenkins,* 491 U.S. 274, 287-88 (1989) ("By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours encourages cost-effective delivery of legal services.").

Briefing in this case was of paramount importance. As detailed above, Plaintiff, *inter alia*, defeated a motion to dismiss under Fed. R. Civ. P. 12(b)(6); overcame dismissal of Plaintiff Halldorson as a plaintiff under Rule 56 when Plaintiff Brundle stepped in as named plaintiff and the Court granted Plaintiff's motion to amend the complaint to add Mr. Brundle; moved to compel the production of documents; took an appeal on the denial of class certification and summary judgment against Plaintiff Halldorson, which is pending; filed briefs on many motions to seal; amended the complaint again; filed a successful motion for partial summary judgment on his primary claim, his loan claim and on certain affirmative defenses, and obtained a denial of Defendant's motion in its entirety; and withstood Defendant's motion to exclude his expert. These briefs achieved what they set out to achieve, and gave the Court grounds to narrow the issues to be tried to Defendant's affirmative defenses, simplifying and shortening the trial.

Courts frequently consider the aggressiveness of the defense of a case in assessing whether a prevailing plaintiff's requested attorney hours are reasonable. As the Supreme Court observed, "[Defendant] cannot litigate tenaciously and then be heard to complain about the time necessarily spent overcoming its vigorous defense." *City of Riverside v. Rivera*, 477 U.S. 561, 580 n. 11 (1986). Plaintiff defended several motions, including motions to dismiss and for summary judgment. Defendant also forced Plaintiff to file a motion to compel, raising frivolous objections to producing documents that were plainly covered by the fiduciary exception to the attorney-client privilege. On the eve of the hearing on Plaintiff's motion, Defendant withdrew its opposition, but not before Plaintiff incurred substantial attorneys' fees in pursuing the withheld documents.

As noted above, in further exercise of billing judgment, Plaintiff has omitted any request for payment of fees representing work performed by lawyers and paralegals and assistants, who

were called into duty for short periods of time. Plaintiff is requesting an award only for those fees incurred by the principal lawyers and paralegals assigned to this case.

Prof. Silver's report concludes that the hours expended on this litigation were reasonable. Silver Dec. ¶¶ 30-33. His conclusion was based on several consideration. First, Counsels' hours were recorded contemporaneously. *Id.* ¶ 31. Second, because the case was continuously active, many of the hours were observed directly or indirectly by the Court, including during the six-day trial. *Id.* Third, and most important, because Counsel worked on a contingency, they were incentivized to be frugal with their time. *Id.* ¶ 32. Federal courts recognize that logical proposition. *See, e.g., Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172-73 (C.D. Cal. 2010) (citation omitted) (noting that "'lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of fee."). There is no study finding that lawyers who work on contingency routinely expend excessive amounts of time, while there are several reporting that plaintiffs' law firms operate efficiently. Silver Dec. ¶ 33.

b. The novelty and difficulty of the questions raised.

This case raised difficult issues in the area of complex ERISA litigation, which only ERISA specialists with years of experience are generally competent to address, and within that specialized area it raised novel issues rarely addressed by the courts. For example, Plaintiff raised a novel defense based on Treasury regulations that Defendant could not meet its burden of proving that the ESOP was an eligible individual account plan due to the short, seven-month life of the ESOP, an element of Defendant's affirmative defenses. Dkt. 185 at 20-22 (Pl. Summary Judgment Opposition); Dkt. 224 at 18 (Pl. Summary Judgment Reply). While the Court did not hold the Plan to be ineligible, it found that "Wilmington's failure to assure itself of Constellis' intent [to create

a permanent plan] is further evidence of its tendency to rubber stamp whatever Constellis and SRR put in front of it, thereby violating its fiduciary duty to exercise prudence." Dkt. 294, Mem. Op., at 52. The case also was novel by challenging commonplace bad practices in company valuations by ESOP trustees that are endemic in the chummy ESOP industry of trustees, investment bankers, valuations firms, and corporate counsel. This case is different from typical ESOP cases like *Perez v. Bruister*, 823 F.3d 250 (5th Cir. 2016), where few would have defended the illegal conduct in play. The court's trial decision in this case has the potential to cause better practices industry-wide throughout the United States, and is already a topic at ESOP industry forums such as the recent National Center for Employee Ownership (NCEO) conference in Denver.

Finally, in addition to the specific novel aspects of this case, courts have repeatedly noted the complexity of ERISA in general. *See, e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (citation omitted) (noting that ERISA is an "enormously complex and detailed statute).

c. The skill required to properly perform the legal services rendered.

This case required a wide range of legal skills, including investigation, legal research and writing on novel topics, conducting and defending depositions, working with expert witnesses, formulating case theories, client counseling, and ultimately trial advocacy. As discussed in the preceding sub-section, ERISA is a highly complex area of law requiring substantial expertise and experience.

d. The attorney's opportunity costs in pressing the instant litigation.

The costs to Counsel in pursuing this case were significant, as each hour spent on this case was an hour not spent on other litigation, including hourly-paying cases on which many of the attorneys work.

e. The customary fee for like work.

Counsel's requested hourly fees for this case fall within the prevailing market rates in this community for similar services by lawyers of reasonably comparable skill, experience and reputation. In support of this motion, Counsel is providing a declaration by lead trial counsel and Prof. Silver's declaration. *See Robinson*, 560 F.3d at 245.

Perhaps the best evidence of the reasonableness of Counsel's hourly rates is that the hourly fees requested in this case reflect the hourly rats that the attorneys bill in similar matters and engagements. Porter Dec. ¶ 11.

Prof. Silver, who has over three decades of experience working with lawyers who handle class actions and other large, complex lawsuits and reviewing countless fee applications, concurs that Counsel's rates were reasonable and comparable to those charged by other lawyers and legal assistants with similar experience and qualifications who practice in urban areas. Silver Dec. ¶¶ 18-29.

Prof. Silver reached that conclusion by (i) reviewing prior litigation in which he was involved; (ii) reviewing consulting surveys of law firms' billing rates taken by the National Law Journal (NLJ), which are often cited as evidence supporting hourly rates in fee applications; (iii) determining that rates for the partners in this case were at or below the middle of the range for "partners" in the *2010* NLJ survey; (iv) reasoning that Counsels' rates are even more appropriate when recent rate structures— in which $1,000 per hour is not out of the ordinary for partners—are compared. Silver Dec. ¶¶ 19-24. The 2014 NLJ study found a median rate for the highest billing partner category of $775 and partners charged an average of $604. *Id.* ¶ 25.

In this case, the rates requested for the two top-billing partner-level attorneys who led the trial team—Brian Glasser and Gregory Porter, both of whom request $750 per hour—fall below

the $775 median for highest-billing partners reported by the NLJ. Two other partners who also bore laboring oars, Ryan Jenny and Thanos Basdekis, bill at the rate of $550. Their charges fall $50 per hour below the average for all partners, and are also reasonable. Turning from partners to associates, the 2014 NLJ survey reported a median high hourly rate for associates of $510 and a median low rate of $235. Silver Dec. ¶¶ 26-27. The average associate rate was found to be $370. *Id.* ¶ 27. Here, the two associates who expended significant amounts of time—Patrick Muench and Benjamin Lajoie—request $400 and $225 per hour, respectively. These rates are reasonable, especially considering the complex issues raised by ERISA litigation generally and valuation disputes specifically.

The rates charged by Defendant's attorneys to try the same case are also relevant. According to the 2014 NLJ survey, partners in the Richmond, Virginia office have an average billing rate of $595, in line with the blended rate of the four partners who worked on this dispute. Silver Dec. ¶¶ 28.

Counsel's requested rates are also in line with those set forth in the Vienna Matrix, which has been used as persuasive evidence of an appropriate range for the rates of attorneys engaged in complex litigation in Northern Virginia. *See Vienna Metro LLC v. Pulte Home Corp.*, No. 1:10–cv–502, Dkt. 263 (E.D. Va. Aug. 24, 2011); *BMG Rights Mgmt. (US) LLC v. Cox Comms., Inc.*, No. 1:14-CV-1611, 2017 WL 600093, at *9 (E.D. Va. Feb. 14, 2017); *Taylor v. Republic Servs., Inc.*, No. 1:12-CV-00523-GBL, 2014 WL 325169, at *5 (E.D. Va. Jan. 29, 2014).

Experience	**Rate**
20+ years	$505-820
11-19 years	$520-770
8-10 years	$465-640

4-7 years	$350-600
1-3 years	$250-435
Paralegal	$130-350

Finally, federal district courts in Virginia have approved lodestar-based fee award requests based on similar rates. A summary of recently-approved rates appeared in *Brown v. Transurban USA, Inc.*, 2016 WL 6909683 (E.D. Va. Sept. 29, 2016):

> *See, e.g.*, *In re Neustar*, 2015 WL 8484438, at *10 (approving rates of $260–$310 for paralegal services, $420–$700 for associates, and $800–$975 for partners, in part because the fee award requested represented a substantial discount off the total lodestar calculated using these rates); *Hosch v. BAE Systems Info. Sols., Inc.*, No. 1:13–CV–00825 (AJT/TCB), 2015 WL 12227738, at *3 n.4 (E.D. Va. Apr. 28, 2015) (finding that rates of up to $650/hour were "within the acceptable range of reasonableness" even though the court determined the hours billed were excessive and reduced the fee award accordingly); *In re Microstrategy, Inc.*, 172 F.Supp.2d 778, 788 n.33 (E.D. Va. 2001) (concluding that $555 per hour for a senior partner and $220 per hour for a junior associate in 2001 were rates "not inconsistent with the rates charged by lawyers in large, prominent, and ... expert law firms"); *Phillips v. Triad Guar. Inc.*, No. 1:09–CV–71, 2016 WL 2636289, at *8 (M.D.N.C. May 9, 2016) (finding that partner billing rates of $640–$880 per hour and associate billing rates of $375–$550 per hour were "within the range of reasonableness[,]" especially given that "the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials"); *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 467 (D. Md. 2014) (accepting as reasonable rates ranging from $325–$700 per hour).

The rates cited therein are similar to or higher than those requested by Counsel.

f. The attorney's expectations at the out-set of the litigation.

Counsel took this case on a contingent basis, bearing all the risk of expenses and effort with the expectation of being compensated accordingly. Specifically, Counsel's representation agreement with Mr. Brundle provided for payment of attorneys' fees up to one-third of the gross value of any monetary award. Porter Dec. ¶ 16. The presence of just such a pre-existing fee agreement is another factor that may aid in determining reasonableness. *United Mktg. Sols., Inc. v. Fowler*, No. 1:09-CV-1392, 2011 WL 13137945, at *9 (E.D. Va. Aug. 24, 2011) (citing

Blanchard v. Bergeron, 489 U.S. 87, 93 (1989)). Specifically, "[t]he fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating attorney's fee expectations when he accepted the case." *Blanchard*, 489 U.S. at 93.

g. The time limitations imposed by the client or circumstances.

Counsel proceeded under a compressed schedule in this case. The Rule 16(b) Scheduling Order was issued on January 13, 2016. (Dkt. 19). Counsel completed discovery in only seven months which required issuing document requests and subpoenas and subsequent review of approximately 20,000 documents while taking ten depositions. Counsel therefore had to commit vast resources to ingesting and analyzing material and thereafter preparing for trial in one year. The hours that Counsel had to expend on this contingent matter to meet the short deadlines necessarily meant that other commitments, some of which were paid on an hourly basis, had to be put off.

h. The amount in controversy and the results obtained.

"[T]he most critical factor" in calculating a reasonable fee award "is the degree of success obtained." *Brodziak v. Runyon*, 145 F.3d 194, 196 (4th Cir. 1998). Plaintiff and Counsel obtained a judgment on behalf of the Plan in the amount of $29,773,250.00, which will increase Plan assets for the benefit of Plan participants by approximately 140%.

i. The experience, reputation and ability of the attorney.

The experience of the lawyers and paralegal who worked on this case are detailed in lead trial counsel's declaration and the biographies attached thereto. Porter Dec. ¶¶ 3-7. Even limiting Counsel's experience to ESOP cases over the last year, Bailey & Glasser's efforts on behalf of ESOP participants have resulted in: (1) a settlement of $19.8 million (*Jessop v. Larsen*, 14-cv-00916 (D. Utah)); (2) a reversal of a dismissal in the Seventh Circuit, establishing important law

for ESOP participants and beneficiaries (*Allen v. GreatBanc Trust Co.*, 835 F.3d 670 (7th Cir. 2016)); and (3) the $29.8 million judgment in this lawsuit. This factor strongly supports a fully compensatory award. *Id.* ¶ 4.

j. The undesirability of the case within the legal community in which the suit arose.

This case was undesirable from a professional standpoint for several reasons, including the risk of nonpayment of attorneys' fees and the need to advance significant expenses. Further, the complexity of the legal and fact issues surrounding valuations and ESOP transactions presented significant, complex challenges.

k. The nature and length of the professional relationship between attorney and client.

Before this case, Counsel had not represented Mr. Halldorson or Mr. Brundle and Counsel has no expectation that it will represent either of them in the future in other matters. This supports the requested reward as Mr. Halldorson and Mr. Brundle are not institutional clients whom the firm could expect to bill for future legal services.

l. Attorneys' fees awards in similar cases.

The rates requested here are consistent with rates awarded in similar cases, brought as was this one on a contingent-fee basis under a fee-shifting statute. *See supra* at III.A.2.e; Silver Dec. ¶ 29.

For all the foregoing reasons, Plaintiff and the Plan should be awarded the lodestar fees requested pursuant to the fee-shifting statute. 29 U.S.C. § 1132(g)(1).

B. Counsel's Proposed Fee of One-Third the Value of the Common Fund is Reasonable and Appropriate.

In the customary role as claimant to a common fund, Counsel requests a fee of one-third of the common fund. *See* Court Awarded Attorney Fees: Report of the Third Circuit Task Force,

108 F.R.D. 237, 255 (3d Cir. 1985) ("When a class action lawyer secures a recovery for his clients and then proceeds to file a fee petition seeking compensation from those very same funds . . . the plaintiffs' attorney's role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit."); *see also Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (quoting same); *In re Cendant Corp.*, 260 F.3d 183, 196 (3d Cir. 2001) (same). As explained below, a fee calculated on this basis is fair and reasonable, and consistent with the prevailing method of determining attorney fee awards in representative actions.

1. Counsel's fee should be determined by the percentage-of-common-fund method, with the common fund consisting of the judgment for the Plan.

The common fund doctrine is one of the earliest recognized exceptions to the "American Rule," which generally requires that litigants bear their own costs and attorney fees. Premised on the equitable powers of the court, the common fund doctrine allows a person who maintains a suit that results in the creation, preservation or increase of a fund in which others have a common interest, to be reimbursed from that fund for the litigation expenses incurred. *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885). "[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing*, 444 U.S. at 478.

The percentage method "is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *In re Cendant Corp.*, 243 F.3d 732 (citation omitted); *see also Muhammad v. Nat'l City Mortg., Inc.*, No. 2:07-0423, 2008 WL 5377783 at *7 (S.D. W. Va. Dec. 19, 2008). Although the Fourth Circuit has not determined the preferred method for calculating attorney fees where the common fund has been generated for the benefit of multiple persons, here the Plan and its participants and beneficiaries, nearly all circuits, as well as district courts within this District, that have considered the issue have found

that the trial court may use the percentage method.[5] Consistent with the Circuit Courts' consensus, "District Courts within this Circuit have also favored the percentage method." *Manuel*, 2016 WL 1070819, at *5 (E.D. Va. Mar. 15, 2016);[6] *see also* Silver Dec. ¶ 14 (noting a recent study found that judges used the percentage method 69 percent of the time and that the "lodestar method was strongly disfavored.").

[5] *See Strang v. JHM Mortg. Sec. Ltd P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) ("Although the Fourth Circuit has not yet ruled on the issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases."); *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009) ("While the Fourth Circuit has not definitively answered this debate, other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method for calculating attorneys' fees in common fund cases."); *Manuel v. Wells Fargo Bank, National Association*, No. 3:14cv238, 2016 WL 1070819, at *5 (E.D. Va. Mar. 15, 2016) ("In the instant action, this Court will apply the percentage method preferred by most courts in common fund cases."); *Thomas v. FTS USA, LLC*, No. 3:13cv825, 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017) ("Courts across the nation favor the percentage method of computation. The courts adopting the percentage method have found it more efficient, while also offering a more reasonable measure of compensation."). *See also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992); *Camden I Condo. Ass'n*, 946 F.2d 768, 773-774 (11th Cir. 1991); *Bebchick v. Wash. Met. Area Transit Comm'n*, 805 F.2d 396, 406-7 (D.C. Cir. 1986); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998); *In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Wash. Public Power Supply Sys. Litig.*, 19 F.3d at 1291, 1295 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d. 474 (10th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992); *Muhammad v. Nat'l City Mortg., Inc.*, No. 2:07-0423, 2008 WL 5377783 at *8 (S.D. W. Va. Dec. 19, 2008); *Jones v. Dominion Resource Services, Inc.*, 601 F. Supp. 2d 756, 759 (S.D. W. Va. 2009). In fact, some circuits mandate use of the percentage of fund method. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I Condo. Ass'n*, 946 F.2d at 774.

[6] *See also Kirven v. Central States Health & Life Co.*, No. 3:11-21490MBS, 2015 WL 1314086 at *13 (D.S.C. Mar. 23, 2015) (finding class counsel's request for attorney fees to be reasonable under the percentage-of-the-fund method); *Kidrick v. ABC Television & Appliance Rental*, No. 3:97cv69, 1999 WL 1027050 at *1 (N.D. W. Va. 1999) ("Where there is a common fund in a class settlement, application of a percentage method to calculate an attorney's fee award is now favored") (citing *Boeing*, 444 U.S. at 478); *see also Teague v. Bakker*, 213 F. Supp. 2d 571, 582 (W.D.N.C. 2002) ("The percentage recovery method is generally favored in cases involving a common fund") (quoting *In re Cendant Corp., PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001)); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 437-38 (D. Md. 1998) (applying percentage method, and noting general trend in favor thereof).

In sum, there is a clear consensus among the federal and state courts, consistent with Supreme Court precedent, that attorney fees in common fund cases should be awarded to class counsel based on a percentage of the fund method. And in cases like this, where a plaintiff has prevailed through judgment under a "fee-shifting statute," the best method of determining fees is for class counsel to seek "an additional amount representing the right to fees from the defendant directly, in order to maximize the net recovery to the class," merge those fees into the common fund, and request a percentage of the now-augmented amount as class counsel fees. *Standards & Guidelines for Litigating & Settling Consumer Class Actions*, 299 F.R.D. 160 (3d ed. 2014) (citing *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988)). That said, Counsel here do not seek a percentage of the augmented fund. Instead, Counsel seek an award of the judgment amount absent augmentation by the attorney's fees recovered pursuant to ERISA § 502(g). The fee award under section 502(g), therefore, serves to offset in part the common fund award. *See Dijkstra v. Carenbauer*, No. 5:11-cv-152, 015 WL 12750449, at *7 (N.D. W. Va. July 29, 2015).

2. The requested one-third fee is reasonable.

The courts recognize the presumptive reasonableness of an attorney's fee equal to one-third of a recovery. *See In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (reviewing 289 class actions settlements and finding an "average attorney's fee percentage [of] 31.31%" and a median value of roughly one-third); *Thomas v. FTS USA, LLC*, No. 3:13cv825, 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017) ("Of course, any discussion of percentage awards should acknowledge the age-old assumption that a lawyer receives a third of his client's recovery under most contingency agreements. NEWBERG ON CLASS ACTIONS § 15:73 (5th ed.). Consequently, a fee award of one-third of the settlement fund would be consistent with that awarded in other cases."); *Eriksen Const. Co., Inc. v. Morey*, 923 F. Supp. 878, 881 (S.D. W. Va. 1996); Silver Dec. ¶ 65 ("Common fund fee awards equal to one-third of class action recoveries

are exceedingly common."). A one-third award is also reasonable with respect to the market for legal fees, and "is an amount that a sophisticated business client would willingly have agreed to pay Plaintiff's Counsel at the outset of litigation." Silver Dec. ¶ 59.

Some courts also consider certain factors in analyzing the reasonableness of fees determined by the percentage of recovery method. *In re Neustar, Inc. Secs. Litig.*, No. 1:14cv885, 2015 WL 8484438, at *7 (E.D. Va. Dec. 8, 2015); *Muhammad*, 2008 WL 5377783 at *8. These factors can include: (1) the results obtained for the Class; (2) the presence or absence of substantial objections by members of the class; (3) the quality and skill of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy considerations; and (7) awards in similar cases. *In re Neustar*, 2015 WL 8484438, at *7 (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)). The *Gunter* court instructed that there is no specific formula for analyzing these factors. "Each case is different, and in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1.

These considerations warrant an award of the requested fees. The fund established for Plan participants is substantial and would be further increased by the addition of the lodestar fee award. The one-third fee requested by counsel is very much in line with fee awards in similar cases. The Silver Declaration demonstrates that Plaintiff's fee request is well within the range of reasonableness accepted by the courts. *Id.* ¶ 67. All of the other factors have been addressed in the lodestar discussion, *supra*, and support an award of one-third of the Common Fund.[7] Accordingly, consideration of all of these factors overwhelmingly supports the requested award of one-third the amount of the common fund established for the Plan participants.

[7] The requested fee is also reasonable when considered with respect to the lodestar multiplier of 3.5 ($9.9 million in fees divided by lodestar figure of $2.8 million), a multiplier which falls within the typical range. Silver Dec. ¶ 68.

C. The Requested Costs and Expenses are Reasonable and Should be Awarded.

ERISA's fee-shifting provision further entitles the Plaintiff to recover "the costs of action." 29 U.S.C. § 1132(g)(1). Courts therefore award costs separately from attorney fees to prevailing plaintiffs in lawsuits. *See Matlock v. Pitney-Bowes, Inc.*, 811 F. Supp. 2d 1186, 1192 (M.D.N.C. 2011). As set forth in Porter Declaration, Plaintiff is requesting $643,584.50 in reasonable litigation expenses, to be offset in small part by $1,227.28 in costs paid by Defendant pursuant to Local Civil Rule 54(D). At 2.2% of the $29.8 million damages award, this is comparable to the norm and demonstrates that Plaintiff's Counsel acted reasonably in incurring expenses.

IV. CONCLUSION

For these reasons, Plaintiff and Counsel urge the Court to grant this Motion.[8]

Dated: April 10, 2017

Respectfully submitted,

BAILEY & GLASSER LLP

/s/ Gregory Y. Porter

Gregory Y. Porter (VSB No. 40408)
Ryan T. Jenny (*pro hac vice*)
Patrick O. Muench (*pro hac vice*)
1054 31st Street, NW, Suite 230
Washington, DC 20007
Telephone: (202) 463-2101
Facsimile: (202) 463-2103
gporter@baileyglasser.com
rjenny@baileyglasser.com
pmuench@baileyglasser.com

Brian A. Glasser (*pro hac vice*)
Thanos Basdekis (VSB No. 50913)
209 Capitol Street
Charleston, WV 25301

[8] Plaintiff reserves the right to supplement his motion, and this memorandum, to reflect Counsel's time expended on this motion as well as additional hours and costs expended by Counsel as the case proceeds.

Telephone: (304) 345-6555
Facsimile: (304) 342-1110
bglasser@baileyglasser.com
tbasdekis@baileyglasser.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April 2017, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send such notification to the following:

James P. McElligott, Jr.
Summer L. Speight
Nicholas DelVecchio SanFilippo
Counsel for Defendant
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
Telephone: 804-775-4329
Facsimile: 804-698-2111
Email: jmcelligott@mcguirewoods.com
speight@mcguirewoods.com
nsanfilippo@mcguirewoods.com

Stephen W. Robinson
John E. Thomas, Jr.
Counsel for Defendant
McGuireWoods LLP
1750 Tysons Boulevard, Suite 1800
Tysons Corner, Virginia 22102-4215
Telephone: (703) 712-5000
Facsimile: (703) 712-5050
Email: srobinson@mcguirewoods.com
jethomas@mcguirewoods.com

Sarah Aiman Belger
Counsel for Defendant
Odin Feldman & Pittleman PC
1775 Wiehle Ave., Suite 400
Reston, VA 20190
(703) 218-2161
Sarah.Belger@ofplaw.com

Edward Lee Isler
Micah Ephram Ticatch
Counsel for Constellis Group, Inc.
Isler Dare PC (Vienna, VA)
1945 Old Gallows Road

Suite 650
Vienna, VA 22182
(703) 748-2690
(703) 748-2695 (fax)
eisler@islerdare.com
mticatch@islerdare.com

s/ Gregory Y. Porter
Gregory Y. Porter (VSB No. 40408)
BAILEY & GLASSER LLP
1054 31st Street, NW, Suite 230
Washington, DC 20007
Telephone: (202) 463-2101
Facsimile: (202) 463-2103
gporter@baileyglasser.com

Attorney for Plaintiff

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TIM P. BRUNDLE, on behalf of the Constellis Employee Stock Ownership Plan, **Plaintiff,** **v.** **WILMINGTON TRUST, N.A., as successor to WILMINGTON TRUST RETIREMENT AND INSTITUTIONAL SERVICES COMPANY,** **Defendant.**	**Civil Action No. 1:15-cv-1494 (LMB/IDD)**

REPORT OF PROFESSOR CHARLES SILVER ON PLAINTIFF'S AND PLAINTIFF'S COUNSEL'S REQUEST FOR A STATUTORY FEE AWARD AND A COMMON FUND FEE AWARD

I, Charles Silver, declare as follows:

1. SUMMARY OF OPINIONS

- Plaintiff and Plaintiff's Counsel request a lodestar-based statutory fee award from the Defendant and a percentage-based common fund fee award in favor of Plaintiff's Counsel from the judgment. Both requests are reasonable.

2. CREDENTIALS

1. In this Report, I offer my perspective as an expert on attorneys' fees, a subject I have studied and written about for years. My résumé appears below in Appendix A.

2. I have testified as an expert on attorneys' fees many times. Judges have cited or relied upon my opinions when awarding fees in the following major cases, as well as many smaller

ones: *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F.Supp.2d 437 (E.D.N.Y. 2014) (awarding $544.8 million fee on recovery of $5.7 billion); *Silverman v. Motorola, Inc*., No. 07 C 4507, 2012 WL 1597388 (N.D. Ill. May 7, 2012) (unpublished) (fee award of 27.5 percent on recovery of $200 million); *In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011) (fee award of 30 percent on recovery of $410 million); *In re Enron Corp. Securities, Derivative & "ERISA" Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008) ($688 million fee award on a $7.2 billion recovery); *Allapattah Services, Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (31.33 percent fee award on recovery exceeding $1 billion).

3. Professionally, I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, where I also serve as Co-Director of the Center on Lawyers, Civil Justice, and the Media. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I received tenure in 1991. Since then I have been a Visiting Professor at the University of Michigan School of Law, the Vanderbilt University Law School, and the Harvard Law School.

4. From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited the PRINCIPLES with approval, including the U.S. Supreme Court.

5. I have taught, researched, written, consulted with lawyers, and testified about attorneys' fees and related subjects for 30 years. I have published over 80 major writings, many of which appeared in peer-reviewed publications and many of which focus on subjects relevant to this Report. In 2015, two coauthors and I published a major study of fee awards in securities class actions in the COLUMBIA LAW REVIEW. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is*

the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions, 115 COLUMBIA L. REV. 1371 (2015). My writings are cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996) and the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004). In 2009, the Tort Trial and Insurance Practice Section of the American Bar Association gave me the Robert B. McKay Award in recognition of my scholarship in the areas of tort and insurance law.

6. Finally, because awards of attorneys' fees may be thought to raise issues relating to the professional responsibilities of attorneys, I note that I have an extensive background, publication record, and experience as an expert witness testifying on matters relating to this field. For example, I am a coauthor of William T. Barker and Charles Silver, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (LexisNexis Mathew Bender, Updated 2014). I also served as the Invited Academic Member of the Task Force on the Contingent Fee created by the Tort Trial and Insurance Practice Section of the American Bar Association. I have also taught the subject of legal ethics for years, including a specialized course titled "Professional Responsibility for Civil Litigators" that includes a good deal of material on aggregate lawsuits and lawyers' fees.

3. DOCUMENTS REVIEWED

7. When preparing this Report, I reviewed the items listed below, which, unless noted otherwise, were generated in connection with this case. I may also have reviewed other items including, without limitation, cases, treatises, news reports, correspondence, and published scholarly works.

- Memorandum Of Law In Support Of Plaintiff's Motion For Attorneys' Fees And Costs, And Plaintiff's Counsel's Motion For Attorney's Fees And Reimbursement Of Expenses (in draft) ("Plaintiff's Fee Memorandum")

- Declaration of Gregory Y. Porter (in draft)

4. FACTS

8. The facts relevant to this Report are known to the Court and are set out in Plaintiff's Fee Memorandum. In brief, this is an ERISA case in which, following a grant of summary judgment on the main claim in favor of the Plaintiff and a six-day trial to the Court on affirmative defenses, Plaintiff obtained a judgment in excess of $29.7 million on behalf of an Employee Stock Ownership Plan and its approximately 1,787 participants, each of whom stands to receive more than $16,000 apiece, on average.

9. The Plaintiff and Plaintiff's Counsel (the Movants) now apply to the Court for an award of fees and costs pursuant to 29 U.S.C. § 1132(g)(1), which empowers the Court to award "a reasonable attorney's fee and costs of action to either party." They have also applied for a common fund award from the judgment in favor of Plaintiff's Counsel.

5. ANALYSIS

10. This is a model piece of litigation. After a pre-filing investigation, the original plaintiff and Plaintiff's Counsel filed a complaint in mid-November of 2015. Pre-trial motions then ensued, one of which led to the replacement of the original plaintiff and another of which led to a grant of summary judgment in favor of the new named plaintiff on the main ERISA claim in October of 2016. Discovery occurred throughout this period. Starting on November 28, 2016, the case was tried to the Court over a period of six days for the purpose of determining whether the Defendant could establish affirmative defenses. The Court found in favor of the Plaintiff on March 13, 2017 and entered judgment for over $29.7 million the same day. I find it hard to imagine that this lawsuit could have been managed more efficiently.

11. The Movants argue that the Plaintiff's victory on the merits satisfies the requirements for an award of attorneys' fees under ERISA. In this Report, I assume that is true.

The Movants also request an award of fees from the $29.7 million common fund. If the judgment survives on appeal and is collected, this request will be proper under common fund doctrine of the law of restitution and unjust enrichment. In this Report, I attempt to provide information that may help the Court size the two fee awards appropriately.

12. I begin by emphasizing that there are, in fact, two fee requests. The first, made pursuant to 29 U.S.C. § 1132(g)(1), ERISA's fee-shifting provision, requests that an amount be added to the judgment that the Defendant will be required to pay. The Court's ruling on the first request will liquidate the Defendant's fee-related obligation to the Plaintiff. This is a remedy sought by the Plaintiff for the benefit of the Plaintiff and the Plan.

13. The second request is for a fee award in favor of Plaintiff's Counsel from the $29.7 million judgment. If granted, this award will liquidate the ERISA beneficiaries' fee-related obligations to Plaintiff's Counsel. Notably, Plaintiff's counsel do not seek a percentage of the gross amount of the judgment augmented by the fees collected by Plaintiff under ERISA's fee-shifting statute. This enhances the reasonableness of the requested common fund fee award, as I will explain in more detail below.

14. Because different methodologies apply to the two fee requests, the two fee awards can differ in size. The Movants' request for fees from the Defendant is governed by the lodestar method, which multiplies lawyers' reasonable hourly rates by the number of hours that lawyers reasonably expend and applies a limited number of enhancements. The Movants' request for a fee award from the common fund recovery is governed by the percentage method.[1] Because the

[1] District courts across the country use the percentage method when awarding fees from common funds. Although the Fourth Circuit has not formally adopted this approach, district court judges in this circuit have used it many times. *See, e.g., Manuel v. Wells Fargo Bank, National Association*, 2016 WL 1070819, at *5 (E.D. Va. Mar. 15, 2016) ("In the instant action, this Court will apply the percentage method preferred by most courts in common fund cases.").

percentage method is based more heavily on risks incurred and results obtained than on time expended, a common fund fee award can exceed a lodestar-based fee award, and typically will. Although many courts still use the lodestar method as a cross-check,[2] a study by Professor Brian Fitzpatrick found that judges used the percentage method 69 percent of the time. The lodestar method was strongly disfavored, being used in only 12 percent of the cases. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards,* 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 811, 832 (2010).

15. An as-yet unpublished study that covers a more recent time period, 2009-2013, found that use of the lodestar as the primary fee-setting methodology continues to decline.

> The vast majority of fee awards during the 2009-2013 period were decided using the percentage method or the percentage method with a lodestar check. The percentage method was used in 53.61% of cases and used in combination with a lodestar check in an additional 38.23% of cases. The use of the pure lodestar method, on the other hand, was used in only 6.29% of cases during the 2009-2013 period. This is down from its use in 13.6% of cases during the 1993-2002 period and 9.6% of cases during the 2003-2008 period.

Theodore Eisenberg, Geoffrey P. Miller, and Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013* NYU Law School Law & Economics Research Paper Series, Working Paper No. 17-02 (draft dated December 2016), available at SSRN.com.

---

[2] For example, in *Fangman v. Genuine Title, LLC,* 2017 WL 86010, at *3 (D. Md. Jan. 10, 2017), Judge Richard D. Bennett recently wrote:

> For the reasons explained in this Court's prior Memorandum Opinion of November 18, 2016 (ECF No. 411), the "percentage of recovery" method shall be used to calculate Settlement Counsels' attorneys' fees and expenses in this case. However, this Court will cross-check the "percentage of recovery" analysis with a lodestar analysis. This Court has previously recognized that "using the percentage of fund method and supplementing it with the lodestar cross-check ... take[s] advantage of the benefits of both methods." *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 681 (D. Md. 2013) (quoting *In re The Mills Corp. Securities Litig*., 265 F.R.D. 246, 261 (E.D. Va. 2009)).

This passage accurately describes a common practice.

16. The difference in methodology—lodestar vs percentage of the recovery—reflects a difference in purpose. The Supreme Court has mandated the use of the lodestar method in statutory fee-shifting cases because, in its judgment, this method comports with Congress' desire to enable persons with meritorious claims to obtain competent legal representation. The purpose of the common fund doctrine, by contrast, is to remedy unjust enrichment, which occurs when passive beneficiaries free-ride on others' efforts and enjoy the benefits of successful lawsuits without sharing in the costs. Because the usual cost of hiring a lawyer is the market rate, the law of restitution and unjust enrichment requires passive beneficiaries to pay that amount, on the theory that they would have paid the market rate had they hired lawyers directly.

A. The Statutory Fee Award Payable By The Defendant

17. As mentioned, the lodestar method governs requests for statutory fee awards from opposing parties. One must evaluate the reasonableness of the hourly rates, hours, and multipliers, if any, when applying this method.

i. Plaintiff's Counsels' Hourly Rates

18. The hours and hourly rates for the lawyers and staff members who delivered services for the benefit of the plaintiff class are listed in the table below, which is based on information found in Plaintiff's Fee Memorandum. In my opinion, the requested rates are reasonable.

TIMEKEEPERS, HOURLY RATES, AND TIME EXPENDED				
Name	**Position**	**Hourly Rate**	**Hours**	**Fee**
Brian Glasser	Partner	$750	221.8	$166,350.00
Gregory Porter	Partner	$750	899.5	$674,625.00
Ryan Jenny	Partner	$550	1332.7	$732,985.00
Thanos Basdekis	Partner	$550	1181.7	$649,935.00
Patrick Muench	Senior Associate	$400	875.5	$350,200.00
Benjamin Lajoie	Associate	$225	85.8	$19,305.00
Denise Milhoan	Paralegal	$175	15.8	$2,765.00
Loc Le	Paralegal	$200	129.5	$25,900.00
Melissa Chapman	Paralegal	$175	104.3	$18,252.50
Melissa Kestner-Clay	Paralegal	$200	739.3	$147,860.00
Pratik Budhdev	Business Analyst	$300	91.84	$27,552.00
		$499	5585.90	$2,788,177.50
		Weighted Average	**Total**	**Total**

19. Over the past three decades, I have worked with dozens of lawyers who handle class actions and other large, complex lawsuits and have reviewed or read about countless fee applications. Both my general familiarity with the market for legal services and particular examples lead me to conclude that the listed rates are comparable to those charged by other lawyers and legal assistants with similar experience and qualifications who practice in urban areas.

20. For example, one law firm that I worked with on a prior matter served as counsel in the Flat Panel Antitrust Litigation, which produced a billion-dollar settlement. The firm's charges, which were granted by the court, ran from about $765 per hour for senior partners to $175 per hour for paralegals, rates that are comparable to those requested here. See *Amended Order Granting Direct Purchaser Class Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards, In Re: TFT-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 7575003 (N.D. Cal. Dec. 27, 2011). Many courts have approved rates similar to those requested by Plaintiff's Counsel when awarding fees pursuant to fee-shifting statutes or from common funds.

21. I also gained perspective on Class Counsel's requested rates by consulting surveys of law firms' billing rates taken by the NATIONAL LAW JOURNAL (NLJ) in various years. The surveys contain information regarding the high, low, average, and median billing rates for partners and associates at large law firms that handle business matters and that typically have offices in metropolitan areas. The number of firms participating in the NLJ surveys varies from year to year but always exceeds 100. The NLJ surveys are often cited to courts as evidence supporting hourly rates in fee applications. See, e.g., *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172-73 (C.D. Cal. 2010) (admitting into evidence and relying upon expert report by Professor William Rubenstein, which was based in part on NLJ surveys).

22. Because the law firms included in the NLJ surveys are of the type that normally represent defendants in lawsuits like this one, the rates they charge provide an especially helpful basis on which to assess the reasonableness of Plaintiff's Counsel's requested rates. ERISA beneficiaries deserve representation of the same caliber that large corporate defendants receive. Plaintiff's Counsel provided just such high-quality services here. They grappled with some of Virginia's best lawyers and won.

23. The 2010 NLJ survey reported that the range for "Partner Bill Rate High"—the category that includes senior partners—ran from $1,120 to $385 and averaged $700. The rates requested for the lawyers listed as "partners" in Plaintiff's Fee Memorandum who did the bulk of the work fall near or below the middle of this range. Their charges are reasonable even when compared to rates that lawyers charged when the current decade began.

24. The comparison seems even more favorable when more recent rates are applied. Today, many top-flight lawyers charge more than $1,000 per hour. The subtitle to a report on the NLJ's 2014 billing survey communicated this plainly: "$1,000 Per Hour Isn't Rare Anymore."

Karen Sloan, *NLJ Billing Survey: $1,000 Per Hour Isn't Rare Anymore*, THE NATIONAL LAW JOURNAL (January 13, 2014). Reading the text of the article, one learns that "[n]early 20 percent of the firms included in THE NATIONAL LAW JOURNAL's annual survey of large law firm billing rates [in 2014] had at least one partner charging more than $1,000 an hour." No partner-level lawyer involved in this case requests an hourly rate anywhere close to that amount.

25. The 2014 NLJ survey, which contained information for 159 of the largest law firms in the U.S., found a median rate for the highest partner billing category of $775. This means that at half of the firms, the highest-charging partner billed at a rate above $775 while at the other half the highest-charging partner charged that amount or less. For all firms surveyed, partners charged an average of $604 per hour while associates billed $370. National Law Journal, Billing Rates Across the Country (Jan. 13, 2014), http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country.

26. Here, the rates requested for the two top-billing partner-level attorneys who led the trial team—Brian Glasser and Gregory Porter, both of whom request $750 per hour—fall below the $775 median for highest-billing partners reported by the NLJ. Two other partners who also bore laboring oars, Ryan Jenny and Thanos Basdekis, bill at the rate of $550. Their charges fall $50 per hour below the average for all partners, and are also reasonable.

27. Turning from partners to associates, the 2014 NLJ survey reported a median high hourly rate for associates of $510 and a median low rate of $235. The average associate rate was found to be $370. Here, the two associates who expended significant amounts of time—Patrick Muench and Benjamin Lajoie—request $400 and $225 per hour, respectively. That these charges are reasonable is patent.

28. When considering the reasonableness of Class Counsel's requested hourly rates, the rates being charged by the Defendant's attorneys are also relevant. The table below provides information about the hourly rates charged by lawyers at McGuireWoods LLP taken from two NLJ surveys, one conducted in 2010 and the other in 2013. As is clear, the rates requested by Plaintiff's Counsel are in line with those charged by lawyers of comparable rank at McGuireWoods LLP.

HOURLY RATES FOR MCGUIREWOODS ATTORNEYS AS REPORTED BY THE NATIONAL LAW JOURNAL								
NLJ Publi-cation Year	Firm Name	Location	Partner Billing Rate High	Partner Billing Rate Average	Partner Billing Rate Low	Associate Billing Rate High	Associate Billing Rate Average	Associate Billing Rate Low
2010	McGuire Woods	Richmond, Va.	$830	$543	$325	$600	$355	$220
2014	McGuire Woods	Richmond, Va.	$725	$595	$450	$525	$360	$285

29. Federal district courts in Virginia have approved lodestar-based fee award requests based on similar rates. A summary of recently-approved rates appeared in *Brown v. Transurban USA, Inc.*, 2016 WL 6909683 (E.D. Va. Sept. 29, 2016):

> *See, e.g.*, *In re Neustar*, 2015 WL 8484438, at *10 (approving rates of $260–$310 for paralegal services, $420–$700 for associates, and $800–$975 for partners, in part because the fee award requested represented a substantial discount off the total lodestar calculated using these rates); *Hosch v. BAE Systems Info. Sols., Inc.*, No. 1:13–CV–00825 (AJT/TCB), 2015 WL 12227738, at *3 n.4 (E.D. Va. Apr. 28, 2015) (finding that rates of up to $650/hour were "within the acceptable range of reasonableness" even though the court determined the hours billed were excessive and reduced the fee award accordingly); *In re Microstrategy, Inc.*, 172 F.Supp.2d 778, 788 n.33 (E.D. Va. 2001) (concluding that $555 per hour for a senior partner and $220 per hour for a junior associate in 2001 were rates "not inconsistent with the rates charged by lawyers in large, prominent, and ... expert law firms"); *Phillips v. Triad Guar. Inc.*, No. 1:09–CV–71, 2016 WL 2636289, at *8 (M.D.N.C. May 9, 2016) (finding that partner billing rates of $640–$880 per hour and associate billing rates of $375–$550 per hour were "within the range of reasonableness[,]" especially given that "the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials"); *Boyd v.*

> *Coventry Health Care Inc.*, 299 F.R.D. 451, 467 (D. Md. 2014) (accepting as reasonable rates ranging from $325–$700 per hour).

Most of these rates are similar to those requested here; some are higher.

ii. Plaintiff's Counsels' Hours Expended

30. I turn now to the time that Plaintiff's Counsel expended. The statutory fee request reflects almost 5,700 hours of billed time by attorneys, specialists, and paralegals combined. This total was calculated after applying billing judgment, which led to the exclusion of time spent defending the appeal of the Court's ruling on the original plaintiff, time spent by persons who billed fewer than ten hours, and other hours there were deemed not proper to bill, including time spent on Plaintiff's fee motion.

31. Several considerations support the conclusion that the time expended is reasonable. First, Plaintiff's Counsel recorded their hours contemporaneously. Second, much of the lawyering that took place in this case was observed directly or indirectly by the Court. The docket sheet, which contains over 300 entries, indicates that the litigation was continuously active. A considerable fraction of the time expended also related to preparations for or actions taken during the six-day trial. The Court is well placed to evaluate the reasonableness of these lawyering activities.

32. Most importantly, I note that Plaintiff's Counsel had every reason to be frugal with their time. Unlike lawyers who are paid by the hour, and who must consequently be discouraged from expending time needlessly, Plaintiff's Counsel worked on contingency. Their incentive was to expend too little time, not too much. The risk of nonpayment encourages plaintiffs' attorney to be cautious with their time, and the fact that they receive only a fraction of the gains enjoyed by their clients discourages them from overworking. I have explained these incentives many times, and federal judges have recognized them too. For example, in *Parkinson v. Hyundai Motor Am.*,

796 F. Supp. 2d 1160, 1172-73 (C.D. Cal. 2010), the court observed that "'lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of fee'" (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)). Although Plaintiff's Counsel did send more than one attorney to several depositions for the purpose of enhancing their collective knowledge of the case, hours for attorney's who attended but did not take the deposition have not been charged.

33. The remarkable thing is that Plaintiff's Counsel took this case on contingency and expended the time needed to win, while also bearing the required out-of-pocket costs. It made economic sense to expend these resources only when and because the expected return for the beneficiaries so greatly exceeded the cost as to generate a sufficient premium to pay attorneys' fees. I know of no study finding that lawyers who work on contingency routinely expend excessive amounts of time, and I know of several reporting that plaintiffs' law firms operate efficiently.

B. The Common Fund Fee Award Payable by the Absent Beneficiaries

34. I turn now to the common fund fee award, the purpose of which is to cure unjust enrichment by compensating Plaintiff's Counsel for services delivered to absent ERISA beneficiaries who will participate in the recovery. Plaintiff's Counsel requests an award equal to one-third (33.33 percent) of the judgment amount, approximately $29.7 million. As mentioned above, Plaintiff's Counsel do not seek to collect a common fund fee on the statutory fee award, even though that will be part of the ERISA beneficiaries' recovery.

i. <u>The Common Fund Fee Award Should Reflect Lawyers' Market Rates</u>

35. I have repeatedly urged judges to apply market rates when awarding fees out of common fund recoveries in class actions. I did so in the first article I published after becoming a law professor and, much more recently, in an article I prepared for an academic conference on

securities litigation last year. *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991) (hereinafter *Restitutionary Theory*); and Charles Silver, *The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status Report on Securities Fraud Class Actions*, *presented at* the Fourth Annual Workshop on Corporate & Securities Litigation, Chicago, IL, Sept. 30-Oct 1, 2016, and *forthcoming in* Sean Griffith, Jessica Erickson, David H. Webber, and Verity Winship, Eds., RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION (2017). Altogether, I have espoused this view hundreds of times in published writings, conference presentations, live testimony, and expert witness reports. By market rates I mean the rates at which plaintiffs' attorneys are compensated in the market where plaintiffs hire lawyers on contingency, not the market in which they hire lawyers at guaranteed hourly rates.

36. The reasons for mimicking the market are several. First, the right to compensation arises under the law of restitution and unjust enrichment, and that body of law uses service providers' usual and customary charges as the measure of compensation. The reason is simple. Restitution operates in contexts where it is impracticable for parties to contract for payments in advance. It then reasons that, had no impediment to contracting existed, a beneficiary and a service provider would have settled on the market rate because there would have been no reason for the former to pay more or for the latter to accept less.

37. Second, market rates incentivize lawyers to represent class members zealously, as both Rule 23(a)(4) of the Federal Rules of Civil Procedure and the Due Process Clause require. Again, the thinking is straightforward. When sophisticated clients hire lawyers, they use fee formulas that encourage their attorneys to maximize the expected net value of their claims, that is, the amounts they expect to keep after deducting attorneys' fees and litigation costs. Class members

would want to achieve the same object if they were able to hire lawyers directly. They cannot do so, however, so Rule 23 and the Due Process Clause fill the gap by requiring judges to incentivize lawyers properly for them. The mimic-the-market approach makes this task easy by providing an objective basis upon which the soundness of fee arrangements may be tested. Arrangements like those used by sophisticated clients pass the test; all other arrangements fail.

38. Third, the mimic-the-market approach guides judges' discretion and reduces the likelihood that improper considerations will influence the size of fee awards. By itself, the multi-factor approach sometimes used by courts does neither. As Judge D. Brock Hornby observed, the multi-factor approach "offers little predictability," "would support equally a fee award of 16%, 20%, 25%, 30%, or 33-1/3%," "is not a rule of law or even a principle," "allows uncabined discretion to the fee-awarding judge," employs "factors [that] seem inconsistent with … [the goal of] creat[ing] incentives for the lawyer to get the most recovery for the class by the most efficient manner," and "consume[s] significant lawyer and judicial resources." *Nilsen v. York County*, 400 F.Supp.2d 266, 277-278 (D. Me. 2005). Judge Frank Easterbrook, who sits on the Seventh Circuit, put the matter more succinctly, writing that "a list of factors without a rule of decision is just a chopped salad." *In re Synthroid Mktg. Litig*., 264 F.3d 712, 719 (7th Cir. 2001). "[A]ny method other than looking to prevailing market rates assures random and potentially perverse results." *Id.*

39. The mimic-the-market approach's potential to minimize the impact of the hindsight bias is especially important. The hindsight bias is a known defect in human reasoning that causes people who know about actual outcomes to misestimate *ex ante* risks. If allowed to operate, the hindsight bias would bias fee awards downward by causing judges to under-estimate litigation

risks. This would hurt class members by weakening their lawyers' incentives.[3] The mimic-the-market approach ensures that lawyers will represent class members zealously by focusing judges' attentions on the terms that real clients actually use when hiring attorneys. Because those terms take account of ex ante risks correctly, desirable incentives are preserved.

ii. More and More Judges Are Mimicking The Market When Awarding Fees In Class Actions

40. As mentioned, my 1991 article, *Restitutionary Theory*, introduced the idea that judges should mimic the market when awarding fees in class actions. Thereafter, the idea quickly took root and spread. Only a year or so later, the Seventh Circuit embraced this approach in *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992), where Judge Richard A. Posner wrote that "[t]he object in awarding a reasonable attorney's fee [from a class action settlement] ... is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible." *See also id.* at 568 ("[I]t is not the function of judges . . . to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order."). Since then, Seventh Circuit judges adhering to this doctrine have awarded fees at market rates, even in

[3] Judge Easterbrook wrote about the hindsight bias in *In re Synthroid Mktg. Litig.*, 264 F.3d at 718–19.

> On remand the district court must estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed). The best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers never wait until after recovery is secured to contract for fees. They strike their bargains before work begins…. Only *ex ante* can bargaining occur in the shadow of the litigation's uncertainty[.]… [T]he court must set a fee by approximating the terms that would have been agreed to *ex ante*, had negotiations occurred.

class actions with large recoveries. For example, in *Standard Iron Works v. ArcelorMittal et al*., No. 08 C 5214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014), which settled for $164 million, the district court found "that a 33% fee comport[ed] with the prevailing market rate for legal services of similar quality in similar cases."

41. The Second Circuit endorsed the principle of using market rates a few years later. In *Goldberger v. Integrated Resources, Inc*., 209 F.3d 43, 52 (2d Cir. 2000), it observed that "market rates, where available, are the ideal proxy for [lawyers'] compensation." The Second Circuit's only concern was the difficulty of "know[ing] precisely what fees common fund plaintiffs in an efficient market for legal services would agree to, given an understanding of the particular case and the ability to engage in collective arm's-length negotiation with counsel." *Id*. This, of course, is an *endorsement* of the mimic-the-market approach, not a criticism. When the evidence supports a solid inference regarding the terms that would have been set in the market for legal services, the market rate should determine the fee.

42. Although no other circuit has formally adopted the mimic-the-market approach, a look at the cases reveals that district court judges everywhere take guidance from the market routinely. In *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1211 (S.D. Fla. 2006), a case from the Eleventh Circuit, Judge Alan Gold agreed that "the more appropriate measure of a reasonable percentage is the market rate for a contingent fee in commercial cases" and awarded a fee of 31.33 percent from a billion-dollar recovery. In the First Circuit, District Court Judge D. Brock Hornby has applied the mimic-the-market approach repeatedly, and has gained adherents among his brethren. *See Nilsen v. York County*, 400 F. Supp. 2d 266, 277-278

(D. Me. 2005) (endorsing market-based approach);[4] and *In re Cabletron Systems, Inc. Securities Litigation*, 239 F.R.D. 30 (D. N.H. 2006) (Judge Smith) (following *Nilsen*). And in the Ninth Circuit, Judge Helen J. Frye took the market into account when awarding 40 percent of a $29.25 million partial settlement as fees *In re: Melridge, Inc. Securities Litigation*, No. CV 87-1426-FR (D. Or. Apr. 15, 1996). She observed that, "[i]n Portland[, Oregon], it is normal for contingent fee arrangements entered into at arm's length to provide for a fee of one-third of the recovery if settlement is reached prior to trial, with a larger percentage of 40% if the case proceeds to trial." Combining all of the partial settlements in *Melridge*, the total fee award was 37 percent of the $56.5 million aggregate recovery.

iii. A Survey of Prevailing Market Rates

43. In this section, I discuss what is known about the fees that clients pay when hiring lawyers on contingency. With but two exceptions, neither of which applies here, the evidence shows that when sophisticated clients serve as plaintiffs in high-stakes commercial lawsuits—including but not limited to class actions—they typically pay their lawyers 25-40 percent of their gross recoveries, with fees in the 33.33-40 percent range being especially common.

44. Judges have known this for years. For example, in 1993, Ralph G. Thompson, then Chief Judge of the Western District of Oklahoma, made the following observation when awarding class counsel one-third of a $35 million common fund recovery: "Fees in the range of 30–40% of any amount recovered are common in complex and other cases taken on a contingent fee basis."

[4] In addition to *Nilsen v. York County*, 400 F. Supp. 2d 266, 277-278 (D. Me. 2005), discussed in the text, Judge Hornby applied the mimic-the-market approach in *Scovil v. FedEx Ground Package System, Inc.*, No. 1:10-CV-515-DBH, 2014 WL 1057079, at *5 (D. Me. Mar. 14, 2014); *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 842 F. Supp. 2d 346 (D. Me. 2012); and *Prescott v. Prudential Ins. Co. of America*, No. 2:09-CV-00322-DBH, 2011 WL 6662288, at *2 (D. Me. Dec. 20, 2011).

Cimarron Pipeline Constr., Inc. v. Nat'l Council on Compensation Ins., 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993). To my knowledge, judges generally agree that the market rate falls in this range.

1. Fees Promised by Sophisticated Named Plaintiffs in Class Actions

45. In the course of my studies of class actions and expert witness engagements, I have gathered information about the fees that named plaintiffs agree to pay when hiring lawyers to handle class actions. This information strongly supports the conclusion that contingent fees normally fall within the 25-40 percent range, and cluster more narrowly with 33.33-40 percent.

46. Consider first the series of antitrust class actions against pharma companies listed in the table below. The class members were drug wholesalers who appeared in the cases repeatedly, including several of Fortune 500 size or bigger. Many had in-house or personal counsel monitoring the litigations. The potential damages in several of the cases were enormous. One case, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015), settled for over $500 million, and the series as a whole recovered more than $1 billion. In all of the cases the wholesalers actively supported fee awards in what I have identified as the normal range. Many submitted declarations or letters urging judges to pay the indicated amounts. Seeing that these sophisticated clients believed that class counsel had earned the dollars they requested, the presiding judges gave great weight to their opinions.

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

48. The examples just described are not part of a new trend. Sophisticated clients have been paying fees of 33 percent or more in antitrust cases for years. A famous case from the 1980s involved the Texas law firm of Vinson & Elkins (V&E). ETSI Pipeline Project (EPP) hired V&E to sue Burlington Northern Railroad and other defendants, alleging a conspiracy on their part to

prevent EPP from constructing a $3 billion coal slurry pipeline. In a sworn affidavit, Harry Reasoner, then V&E's managing partner, described the financial relationship between EPP and V&E.

> The terms of our retention were that our client would pay all out-of-pocket expenses as they were incurred, but all legal fees were contingent upon a successful outcome. We were paid 1/3 of all amounts received by way of settlement or judgment. We litigated the matter for 5 years. At the conclusion, we had settled with all defendants for a total of $634,900,000.00. As a result, a total of $211,633,333.00 was paid as contingent legal fees.

Declaration of Harry Reasoner, filed in *In re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (D. Ariz. Nov. 30, 1990). Note that the fee was one-third even though the client bore litigation costs. Had V&E been asked to shoulder those too, the fee would likely have been 40 percent, as shown by the discussion of patent cases below.

49. Antitrust cases are not unique. Sophisticated named plaintiffs agree to pay similar fees in large class actions of other types. Consider *In re U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT) (D. Conn.), a RICO class actions that produced a $297 million settlement. One of the named plaintiffs, Thomas & King Inc., was formerly one of the largest operators of Applebee's franchises in the United States and the nation's eighth-largest restaurant franchise company overall, with approximately 7,500 employees. The other named plaintiff, Catholic Healthcare West/Dignity Health, was the fifth largest health system in the nation and the largest provider of non-profit hospital services in California. Both clients were represented by private counsel when they retained and negotiated fees with class counsel, and both agreed that the fee award might be as high as 40 percent. The court awarded one-third of the recovery as fees.

50. *In re International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-3346 (Court of Common Pleas, Greenville County, South Carolina), was a lawsuit filed by minority investors that settled for relief valued at about $81 million. Five sophisticated investors served as

named plaintiffs. Two, FURSA Alternative Strategies LLC and RAMIUS LLC, were, respectively, a hedge fund manager and a global investment manager. All five clients agreed to pay 35 percent of the gross class-wide recovery as fees, with expenses to be separately reimbursed. The 35 percent fee was bargained down after initially being set at over 40 percent.

51. In all the cases just discussed, the named plaintiffs were sophisticated businesses with significant resources and ready access to the market for legal services. Their willingness to promise fees ranging from one-third to 40 percent in large commercial class actions shows clearly that, in their judgment, fees in this range were reasonable.[5]

2. Contingent Fees in Patent Cases

52. There are many reports of percentage fees of one-third or higher being paid in patent cases, which, like antitrust cases, often involve difficult technical and empirical issues. Indeed, the usual patent case is often less risky and protracted than the typical antitrust litigation because patent plaintiffs rarely face the risks and delay of class certification. This makes the fees paid in patent litigation a conservative point of comparison.

53. The most famous example of the prevalence of fees of one-third or more in high-stakes patent lawsuits involves the dispute between NTP Inc. and Research In Motion Ltd., the

[5] Examples of sizeable contingent fees can also be found in cases involving business clients who intervened in class actions. In *In re Synthroid Marketing Litig*., 264 F.3d 712, 719 (7th Cir. 2001), Judge Frank Easterbrook reported that, *after a settlement was already on the table*, "a group of more than 100 [third party payers] . . . contracted with two law firms to represent them. . . . [T]he contracts provided for a 25% contingent fee at maximum." In an expert witness report submitted in the *High Fructose Corn Syrup Antitrust Litigation*, Professor John C. Coffee, Jr. reported that Gray & Co., an opt-out claimant, promised its lawyers 33-40 percent of the recovery in parallel litigation, depending on the time of settlement. *Declaration of John C. Coffee, Jr*., submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087, Dkt. No. 1421 (C.D. Ill. Oct. 7, 2004), pp. 1-2. Notably, neither of these situations (*Synthroid* or *High Fructose*) presented anywhere near the risk for the lawyers associated with litigating a complex class action case from scratch.

company that manufactured the Blackberry. NTP, the plaintiff, promised its law firm, Wiley Rein & Fielding (WRF), a one-third contingent fee. When the case settled for $612.5 million, WRF received more than $200 million in fees. Yuki Noguchi, *D.C. Law Firm's Big BlackBerry Payday: Case Fees of More Than $200 Million Are Said to Exceed Its 2004 Revenue*, WASHINGTON POST, March 18, 2006, at D03.

54. The terms in WRF's fee agreement were typical, as Professor David L. Schwartz learned by interviewing 44 experienced patent lawyers and reviewing 42 contingent fee agreements that were used in patent cases. Professor Schwartz reported that, across the board, fee percentages fell within the range I have described as normal, typically clustered within 33-40 percent, and increased with case duration and appeals.

> On the whole, the contingent rates are similar to the "one-third" that a stereotypical contingent personal injury lawyer charges. There are two main ways of setting the fees for the contingent fee lawyer: a graduated rate and a flat rate. Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated rates typically set milestones such as "through close of fact discovery," "through trial," and "through appeal," and tied rates to recovery dates. As the case continued, the lawyer's percentage increased. Of the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%.

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation,* 64 ALABAMA LAW REVIEW 335, 360 (2012).

55. Professor Schwartz did not have a random sample of engagement contracts used in patent cases to consider. But his conclusions are consistent with both the examples discussed above and with reports found in patent blogs, case reports, and other publications. For example, the following passage appeared in Matt Cutler, *Contingent Fee Patent Litigation, and Other Options*.

> *Contingent Fee Arrangements*: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid from damages obtained in a verdict or settlement. Typically, the law firm will receive

> between 33-50% of the recovered damages, depending on several factors—a strictly results-based system.

Matt Cutler, *Contingent Fee Patent Litigation, and Other Options*, PATENT LITIGATION, http://ipr-pgr.com/patent-litigationlaw-updates/cost-contained-u-s-patent-litigation. Mr. Culter's observation that fees sometimes run as high as 50 percent comports with Professor Schwartz's finding that the average rate through appeal was 40.2 percent.

56. Sophisticated clients sometimes use scales of percentages in patent cases, but when they do the percentages seem not to fall below 25 percent. *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP, et al.*, 105 S.W.3d 244 (Tex. Appls.—Houston, 2003), provides an example. There, a sophisticated client "agreed to pay the [l]awyers a contingency fee pursuant to a sliding scale: 25% of the first $32 million recovered by Tanox, 33 1/3% of recovery from $32 million to $60 million, 40% of recovery from $60 million to $200 million, and 25% of recovery over $200 million." *Id*. at 248-249. The agreement also contained other provisions favorable to the lawyers, including a promise of "$100 million if they obtained a permanent injunction." "The total fees Tanox agreed to pay the Lawyers were capped at $500 million and the total fees derived from royalties were capped at $300 million." *Id*. at 249. Like NTP in the *Blackberry* litigation, Tanox agreed to pay both high percentages and a potentially enormous amount.

3. Contingent Fees In Other Commercial Litigations

57. Turning from patent lawsuits to matters of other types, many examples show that compensation as a significant percentage of recovery is common. In 2012, the U.S. Court of Appeals for the Tenth Circuit decided a case involving a dispute over the fee that a business client owed the law firm of Susman & Godfrey (S&G). S&G had handled an oil and gas matter for the client on the following terms. "Under the Fee Agreement, [the client] agreed to pay [S&G] 30% 'of the sum recovered by settlement or judgment,'" subject to caps based on when the lawsuit was

resolved. *Grynberg Production Corp. v. Susman Godfrey, L.L.P.*, No. 10-1248, 2012 U.S. App. LEXIS 3316, at *2 (10th Cir. February 16, 2012). "[T]he Fee Agreement capped fees at $50 million if the case settled within one year after the action was filed." *Id.* The fee agreement thus entitled S&G to be paid $50 million for a year's worth of work—and that is what an arbitrator decided S&G should receive, subject to an offset of less than $2 million that, for present purposes, is irrelevant. The Tenth Circuit affirmed the fee award.

58. Based on what lawyers who write about fee arrangements in business cases have said, contingent percentages of one-third or more remain common today. In 2011, THE ADVOCATE, a journal produced by the Litigation Section of the State Bar of Texas, published a symposium entitled "Commercial Law Developments and Doctrine." It included an article on alternative fee arrangements, according to which:

> A pure contingency fee arrangement is the most traditional alternative fee arrangement. In this scenario, a firm receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the contingency is approximately 33%, with the client covering litigation expenses; however, firms can also share part or all of the expense risk with clients. Pure contingency fees, which are usually negotiated at approximately 40%, can be useful structures in cases where the plaintiff is seeking monetary or monetizable damages. They are also often appropriate when the client is an individual, start up, or corporation with limited resources to finance its litigation. Even large clients, however, appreciate the budget certainty and risk-sharing inherent in a contingent fee arrangement.

Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*, 66 THE ADVOCATE (TEXAS) 20 (2011).

59. I could add examples to those already discussed, but the point has been made. All of the evidence suggests that a fee equal to one-third of the recovery award is an amount that a sophisticated business client would willingly have agreed to pay Plaintiff's Counsel at the outset of litigation. Sophisticated clients pay such percentage fees when the risks and costs of litigation warrant the expenditure, because they are better off hiring lawyers at market rates than giving up

on their claims. To be clear, I am not saying that sophisticated business clients always pay fees in this range; they will pay less when they can hire competent lawyers on more attractive terms. The point is just that they know how the market for legal services works: risks require offsetting rewards.

4. Two Exceptions

60. I mentioned at the outset that there are two exceptions to the rule that sophisticated clients typically pay fees within the 25-40 percent range, with fees of 33.33-40 percent being especially common. One exceptional category includes personal injury lawsuits brought in the wake of commercial airplane accidents. In these cases, fees are said to fall near 20 percent because the defendants usually concede liability, leaving only damages to be proven. Because liability is routinely denied in class actions of all types, and obviously was vigorously contested here, airplane accident cases are irrelevant.

61. The other exceptional category encompasses securities fraud class actions led by public pension funds. In these cases, fee percentages are sometimes lower and declining scales are sometimes employed. Nothing should be inferred from these cases, however, for two reasons.

62. First, public pension funds are politically-controlled and may have agendas that deviate from maximizing class members' recoveries. Professor John C. Coffee, Jr., the country's leading authority on class action lawsuits, previously made this point by offering political pressure as the explanation for public pension funds' unique behavior.

> I am aware that "declining" percentage of the recovery fee formulas are used by some public pension funds, serving as lead plaintiffs in the securities class action context. However, I have never seen such a fee contract used in the antitrust context; nor, in any context, have I seen a large corporation negotiate such a contract (they have instead typically used straight percentage of the recovery formulas). My belief is that public pension funds prefer the "declining percentage" formula largely for political reasons, while private corporations disdain such formula for economic reasons. That is, public pension funds are frequently administered by elected political officials who are potentially subject to media and

> political criticism for conferring "windfall" fees on their attorneys. Necessarily, they seek to avoid criticism, and the declining percentage formula seems primarily a defensive strategy to protect political officials from such criticism. Corroborating this conclusion is the rareness of its use by private corporations (as Coca-Cola, PepsiCo and Admiral Beverage have implicitly confirmed in this case [by paying straight percentage fees in the typical range].

Declaration of John C. Coffee, Jr., submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004), ¶ 22. According to Professor Coffee, then, public pension funds do themselves and other investors a disservice by using inferior fee arrangements. They may look good on paper because they appear to be keeping lawyers' fees low, but they actually endanger investors.

63. *In re Merry-Go-Round Enterprises, Inc*., 244 B.R. 327 (D. Md. 2000), where the court concluded that the market price for the legal services supported a 40% fee, provides an example supporting Professor Coffee's assessment that the market is not fond of declining percentage scales. There, the bankruptcy trustee wanted to assert claims against Ernst & Young. He looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40 percent of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees, 21 times its lodestar. The bankruptcy judge granted the request, writing: "Viewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." 244 B.R. 327 at 335. The court's logic is impeccable.

64. Second, this case was tried to the Court, which entered judgment for the Plaintiff and other ERISA beneficiaries. No system of declining incentives is likely to make sense when a case is tried. Ordinarily, contingent fee contracts increase lawyers' compensation as more advanced procedural stages like trial are reached.

5. Awards in Similar Cases

65. In a study of all federal class actions that settled in 2006 or 2007, Professor Brian Fitzpatrick confirmed that the range of fee awards mirrors the private market fairly well. He found that the vast majority of fee awards (exclusive of costs) ran from 25 percent of the recovery to 40 percent, and that more awards fell into the 30-35 percent range than any other. Brian T. Fitzpatrick, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 811, 834 Fig. 4 (2010). Common fund fee awards equal to one-third of class action recoveries are exceedingly common.

66. Professor Fitzpatrick also found that the average fee award in employee benefit class actions—which includes only ERISA cases—was 26 percent. *Id*., Table 8. The unpublished study by Professors Eisenberg, Miller, and Germano, *supra*, at Table 4, found the identical fee percentage for these cases.

67. Of course, when the average award is 26 percent, there are many, many awards in the one-third range too. Examples of ERISA cases in which courts awarded one-third of the monetary recovery as fees include *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066 (M.D.N.C. Sept. 29, 2016) (awarding plaintiffs' counsel one-third of $32 million settlement); *Spano v. The Boeing Company*, No. 06-743, 2016 WL 3791123 (S.D. Ill. Mar. 31, 2016) (awarding plaintiffs' counsel one-third of $57 million settlement); *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475 (S.D. Ill. July 17, 2015) (awarding plaintiffs' counsel one-third of $62 million settlement); *Krueger v. Ameriprise Financial*, No. 11-2781, 2015 WL 4246879 (D. Minn. July 13, 2015) (awarding plaintiffs' counsel one-third of $27.5 million settlement); *Beesley v. Int'l Paper Co.*, No. 06-703-DRH, 2014 WL 375432 (S.D. Ill. Jan. 31, 2014) (awarding plaintiffs' counsel one-third of $30 million settlement). The judges who granted these awards recognized that a one-third free was appropriate given the risks the lawyers incurred,

the results they obtained, the effort they expended, and the prevailing market rate. These considerations support a fee of the same size in this case.

68. A fee of one-third of the recovery here would result in a multiplier of approximately 3.5, based on current hourly rates. The Court has discretion to approve a lodestar multiplier of this size. Typical multipliers range from one to four depending on the facts, with many courts awarding multipliers larger than four on case-specific grounds. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 & n. 6 (9th Cir. 2002) (awarding 3.65 multiplier from $96.9 million settlement fund, and noting standard one to four multiplier range); *Newberg on Class Actions* § 14.6 (4th ed. 2009) ("multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied").

69. I mentioned above that Plaintiff's Counsel have not requested any fee for securing a statutory fee award from the Defendant. They could have included a fee-on-the-fee-award in their common fund request, because the statutory fee award is just another remedy that increases the ERISA beneficiaries' recovery. The Supreme Court said as much in *Evans v. Jeff D.*, 475 U.S. 717 (1986), a civil rights case in which the question was whether the class' right to a statutory fee award could be waived in a settlement. The Court answered affirmatively because "Congress … added [fee awards] to the arsenal of remedies available to combat violations of civil rights" for the same reason it provided for damages and injunctive relief—to "promot[e] respect for civil rights." *Jeff D.*, 475 U.S. at 731-732. Those other forms of relief could be waived, so the right to a statutory fee award could too.

70. Given that a statutory fee award is just another remedy, then its value should be included in the numerator to which the fee percentage is applied. For example, if the statutory fee award here is $3 million, the gross recovery will be approximately $32.7 million, one-third of

which would equal $10.9 million. In fact, Plaintiff's Counsel have requested only $9.9 million—one-third of $29.7 million—$1 million less. Assuming a $3 million statutory fee award, then, the common fund fee request actually equals 30 percent of the gross recovery. The reasonableness of this amount is plain.

71. The Fourth Circuit tends to award fee percentages in keeping with those in other circuits. According to the unpublished study by Professors Eisenberg, Miller, and Germano, *supra*, at Table 3, the average class action recovery over the 2009-2013 period was $25 million and the average common fund fee award was 26 percent. This figure is very close to the 25.2 percent figure found by Professor Fitzpatrick, *supra*, Table 9. I note that most of the fees paid under common fund awards result from settlement, not judgment. Plaintiff's Counsel took considerably more risk than in most cases by trying this case.

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

DATED: April 10, 2017

CHARLES SILVER

EXHIBIT 1: RESUME OF PROFESSOR CHARLES SILVER

CHARLES SILVER

I. CONTACT INFORMATION

Co-Director, Center on Lawyers, Civil Justice and the Media
School of Law
University of Texas
727 East Dean Keeton Street
Austin, Texas 78705

(512) 232-1337 (voice)

II. ACADEMIC EMPLOYMENTS

School of Law, University of Texas at Austin, 1987-Present
- Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure
- W. James Kronzer Chair in Trial & Appellate Advocacy
- Cecil D. Redford Professor
- Robert W. Calvert Faculty Fellow
- Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow
- Assistant Professor

Harvard Law School, Fall 2011
- Visiting Professor

Vanderbilt University Law School, Fall 2003
- Visiting Professor

University of Michigan Law School, Fall 1994
- Visiting Professor

University of Chicago, 1983-1984
- Managing Editor, Ethics: A Journal of Social, Political and Legal Philosophy

III. EDUCATION

Yale Law School, JD (1987)
University of Chicago, MA (Political Science) (1981)
University of Florida BA (Political Science) 1979

IV. PUBLICATIONS

SPECIAL PROJECTS

Associate Reporter, American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, (2010) (with Samuel Issacharoff, Reporter, and Robert Klonoff and Richard Nagareda, Associate Reporters).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, REPORT ON CONTINGENT FEES IN CLASS ACTION LITIGATION, 25 Rev. Litig. 459 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, REPORT ON CONTINGENT FEES IN MASS TORT LITIGATION, 42 Tort Trial & Insurance Practice Law Journal 105 (2006), available at http://www.jstor.org/stable/25763828

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, REPORT ON CONTINGENT FEES IN MEDICAL MALPRACTICE LITIGATION (2004) available at http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf; published at 25 Rev. Litig. 459 (2006).

Co-Reporter, International Association of Defense Counsel PRACTICAL GUIDE FOR INSURANCE DEFENSE LAWYERS (2002) (with Ellen S. Pryor and Kent D. Syverud, Co-Reporters); published on the IADC website (2003); revised and distributed to all IADC members as a supplement to the Defense Counsel J. (2004).

BOOKS

AFTER OBAMACARE: MAKING AMERICAN HEALTHCARE BETTER AND CHEAPER (with David A. Hyman), Cato Institute (forthcoming 2018)

MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHAT IT DOES, AND WHY TORT REFORM HASN'T HELPED (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage) (in progress).

HEALTH LAW AND ECONOMICS, Vols. I and II (Edward Elgar 2016) (coedited with Ronen Avraham and David A. Hyman).

LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, 2nd Edition (2012) (with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley) (updated annually).

PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (2012) (with William T. Barker) (updated annually).

ARTICLES BY SUBJECT AREA (* INDICATES PEER REVIEWED)

Health Care Law & Policy

1. "It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and Healthcare Spending," in I. Glenn Cohen, Allison Hoffman, and William M. Sage, eds., OXFORD HANDBOOK OF AMERICAN HEALTH LAW (forthcoming 2016) (with David A. Hyman).*

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

3. **"**Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation," 63 DePaul L. Rev. 574 (2014) (with David A. Hyman) (invited symposium).

4. "Five Myths of Medical Malpractice," 143:1 Chest 222-227 (2013) (with David A. Hyman).*****

5. "Health Care Quality, Patient Safety and the Culture of Medicine: 'Denial Ain't Just A River in Egypt,'" (coauthored with David A. Hyman), 46 New England L. Rev. 101 (2012) (invited symposium).

6. "Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?" in Ken Oliphant & Richard W. Wright, eds., MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE (2013) (coauthored with David A. Hyman)*; originally published in 87 Chicago-Kent L. Rev. 163 (2012).

7. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman).*****

8. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

9. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

10. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

11. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?" 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

12. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

13. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

14. "The Case for Result-Based Compensation in Health Care," 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).*****

Empirical Studies of Medical Malpractice

15. "Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010**,"** 13 J. Empirical Legal Stud. 183 (2016) (with Bernard S. Black, David A. Hyman, and Mohammad H. Rahmati).

16. "Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance," 5 U.C. Irvine L. Rev. 559 (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik) (invited symposium).

17. "Does Tort Reform Affect Physician Supply? Evidence from Texas," Int'l Rev. of L. & Econ. (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik), available at http://dx.doi.org/10.1016/j.irle.2015.02.002.*****

18. "How do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform? Evidence From Texas" (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage), Amer. L. & Econ. Rev. (2012), doi: 10.1093/aler/ahs017.*****

19. "Will Tort Reform Bend the Cost Curve? Evidence from Texas" (with Bernard S. Black, David A. Hyman, Myungho Paik), 9 J. Empirical Legal Stud. 173-216 (2012).*****

20. "O'Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers," 7 J. Empirical Legal Stud. 379 (2010) (with Bernard S. Black and David A. Hyman).*****

21. "The Effects of 'Early Offers' on Settlement: Evidence From Texas Medical Malpractice Cases, 6 J. Empirical Legal Stud. 723 (2009) (with David A. Hyman and Bernard S. Black).*****

22. **"**Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," 1 J. Legal Analysis 355 (2009) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue).*****

23. "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate (Texas) 25 (2008) (with Bernard S. Black and David A. Hyman) (invited symposium).

24. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 3 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with Bernard S. Black, David A. Hyman, William M. Sage and Kathryn Zeiler).*****

25. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," 36 J. Legal Stud. S9 (2007) (with Bernard S. Black, David A. Hyman, William M. Sage, and Kathryn Zeiler).*****

26. "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003," J. Empirical Legal Stud. 3-68 (2007) (with Bernard S. Black, David A. Hyman, William M. Sage, and Kathryn Zeiler).*****

27. "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," 2 J. Empirical Legal Stud. 207–259 (July 2005) (with Bernard S. Black, David A. Hyman, and William S. Sage).*****

Empirical Studies of the Law Firms and Legal Services

28. "Medical Malpractice Litigation and the Market for Plaintiff-Side Representation: Evidence from Illinois," 13 J. Empirical Stud. 603-636 (2016) (with David A. Hyman, Mohammad Rahmati, Bernard S. Black).*

29. "The Economics of Plaintiff-Side Personal Injury Practice," U. Ill. L. Rev. 1563 (2015) (with Bernard S. Black and David A. Hyman).

30. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 Fordham Urb. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

31. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 Amer. Law & Econ. Rev. 185 (2008) (with Bernard S. Black, David A. Hyman, and William M. Sage).*****

Attorneys' Fees—Empirical Studies and Policy Analyses

32. "The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status Report on Securities Fraud Class Actions," RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, Sean Griffith, Jessica Erickson, David H. Webber, and Verity Winship, Eds. (forthcoming 2017).

33. "Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions," 115 Columbia L. Rev. 1371 (2015) (with Lynn A. Baker and Michael A. Perino).

34. "Regulation of Fee Awards in the Fifth Circuit," 67 The Advocate (Texas) 36 (2014) (invited submission).

35. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66 Vanderbilt L. Rev. 1677 (2013) (with Lynn A. Baker and Michael A. Perino).

36. "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal," 63 Vanderbilt L. Rev. 107 (2010) (with Geoffrey P. Miller).

37. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul L. Rev. 471 (2008) (with Sam Dinkin) (invited symposium), reprinted in L. Padmavathi, Ed., SECURITIES FRAUD: REGULATORY DIMENSIONS (2009).

38. "Reasonable Attorneys' Fees in Securities Class Actions: A Reply to Mr. Schneider," 20 The NAPPA Report 7 (Aug. 2006).

39. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006).

40. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

41. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

42. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

43. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

Liability Insurance and Insurance Defense Ethics

44. "The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique," 68 Rutgers U. L. Rev. 83 (2015) (with William T. Barker) (symposium issue).

45. "The Basic Economics of the Duty to Defend," in D. Schwarcz and P. Siegelman, eds., RESEARCH HANDBOOK IN THE LAW & ECONOMICS OF INSURANCE 438-460 (2015).*****

46. "Insurer Rights to Limit Costs of Independent Counsel," ABA/TIPS Insurance Coverage Litigation Section Newsletter 1 (Aug. 2014) (with William T. Barker).

47. "Litigation Funding Versus Liability Insurance: What's the Difference?," 63 DePaul L. Rev. 617 (2014) (invited symposium).

48. "Ethical Obligations of Independent Defense Counsel," 22:4 Insurance Coverage (July-August 2012) (with William T. Barker), available at http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html.

49. "Settlement at Policy Limits and The Duty to Settle: Evidence from Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard S. Black and David A. Hyman).*****

50. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

51. "Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

52. "Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases," 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

53. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

54. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

55. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

56. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6 Coverage 47 (1996) (with Michael Sean Quinn).

57. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6 Coverage 21 (1996) (with Michael Sean Quinn).

58. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud); reprinted in IX INS. L. ANTHOL. (1996) and 64 Def. L. J. 1 (Spring 1997).

59. "Wrong Turns on the Three Way Street: Dispelling Nonsense about Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

60. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

61. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994); reprinted in Practicing Law Institute, INSURANCE LAW: WHAT EVERY LAWYER AND BUSINESSPERSON NEEDS TO KNOW (1998).

62. "A Missed Misalignment of Interests: A Comment on *Syverud, The Duty to Settle*," 77 Va. L. Rev. 1585 (1991); reprinted in VI INS. L. ANTHOL. 857 (1992).

Class Actions, Mass Actions, and Multi-District Litigations

63. "What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on *Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*," 5 J. of Tort L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited symposium).

64. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 Fordham L. Rev. 1985 (2011) (invited symposium).

65. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda).*****

66. "A Rejoinder to *Lester Brickman, On the Theory Class's Theories of Asbestos Litigation,"* 32 Pepperdine L. Rev. 765 (2005).

67. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

68. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

69. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

70. "Representative Lawsuits & Class Actions," in B. Bouckaert & G. De Geest, eds., INT'L ENCY. OF L. & ECON. (1999).*****

71. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

72. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

73. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

74. "Justice in Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman).*****

General Legal Ethics and Civil Litigation

75. "A Private Law Defense of the Ethic of Zeal" (in progress), available at http://ssrn.com/abstract=2728326.

76. "The DOMA Sideshow" (in progress), available at http://ssrn.com/abstract=2584709.

77. "Fiduciaries and Fees," 79 Fordham L. Rev. 1833 (2011) (with Lynn A. Baker) (invited symposium).

78. "Ethics and Innovation," 79 George Washington L. Rev. 754 (2011) (invited symposium).

79. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

80. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

81. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

82. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

83. "What's Not To Like About Being A Lawyer?" 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

84. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

85. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

86. "Bargaining Impediments and Settlement Behavior," in D.A. Anderson, ed., DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (1996) (with Samuel Issacharoff and Kent D. Syverud).

87. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

88. "Do We Know Enough about Legal Norms?" in D. Braybrooke, ed., SOCIAL RULES: ORIGIN; CHARACTER; LOGIC: CHANGE (1996) (invited contribution).

89. "Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas," 58 Law and Contemporary Problems 213 (1995) (with Amon Burton, John S. Dzienkowski, and Sanford Levinson,).

90. "Thoughts on Procedural Issues in Insurance Litigation," VII INS. L. ANTHOL. (1994).

Legal and Moral Philosophy

91. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987).*****

92. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985).*****

93. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984).*****

Practice-Oriented Publications

94. "Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996).

95. "Getting and Keeping Clients," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996) (with James M. McCormack and Mitchel L. Winick).

96. "Advertising and Marketing Legal Services," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

97. "Responsibilities of Senior and Junior Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

98. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

Miscellaneous

99. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro).*****

V. PERSONAL

Married to Cynthia Eppolito, PA; Daughter, Katherine; Step-son, Mabon.

Consults with attorneys and serves as an expert witness on subjects in his areas of expertise.

First generation of family to attend college.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TIM P. BRUNDLE, on behalf of the Constellis Employee Stock Ownership Plan, **Plaintiff,** **v.** **WILMINGTON TRUST, N.A., as successor to WILMINGTON TRUST RETIREMENT AND INSTITUTIONAL SERVICES COMPANY,** **Defendant.**	**Civil Action No. 1:15-cv-1494 (LMB/IDD)**

Declaration of Gregory Y. Porter

I, Gregory Y. Porter, declare as follows:

1. I am a partner at the law firm Bailey & Glasser LLP ("Bailey & Glasser"). I am also Plaintiff's lead counsel in this action. If called as a witness, I would and could competently testify to these facts.

2. I submit this declaration in support of Plaintiff's Motion for Attorneys' Fees and Costs, and Plaintiff's Counsel's Motion for Attorney's Fees and Reimbursement of Expenses.

3. I have over twenty years of experience. My experience serving as lead or co-lead counsel in ERISA class actions was detailed in the Declaration of Gregory Y. Porter submitted in support of Plaintiff's Motion for Class Certification. (Dkt. 56-13) and an updated biography is attached hereto as Exhibit 1. A select group of cases in which I have acted as lead or co-lead counsel in ERISA actions includes: (i) *Jessop v. Larsen*, 14-cv-00916 (D. Utah) (employee stock

ownership plan settlement with trustee and individual defendants for $19.8 million); (ii) *Diebold v. Northern Trust Investments, N.A.*, 09-cv-1934 (as co-lead counsel, secured a $36 million cash settlement on behalf of hundreds of ERISA retirement plans who complained about mismanagement of class collateral pools); (iii) *Glass Dimensions, Inc. v. State Street Bank and Trust Co.*, 10-10588 (D. Mass.) (class action about securities lending fees settled for $10 million in 2014); (iv) *Figas v. Wells Fargo*, 08-04546 (D. Minn.) (recovered $17.5 million in case alleging investment conflicts of interest); (v) *In re CMS Energy ERISA Litig.*, 02-cv-72834 (E.D. Mich.) (recovered $28 million for employees in case alleging imprudent investment in employer stock); (vi) *Sherrill v. Federal Mogul Corp.*, 04-cv-72949 (E.D. Mich.) (recovered over $14 million for employees in case alleging imprudent investment in employer stock); (vii) *Tittle v Enron Corp.*, 01-cv-3913 (S.D. Tex.) (represented Jeffrey Skilling, Chief Executive Officer of Enron Corp., in landmark ERISA case alleging imprudent investment of 401(k) plan savings in Enron stock); (viii) *Dupree v. The Prudential Ins. Co. of Am.*, No. 99-8337 (S.D. Fla.) (successfully defended Prudential in trial of first impression involving claims that Prudential breached its duties by causing its own employee retirement plan to purchase investment products from Prudential).

4. Over the past year, Bailey & Glasser's efforts on behalf of ESOP participants have resulted in: (1) a settlement of $19.8 million (*Jessop v. Larsen*, 14-cv-00916 (D. Utah)); (2) a reversal of a dismissal in the Seventh Circuit, establishing important law for ESOP participants and beneficiaries (*Allen v. GreatBanc Trust Co.*, 835 F.3d 670 (7th Cir. 2016)); and (3) the $29.8 million judgment in this lawsuit. These cases require an enormous investment of time and resources, with expert expenses approaching half a million dollars to litigate and try a case. These cases require deep subject matter expertise in ERISA and understanding of complex corporate transactions and private company valuations.

5. Plaintiff and the Plan were also represented by attorneys Brian A. Glasser, Ryan T. Jenny, Athanasios Basdekis and Patrick Muench, and paralegals Melissa C. Kestner-Clay and Loc Le.

6. Mr. Glasser's biography is attached hereto as Exhibit 2. Mr. Glasser has over 22 years of experience. A selection of Mr. Glasser's recent relevant experience includes: (i) *Krakauer v. Dish Network, LLC,* 14-cv-00333, (M.D.N.C.) (obtained, as lead trial counsel, a verdict on behalf of a class of consumers of approximately $20.5 million against DISH Network, Inc., for over 51,000 violations of the Telephone Consumer Protection Act); *Gatling Ohio, LLC v. Alleghany Energy Supply Company, LLC,* 13CVH06-6206 (Oh. Ct. Common Pleas, Franklin Cty.) (obtained, as lead trial counsel, a verdict for more than $2 million against Allegheny Energy, Inc., in a uniform commercial code case over breach of a contract for the sale of goods); *Kirschner v. Blixseth*, CV-11-8283 (C.D. Cal.) (obtained, as Trustee of the Yellowstone Club Liquidating Trust, judgment against Tim Blixseth for $219.8 million for breach of a promissory note contract); *Charron v. Sallyport Global Holdings, Inc.*, 12-cv-06837 (S.D.N.Y.) (obtained, as lead trial counsel, a $21.1 million dollar verdict against Sallyport Global Holdings, Inc., in a breach of contract valuation case); *Dynamic Energy v. International Industries,* 11-C-82-O (Cir. Ct. of Logan Cty., W. Va.) (lead counsel defending International Industries Inc. from a $127m breach of contract claim. After five years of litigation, the Court limited the plaintiff's maximum recovery to $2 million and the case was quickly resolved).

7. The biographies of Mr. Jenny, who has over sixteen years of experience, Mr. Basdekis, who has over nineteen years of experience, and Mr. Muench, who has over ten years of experience, are attached hereto as Exhibits 3-5, respectively. Collectively, Plaintiff's Counsel have

many decades of experience prosecuting complex commercial actions, class actions and ERISA actions.

8. As lead trial counsel, I personally managed, delegated, and supervised the allocation of personnel and expenses. We have aggressively and vigorously prosecuted this case and represented the best interests of the Plaintiffs and the participants and beneficiaries of the Constellis Employee Stock Ownership Plan (the "Plan"). To date, we have performed over almost 5,700 hours of work and incurred over $640,000 in expenses to investigate, prosecute and successfully try the claims in this action. We kept regular, contemporaneous records of our time and expenses incurred on behalf of the Plaintiffs. The categories of expenses sought to be reimbursed are broken down as follows:

Expense Category	Amount
Court Reporting Costs	$46,089.13
Document Hosting Costs	$9,201.10
Expert Witness Costs	$418,981.98
Fees, Filing, Service of Process, Pro Hac Vice	$2,794.50
Legal Research	$13,691.50
Document Copying, Postage, FEDEX, Courier	$41,052.14
Travel, Lodging and Meals	$95,578.37
Miscellaneous	$14,968.50
Taxable Costs	$1,227.28
TOTAL	**$643,584.50**

9. The time records do not include hours billed by timekeepers who billed fewer than ten hours to the lawsuit; work performed by summer associates; work performed in connection with Mr. Halldorson's appeal; and time for more than one attorney appearing at a deposition.

10. Over 5,600 hours performed to date does not include any of the work performed by Plaintiff's Counsel seeking reasonable attorneys' fees and expenses in this matter. Likewise, none

of the expenses sought to be reimbursed include any expenses incurred relating to seeking reasonable attorneys' fees and expenses in this matter.

11. The hourly rates of timekeepers reflect the hourly rates that they bill in similar matters and engagements.

12. Had Plaintiff included all time billed to this matter, the fees would have totaled approximately $3.15 million. After the adjustments identified above, Plaintiff seeks a fee award for his benefit and the benefit of the Plan in the amount of 2,815,729.50.

13. Plaintiff's Counsel only spent the time necessary to effectively prosecute this case, and attempted to avoid duplication of efforts.

14. Plaintiff's Counsel received from Defendant and third parties, and subsequently reviewed, approximately 20,000 documents.

15. The expenses pertaining to this case are reflected in the books and records of my firm. These books and records are prepared from expense vouchers, check records and other documents, and are an accurate record of the expenses incurred in the prosecution of this matter.

16. In this matter, the representation agreement between Plaintiff Tim P. Brundle and Plaintiff's Counsel provided for payment of attorneys' fees up to one-third (33.33%) of the gross value of any monetary award obtained after the litigation costs advanced by the attorneys are deducted.

17. Details and material supporting the time records and expenses referenced in this declaration are available upon the request of the Court and have been provided to Defendant.

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

Executed this 10th day of April, 2017 at Washington, District of Columbia.

By: /s/ Gregory Y. Porter
Gregory Y. Porter

EXHIBIT 1

BAILEY GLASSER LLP

Attorney
1054 31st Street, NW
Suite 230
Washington, DC 20007
T: 202.463.2101
F: 202.463.2103
gporter@baileyglasser.com

Practices
- High Stakes Litigation
  - Complex Commercial Litigation
  - Class Actions-Mass Torts
  - Labor, Employment and Employee Benefits
  - Whistleblower-False Claims Act

Gregory Y. Porter

Biography

Greg is a partner at Bailey & Glasser. He has extensive experience litigating complex pension, consumer fraud, insurance sales, and RICO class actions in federal and state courts throughout the United States. Greg has sued and represented many Fortune 500 companies in class actions under the federal Employee Retirement Income Security Act (ERISA). Greg also represents whistleblowers in qui tam, securities, and commodities frauds.

Greg currently represents employees in several retirement plan class actions, including claims that large financial institutions have limited employee 401(k) plan investment options to inferior in-house mutual funds, that fiduciaries of 401(k) plans have imprudently invested employee retirement savings in employer stock, and that financial institutions have mismanaged securities lending programs. Greg has also defended companies, trustees and individuals in several landmark cases. Greg has argued ERISA appeals in the Second, Fourth, Sixth and Eighth United States Circuit Courts of Appeal.

Greg is a member of the Employee Benefits Committee of the American Bar Association's Labor and Employment Section. He is a contributing author to the Committee's respected treatise on employee benefits law and a former co-chair of the Committee's Preemption and Benefit Claims sub-committees. He is a regular speaker at the Committee's annual meeting and speaks at other conferences about employee benefits litigation, including the American Conference Institute's annual ERISA conference. Greg served for four years in the United States Infantry, including 18 months on the DMZ in Korea.

Professional Involvement

Bar Admissions
District of Columbia, 1998
Commonwealth of Virginia, 1996

Prior Experience
Prior to joining the firm in March 2009, Mr. Porter was a partner at McTigue & Porter, LLP. Before joining McTigue & Porter, Greg practiced in the Washington office of O'Melveny & Myers LLP for six years, where he focused on employee benefit and complex class actions.

Court Admissions
U.S. Circuit Court of Appeals for the First Circuit
U.S. Circuit Court of Appeals for the Second Circuit
U.S. Circuit Court of Appeals for the Third Circuit
U.S. Circuit Court of Appeals for the Fourth Circuit
U.S. Circuit Court of Appeals for the Sixth Circuit

U.S. Circuit Court of Appeals for the Eighth Circuit
U.S. District Court for the District of Columbia
U.S. District Court for the Northern District of Ohio
U.S. District Court for the Eastern District of Virginia

Cases

National City Corp., Securities, Derivative & ERISA Litigation
Recovered $43 million for class members in settlement of breach of fiduciary duty claims for mismanaging 401(k) plan investments.

Figas v. Wells Fargo & Company
Serving as co-lead counsel, we recovered $17.5 million in settlement of breach of fiduciary duty claims against Wells Fargo & Co. for mismanaging Wells Fargo 401(k) plan.

Glass Dimensions, Inc. v. State Street Bank & Trust Co.
Obtained class certification on behalf of 1,500 retirement plans invested in over 250 collective investment funds claiming excessive fees in securities lending; the parties later reached a proposed $10 million settlement; final approval pending.

Bilewicz v. Fidelity Investments
Bailey & Glasser was named co-lead counsel representing nearly 100,000 current and former employees of Fidelity, who had been compelled to invest in Fidelity mutual funds despite the availability of better, cheaper investment options. The case settled for $12 million plus reforms to Fidelity's employee 401(k) plan.

Diebold v. Northern Trust
As co-lead counsel, Bailey & Glasser secured a $36 million cash settlement on behalf of hundreds of ERISA retirement plans who complained about mismanagement of class collateral pools.

Brundle v. Wilmington Trust
Bailey & Glasser recovered $30 million for the participants in the Constellis Employee Stock Ownership Plan following a two-week trial. The court's decision set important new standards for ESOP trustees representing plans and participants in ESOP transactions.

Jessop v. Larsen
In 2016 Bailey & Glasser negotiated a settlement under which the former top officers and owners of once-high flying nutritional juice company MonaVie, and plan trustee Bankers Trust Co. of South Dakota, agreed to pay $19.8 million to settle a lawsuit over an employee stock program that lost nearly all of its value within about two years. Bankers Trust also agreed to a permanent injunction barring it from serving as an ESOP trustee. Notably, we recovered well more than the available insurance coverage from the defendants.

Education

- J.D., 1996; Order of the Coif; Articles Editor, Southern California Law Review; Paralyzed Veterans of America Scholarship; Teaching and Research Assistant - University of Southern California School of Law
- B.A., History, 1989; Winning History Department Essay, 1988 - University of Massachusetts at Amherst

EXHIBIT 2

BAILEY GLASSER LLP

Attorney
1054 31st Street, NW
Suite 230
Washington, DC 20007
T: 202-463-2101
F: 202-463-2103
bglasser@baileyglasser.com

Practices
- High Stakes Litigation
  - Complex Commercial Litigation
  - Energy and Environment
  - Insolvency & Bankruptcy
  - Products Liability-Personal Injury
  - Criminal Defense and Internal Investigations
- Corporate & Finance

Brian A. Glasser

Biography

Brian, a Rhodes Scholar and a founding partner in the firm, started his career as purely a civil and criminal trial and appellate lawyer. He has tried cases in eight states and been personally involved in litigation in twenty-six states. His consistent involvement in high-stakes commercial litigation expanded his practice to include negotiating and managing the execution of billions of dollars worth of business transactions.

Today, Brian maintains a diverse practice. While managing and supervising many of the firm's lawyers, he remains deeply involved in our clients' most pressing issues. Brian has been featured in a variety of publications throughout his career, including the articles listed here:

- Yellowstone Club Trustee Offers Bounty to Find Blixseth's Missing Millions
- Objections Overruled – Court is in Session with Legal Powerhouse Brian Glasser
- Bailey & Glasser – A Different Kind of Legal Powerhouse
- Attorney Charges Into Legal Arena

Here are a few examples of Brian's work:

2017

- Obtained, as co-trial counsel, a verdict on behalf of ERISA plan participants of approximately $29.7m against Wilmington Trust for breach of fiduciary duty in the valuation and purchase of a defense contractor on behalf of an ESOP plan. Memorandum Opinion
- Obtained, as lead trial counsel, a verdict on behalf of a class of consumers of approximately $20.5m against DISH Network, Inc., for over 51,000 violations of the Telephone Consumer Protection Act for calling numbers protected by the National Do Not Call registry. Verdict Sheet
- Obtained, as lead trial counsel, a verdict for more than $2m against Allegheny Energy, Inc., in a uniform commercial code case over breach of a contract for the sale of goods.

2016

- In the Yellowstone Mountain Club case discussed below, the United States Court of Appeals for the Ninth Circuit rejected all defendant Tim Blixseth's challenges to the verdict and reversed the trial court's reduction to $40m, reinstating the original fraud judgment for more than $286m.
- In the Yellowstone Mountain Club BLX case discussed below, the United States Court of Appeals for the Ninth Circuit upheld the trial court's breach of contract judgment for over $219m against Tim Blixseth.
- In the Charron case discussed below, the United States Court of Appeals for the Second Circuit upheld the trial court verdict against Sallyport Global Holdings, Inc. for more than $21m.

2015

- Lead counsel to Foresight Reserves, L.P., in the sale of a non-controlling 50% interest in its subsidiary Foresight Energy L.P. (NYSE: FELP) to Murray Energy Corporation for $1.375 billion.
- Lead counsel to Kameron Collieries ULC in its acquisition of 100% of the Donkin Project, a large undeveloped coal reserve in the Cape Breton region of Nova Scotia, Canada, from Glencore Xstrata, a global mining and trading company based out of Barr, Switzerland and Morien Resources Corporation, a Canadian royalty company.

2014

- Obtained, as Trustee of the Yellowstone Club Liquidating Trust, judgment against Tim Blixseth for $219.8 million for breach of a promissory note contract.
- Served as counsel to Foresight Reserves, L.P., in the $2.4 billion initial public offering of common units of its subsidiary Foresight Energy Partners, L.P. (NYSE: FELP). https://www.youtube.com/watch?v=5FnxjsLh7Cg
- Obtained, as lead trial counsel, a $21.1 million dollar verdict against Sallyport Global Holdings, Inc., in a breach of contract valuation case in federal court in New York City. Published Decision »

2013

- Counsel to Foresight Energy LLC in connection with its $1.55 billion refinancing, involving a bond, term loan and revolver combination.
- Served as Trustee for the Yellowstone Club Liquidating Trust.

2012

- Served on the Board of Directors of Tory Burch, LLC as the Chris Burch designee during the period of a contentious dispute over investor rights. The case was resolved by agreement.
- Counsel to the issuer in Foresight Energy LLC's $200m bolt-on financing.

2011

- Lead counsel defending International Industries Inc. from a $127m breach of contract claim. After five years of litigation, the Court limited the plaintiff's maximum recovery to $2m and the case was quickly resolved.

2010

- Co-lead trial counsel in the Yellowstone Mountain Club fraud case in Montana, obtaining a $286m verdict against property developer and former owner Tim Blixseth for fraud. The trial court reduced the judgment to $40m and upon defendant's appeal, we cross-appealed.
- Lead counsel in Foresight Energy, LLC's $690m refinancing.

2009

- Lead trial counsel in a case of first impression respecting the power of the United States Mine Safety and Health Administration to impose ventilation plans on mine operators.
- Lead counsel for Colt LLC's sale of $255m in coal reserves.
- Lead counsel for Macoupin Energy LLC's sale/leaseback of $143.7m in coal reserves.

2008

- Retained by the Trustee of the Refco Liquidating Trust and obtained a significant confidential settlement on his behalf.
- Served on trial team in major nationwide product liability case that settled prior to trial.

2007

- Lead counsel for Adena Minerals LLC's sale of coal and transportation assets in return for a significant percentage of Natural Resource Partners, LP (NYSE: NRP) and a 22% interest in NRP's general partner.
- Lead counsel for the West Virginia class and coordinating/lead negotiator for multistate class in a $62.5m settlement with H&R Block (NYSE: HRB). The West Virginia share was $32.5m.
- Served as sell-side counsel in a significant private equity investment by Riverstone Holdings, LLC, a private equity fund manager, in Foresight Reserves, L.P.

Earlier Matters

- Co-lead trial counsel for plaintiffs in a mass action under the Surface Coal Mining and Reclamation Act obtaining compensation for damage to water wells and homes.
- Lead trial counsel for the plaintiffs in a mass action of first impression under the Surface Coal Mining and Reclamation Act, establishing rights for off-permit damages from dust fall.
- Served as co-counsel in the Petition and Briefing stage at the United States Supreme Court in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001).
- Special Assistant Attorney General for the State of West Virginia in the Mountaintop Removal, Cumulative Hydrologic Impact Analysis, and Bonding Litigations from 1999-2003. This series of cases involved several injunction hearings and numerous complex federal and state issues resulting in fundamental changes in the mining and environmental laws of West Virginia and the region.
- Tried numerous civil and criminal cases to verdict in state and federal court, in arbitration, and before state and federal agencies.

Professional Involvement

Bar Admissions

West Virginia, 1994
District of Columbia, 2014

Government Experience

Law Clerk, Hon. M. Blane Michael, U.S. Court of Appeals for the Fourth Circuit, 1994-1995

Memberships and Affiliations

West Virginia State Bar
Hon. John A. Field, Jr., Inn of Court (President), 2008-2009
Permanent Member, Judicial Conference for the U.S. Court of Appeals for the Fourth Circuit

Publications

Brian Glasser and Eric Snyder, "Payday Lending-The Litigation and Legislation That Regulate It," 11th Annual Consumer Financial Services Litigation Institute, Vol. 1., Practicing Law Institute, New York:

2006.

Lectures

"West Virginia Coal Law," National Business Institute, 2014.

Court Admissions

U.S. Supreme Court
U.S. Court of Appeals for the First Circuit
U.S. Court of Appeals for the Second Circuit
U.S. Court of Appeals for the Third Circuit
U.S. Court of Appeals for the Fourth Circuit
U.S. Court of Appeals for the Sixth Circuit
U.S. Court of Appeals for the Seventh Circuit
U.S. Court of Federal Claims
U.S. District Court for the Northern District of West Virginia
U.S. District Court for the Southern District of West Virginia

Cases

Hillsboro Energy LLC, Permit No. 399
In 2009, several individuals and environmental groups sought administrative review of the Illinois Department of Natural Resources' issuance of a Surface Mining Control and Reclamation Act permit. After our successful defense of the petitioners' summary judgment motion, we sought and obtained a complete dismissal.

Not guilty verdict for doctor in overprescribing charges
Not guilty verdict for a doctor accused by federal authorities of excessive prescribing of painkillers.

DeClue v. Illinois Department of Natural Resources and Macoupin Energy LLC
In 2010, after the Illinois DNR renewed our client's mining permits, two citizens petitioned for administrative review. We prevailed on a motion to dismiss for failure to state a claim, and our client was enabled to continue operating under the permit.

DuBose v. Illinois Department of Natural Resources and Sugar Camp Energy LLC
In 2012, petitioner DuBose sought administrative review of a major revision to a mining permit. We successfully argued in a motion to dismiss that the petitioner lacked standing to bring the action.

Prairie Rivers Network v. Illinois EPA, Sugar Camp Energy LLC, and Hillsboro Energy LLC
In 2009, Prairie Rivers Network and Sierra Club petitioned for review of the Illinois Environmental Protection Agency's issuance of National Pollutant Discharge Elimination System permits for mining operations at our client's coal mines. In a creative settlement reached with the petitioners, our client agreed to build and allow study of wetlands as a possible treatment option for mine processing discharge. The settlement allowed the mine operations to continue.

Macoupin Energy, LLC
The Illinois Department of Natural Resources issued our client a permit to allow underground disposal of slurry created from the coal mining processes. An individual and an environmental group sought administrative review of the permit. We settled with the environmental group agreeing to modification of the permit. In early 2014, we obtained summary judgment for our client as to the individual's claims.

Cummins v. H&R Block, Inc.
In a case litigated for five years in venues ranging from the West Virginia trial and appellate courts, to federal district courts in West Virginia and Illinois, to the United States Supreme Court, our lawyers served as lead counsel in winning a $62.5 million multistate class action settlement against H&R Block. The case involved first-impression claims relating to the application of West Virginia's credit-services organization statute to Block's refund anticipation loan product. Other firms across the country litigated cases against Block alleging similar claims, without success, for more than ten years. West Virginia's share of the settlement was $32.5 million.

Mey v. Herbalife Int'l, Inc.
We were brought in by a team of lawyers to help prosecute class action claims under the Telephone Consumer Protection Act. The case settled for $7 million, at the time one of the largest TCPA robocall telemarketing settlements since the statute was enacted in 1991.

Dynamic Energy, Inc., v. International Industries, Inc.
We were lead counsel defending International Industries from a $127 million breach of contract claim. After five years of litigation, the Court limited the plaintiff's maximum recovery to $2 million, and the case was quickly resolved.

MSHA v. Mach Mining, LLC
We served as lead trial counsel in a case of first impression regarding MSHA's power to impose ventilation plans on mine operators.

Refco, Inc. Securities Litigation Bankruptcy
In $64 billion bankruptcy case, we were hired by Marc S. Kirschner, Trustee of the Refco Liquidating Trust, to pursue claims for distribution to creditors; obtained significant confidential settlement on his behalf.

Buckhannon Bd. and Care Home, Inc. v. West Virginia DHHR, 532 U.S. 598 (2001)
Brian A. Glasser served as co-counsel in the petition and briefing stage at the United States Supreme Court.

State of West Virginia v. USEPA, No. 12-5150
Bailey & Glasser counsel served as Special Assistant Attorneys General for West Virginia in the groundbreaking environmental litigation filed in the State from 1999-2003--the Mountaintop Removal, Cumulative Hydrologic Impact Analysis, and Bonding Litigations. Almost a decade later, Bailey & Glasser lawyers again represented the State against USEPA in these actions:

- Mingo Logan Coal Co. v. EPA, 714 F.3d 608 (D.C Cir. 2013);
- National Mining Association, et al. v. Gina McCarthy, et al., 758 F.3d 243 (D.C. Cir. 2014); and
- WV Highlands Conservancy, Inc., et al. v. Randy C. Huffman, 651 F. Supp. 2d 512 (S.D. W.Va. 2009).

This series of cases involved several injunction hearings and numerous complex federal and state issues addressing fundamental changes made by EPA in the mining and environmental laws of West Virginia and the region.

BPI Energy, Inc. v. Colt LLC
We served as lead trial counsel for a mining company defending $395 million claim. After a successful injunction trial, the plaintiff paid the firm's client $3 million to settle the case.

Paint Creek Coal Co. v. Panther Coal Co., Inc. and Chris Cline
The firm was lead trial counsel in this complex commercial arbitration. Our client was sued for more than

$50 million, and "lost" $1 million by the arbitration verdict. The plaintiff's appeal was dismissed.

Trinity Coal Corporation
Served as Special Assistant Attorneys General for the State of West Virginia in connection with Trinity Coal's Chapter 11 bankruptcy cases, representing the Department of Environmental Protection.

UST Litigation & Related Proceedings
We serve on the management committee of a consortium of firms representing 22 governors, state attorneys general, and underground storage tank funds pursuing claims against the major oil companies for overpayments of UST cleanup costs. This ongoing endeavor has returned over $100 million dollars to the various states.

Tory Burch, LLC
Brian A. Glasser served on the Board of Directors of Tory Burch, LLC as Christopher Burch's designee during the period of a contentious dispute over investor rights. The case was resolved by agreement.

Foresight Energy Bolt-On Financing
We served as counsel to the issuer in Foresight Energy LLC's $200 million bolt-on financing.

Foresight Energy Refinancing
We served as counsel in Foresight Energy, LLC's $690 million refinancing.

Colt, LLC
We were lead counsel for Colt, LLC's sale of $255 million in coal reserves.

Macoupin Energy, LLC
We were lead counsel for Macoupin Energy, LLC's sale/leaseback of $143.7 million in coal reserves.

Adena Minerals, LLC
We were lead counsel for Adena Minerals, LLC's sale of coal and transportation assets in return for a significant percentage of Natural Resource Partners, LP (NYSE: NRP) and a 22% interest in NRP's general partner.

Raven Energy LLC - Convent Marine Terminal Projects
We were lead counsel for Raven Energy LLC with respect to a $185 million financing for capital improvement projects at the Convent Marine Terminal.

Southern Land Co. L. P./Dickinson Properties, LLC
We were lead counsel for Southern Land and Dickinson Properties with respect to the corporate reorganization of certain jointly owned coal reserves and other assets in southern West Virginia.

Kameron Collieries ULC – Acquisition of Donkin Coal Mine, Nova Scotia, Canada
We served as lead counsel to Kameron Collieries ULC in its acquisition of 100% of the Donkin Project, a large undeveloped coal reserve in the Cape Breton region of Nova Scotia, Canada, from Glencore Xstrata, a global mining and trading company based out of Barr, Switzerland and Morien Resources Corporation, a Canadian royalty company.

Anderson v. Elk Run Coal Company, Inc.
We won a six-week jury trial against a Massey Coal subsidiary alleging nuisance from coal preparation plant; total recovery of approximately $2.4 million, plus injunctive relief valued at more than $10 million. The case was featured in National Geographic magazine and other national media outlets.

Ooten v. Massey Coal
Our lawyers were co-lead counsel in a two-phase, six-week jury trial alleging a Massey Coal subsidiary damaged the groundwater supplies of coalfield residents; total cash recovery was $3.2 million, plus injunctive relief. The case was virtually unprecedented, both in the sheer numbers of plaintiffs involved and the claims alleged.

Charron v. Sallyport Global Holdings, Inc.
Obtained a $21.1 million dollar verdict against Sallyport Global Holdings, Inc., in a breach of contract valuation case in federal court in New York City. Satisfaction of Judgment

Charron v. Sallyport Global Holdings
Charron v. Sallyport Global Holdings – Bailey & Glasser obtained affirmance in the United States Court of Appeals for the Second Circuit of a $20 million judgment in a commercial dispute regarding sale of a government contracting company.

Yellowstone Mountain Club, LLC Bankruptcy
The firm served as lead counsel in obtaining $520 million in verdicts in Montana against Yellowstone Mountain Club developer Tim Blixseth, as well as a $9.4 million jury verdict his wife, Jessica Blixseth. The firm's team has included Brian Glasser, who now serves as the trustee of the Yellowstone Club trust, Kevin Barrett, Thanos Basdekis, Michael Murphy, Ora Nwabueze, among many others.

Patriot Coal Corp. Bankruptcy
Our lawyers served as Special Assistant Attorneys General in both Patriot Coal bankruptcy cases, the first in the Southern District of New York and Eastern District of Missouri and the second in the Eastern District of Virginia. They represented the West Virginia Department of Environmental Protection as well as the West Virginia State Tax Department and Offices of the Insurance Commissioner. For the DEP, our lawyers helped secure a settlement valued at $50 million for the State to help ensure funding of reclamation and water treatment. On behalf of the Tax Department, our lawyers obtained dismissal of the Patriot trustee's $5-plus million suit to recover alleged tax refunds due.

WP Steel, LLC
On behalf of the West Virginia Offices of the Insurance Commissioner, firm lawyers served as Special Assistant Attorneys General for the State of West Virginia in connection with the Chapter 11 case of RG Steel, LLC. After RG Steel defaulted on its workers' compensation obligations, firm attorneys obtained relief from the automatic stay to allow the Insurance Commissioner to obtain $7 million in funds to pay workers' compensation claims.

Brundle v. Wilmington Trust
Bailey & Glasser recovered $30 million for the participants in the Constellis Employee Stock Ownership Plan following a two-week trial. The court's decision set important new standards for ESOP trustees representing plans and participants in ESOP transactions.

Education

- J.D., 1994, cum laude - Harvard Law School
- B.A., 1991 - Oxford University
- B.A., 1988, summa cum laude; Rhodes Scholar, 1988; Truman Scholar, 1987 - West Virginia University

EXHIBIT 3

BAILEY GLASSER LLP

Attorney
1054 31st Street, NW
Suite 230
Washington, DC 20007
T: 202.463.2101
F: 202.463.2103
rjenny@baileyglasser.com

Practices

- High Stakes Litigation
  - Class Actions-Mass Torts
  - Labor, Employment and Employee Benefits

Ryan T. Jenny

Biography

Ryan T. Jenny is a partner in Bailey & Glasser LLP's Washington, D.C. office. He practices primarily in the area of complex employee benefits litigation, representing clients in actions brought under the Employee Retirement Income Security Act of 1974 (ERISA).

Ryan has litigated a broad range of ERISA class and individual actions at both the trial and appellate levels, with a particular focus on the fiduciary responsibility area. His recent fiduciary litigation includes employer stock, private company ESOP, misrepresentation and nondisclosure, excessive fee, and Affordable Care Act (ACA) actions. Other representative ERISA cases have focused on issues such as Section 510 discrimination and unlawful termination, the remedies available under the statute, the termination of retiree health benefits, prohibited transactions, claims for benefits, and the preemption of state statutory and common law. Ryan has also represented multiemployer plan trustees in actions arising under the Labor Management Relations Act (LMRA).

Prior to joining the firm, Ryan was of counsel in the D.C. office of Steptoe & Johnson LLP, where he litigated and counseled in the areas of ERISA, the ACA, the Health Insurance Portability and Accountability Act (HIPAA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), and other employment statutes and regulations. For seven years Ryan also managed a team that provided pro bono representation to Holocaust survivors in claiming benefits under Germany's Social Security Pension Program and German Ghetto Work Payment Program. He also served as an associate in the labor and employee benefits group of a prominent law firm in New York, and as a law clerk for the American Psychological Association's Legal and Regulatory Affairs Department in D.C., where he focused on professional licensure and legislative issues in the healthcare industry.

He received his J.D. from The George Washington University Law School, and holds a B.A.in Anthropology from The University of Chicago.

Professional Involvement

Bar Admissions

New York, 2000
District of Columbia, 2006

Court Admissions

U.S. Court of Appeals for the Fourth Circuit
U.S. Court of Appeals for the Fifth Circuit

U.S. Court of Appeals for the Seventh Circuit
U.S. Court of Appeals for the Eighth Circuit
U.S. District Court for the District of Columbia
U.S. District Court for the Western District of New York
U.S. District Court for the District of Colorado
U.S. District Court for the Northern District of Illinois

Cases

Brundle v. Wilmington Trust
Bailey & Glasser recovered $30 million for the participants in the Constellis Employee Stock Ownership Plan following a two-week trial. The court's decision set important new standards for ESOP trustees representing plans and participants in ESOP transactions.

Education

- J.D., 1999 - George Washington University Law School
- B.A., Anthropology, 1995 - University of Chicago

EXHIBIT 4

BAILEY GLASSER LLP

Attorney
209 Capitol Street
Charleston, WV 25301
T: 304.345.6555
F: 304.342.1110
tbasdekis@baileyglasser.com

Practices

- High Stakes Litigation
  - Complex Commercial Litigation
  - Insolvency & Bankruptcy

Thanos Basdekis

Biography

Thanos maintains a diverse practice, including his high-profile role representing the creditors of Yellowstone Club, a luxurious ski and golf club in Montana that went bankrupt after Timothy L. Blixseth pocketed much of a $375 million Credit Suisse loan to the resort and gave control of the resort to his wife during their 2008 divorce. As trial counsel, Thanos obtained a $286.4 million verdict against Blixseth in federal court in Montana. Separately in federal court in California, Thanos helped obtain an over-$200 million judgment against Blixseth as well on a case in which Blixseth defaulted on a loan agreement.

He also represented Washington Redskins wide receiver Pierre Garcon, who in 2015 filed a class-action lawsuit against daily fantasy sports company FanDuel on behalf of all offensive players in the NFL. Garcon's lawsuit claims that FanDuel "improperly exploits the popularity and performance" of NFL players without their permission to do so. The lawsuit, filed in the United States District Court of Maryland, alleged that FanDuel benefitted from the performance and popularity of the players without a license and, through a "comprehensive television advertising campaign," FanDuel used the "names and likenesses of some of these NFL players without authorization to promote FanDuel's commercial enterprise." The case was quickly settled.

Thanos concentrates on commercial litigation, ERISA/ESOP litigation, and bankruptcy- and insolvency-related litigation. Thanos' work as an attorney is about helping others. He enjoys working with clients to help them meet their goals in their businesses and in the courtroom.

He is an experienced litigator, who has routinely won multi-million dollar verdicts in complex corporate cases. He has also defended corporations in contract claims.

Thanos, as trial counsel, recently obtained a $21.1 million dollar verdict against John P. DeBlasio and Sallyport Global Holdings, Inc., in a breach of contract valuation case in federal court in New York City. As co-lead counsel, he defended International Industries Inc. from a $127 million breach of contract claim. After five years of litigation, the court limited the plaintiff's maximum recovery to $2 million and the case was quickly resolved.

Thanos also has substantial experience in personal injury and wrongful death cases, which includes a $5 million verdict against the District of Columbia in a catastrophic brain injury case concerning a diving board accident involving a young child.

He was also part of a Bailey & Glasser team that represented the FDIC in its capacity as the receiver of Colonial Bank. Their work led to a $16.5 billion multi-case, multi-agency settlement that included payments of more than $1 billion to the FDIC.

Professional Involvement

Bar Admissions
West Virginia, 2003
Virginia, 2002
Maryland, 2001
District of Columbia, 1999
New York, 1998

Government Experience
Law Clerk, Hon. Leonard B. Sand, U.S. District Court for the Southern District of New York, 1997-1998

Memberships and Affiliations
American Hellenic Institute, Advisory Board
Hon. John A. Field, Jr., Inn of Court
West Virginia State Bar

Publications
Athanasios Basdekis, *The Ancient Greek Origins of the Modern Legal System*, National Herald (May 2002)
Perfection by Nullification, 105 Yale L.J. 2285 (1996)

State Courts
New York State Bar
District of Columbia State Bar
The Bar of the Commonwealth of Virginia
Maryland State Bar
West Virginia State Bar

Federal Courts
U.S. Supreme Court
U.S. Court of Federal Claims
U.S. Court of Appeals for the Fourth Circuit
U.S. Court of Appeals for the District of Columbia Circuit
U.S. District Court for the Southern District of New York
U.S. District Court for the District of Columbia
U.S. District Court for the District of Maryland
U.S. District Court for the Eastern District of Virginia
U.S. District Court for the Western District of Virginia
U.S. District Court for the Southern District of West Virginia
U.S. District Court for the Northern District of West Virginia

Cases

Dynamic Energy, Inc., v. International Industries, Inc.
We were lead counsel defending International Industries from a $127 million breach of contract claim. After five years of litigation, the Court limited the plaintiff's maximum recovery to $2 million, and the case was quickly resolved.

Refco, Inc. Securities Litigation Bankruptcy
In $64 billion bankruptcy case, we were hired by Marc S. Kirschner, Trustee of the Refco Liquidating Trust, to pursue claims for distribution to creditors; obtained significant confidential settlement on his

behalf.

Norfolk Southern Railway Co., v. Drummond Coal Sales, Inc.
Bailey & Glasser served as lead counsel defending DCSI against a $30 million breach of contract claim arising out of DCSI's alleged failure to deliver imported coal into the port of Charleston, S.C. The case settled under a confidentiality agreement but received coverage in the trade press such as Coal Age and SNL Daily.

Charron v. Sallyport Global Holdings, Inc.
Obtained a $21.1 million dollar verdict against Sallyport Global Holdings, Inc., in a breach of contract valuation case in federal court in New York City. Satisfaction of Judgment

Charron v. Sallyport Global Holdings
Charron v. Sallyport Global Holdings – Bailey & Glasser obtained affirmance in the United States Court of Appeals for the Second Circuit of a $20 million judgment in a commercial dispute regarding sale of a government contracting company.

WP Steel, LLC
On behalf of the West Virginia Offices of the Insurance Commissioner, firm lawyers served as Special Assistant Attorneys General for the State of West Virginia in connection with the Chapter 11 case of RG Steel, LLC. After RG Steel defaulted on its workers' compensation obligations, firm attorneys obtained relief from the automatic stay to allow the Insurance Commissioner to obtain $7 million in funds to pay workers' compensation claims.

Brundle v. Wilmington Trust
Bailey & Glasser recovered $30 million for the participants in the Constellis Employee Stock Ownership Plan following a two-week trial. The court's decision set important new standards for ESOP trustees representing plans and participants in ESOP transactions.

Yellowstone Mountain Club, LLC Bankruptcy
The firm served as lead counsel in obtaining $520 million in verdicts in Montana against Yellowstone Mountain Club developer Tim Blixseth, as well as a $9.4 million jury verdict his wife, Jessica Blixseth. The firm's team has included Brian Glasser, who now serves as the trustee of the Yellowstone Club trust, Kevin Barrett, Thanos Basdekis, Michael Murphy, Ora Nwabueze, among many others.

Education

- J.D., 1997; Senior Editor, Yale Law Review - Yale Law School
- B.A., 1994, summa cum laude; Phi Beta Kappa; Stephen Hermides Scholar - Columbia University

EXHIBIT 5

BAILEY GLASSER LLP

Attorney
209 Capitol Street
Charleston, WV 25301
T: 304.345.6555
F: 304.342.1110
pmuench@baileyglasser.com

Practices
- High Stakes Litigation
  - Complex Commercial Litigation
  - Energy and Environment

Patrick Muench

Biography

Patrick focuses his practice on complex litigation. He has experience handling cases involving bankruptcy, major national bank failures, and international discovery. Patrick graduated cum laude from the University of Illinois College of Law, where he was awarded Best Brief at the National Environmental Moot Court Competition. Following law school, Patrick served as a law clerk for the Honorable Robert M. Dow, Jr. in the Northern District of Illinois.

Professional Involvement

Bar Admissions
Illinois, 2006

Government Experience
Law Clerk, Northern District of Illinois, Judge Robert M. Dow Jr., 2007-2009

Memberships and Affiliations
Chicago Bar Association
Illinois Bar Association

Court Admissions
U.S. Court of Appeals for the Fourth Circuit
U.S. District Court for the Northern District of Illinois

Cases

Bank of America, NA v. FDIC-Receiver
The firm was retained to represent the FDIC in its capacity as receiver of Colonial Bank. The case was resolved favorably to the FDIC as part of a multi-case, multi-agency settlement for $16.65 billion, the largest single-company settlement in U.S. history. The FDIC's portion of the BoA total settlement, which includes payment for FDIC's counterclaims in this case, amounts to $1.031 billion. Christopher Morris, Ben Bailey, Patrick Muench, and Maryl Sattler of B&G handled this matter for the FDIC.

Brundle v. Wilmington Trust
Bailey & Glasser recovered $30 million for the participants in the Constellis Employee Stock Ownership Plan following a two-week trial. The court’s decision set important new standards for ESOP trustees representing plans and participants in ESOP transactions.

BAILEY GLASSER LLP

Education

- J.D., 2006, cum laude; Rickert Award for Excellence in Advocacy; Best Brief at 2006 National Environment Moot Court Competition - University of Illinois College of Law
- B.A., 2000 - University of Texas at Austin

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TIM P. BRUNDLE, on behalf of the Constellis Employee Stock Ownership Plan, **Plaintiff,** **v.** **WILMINGTON TRUST, N.A., as successor to WILMINGTON TRUST RETIREMENT AND INSTITUTIONAL SERVICES COMPANY,** **Defendant.**	**Civil Action No. 1:15-cv-1494 (LMB/IDD)**

[Proposed] ORDER

THIS MATTER CAME BEFORE THE COURT on Plaintiff's Motion for Attorneys' Fees and Costs, and Plaintiff's Counsel's Motion for Attorneys' Fees and Reimbursement of Expenses. In consideration of the arguments advanced by counsel and for good cause shown, it is hereby:

ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Attorneys' Fees and Costs, and Plaintiff's Counsel's Motion for Attorneys' Fees and Reimbursement of Expenses is granted; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff is awarded $2,815,729.50 in attorney fees from Defendant Wilmington Trust, N.A.;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff is awarded $1,227.28 in costs from Defendant Wilmington Trust, N.A.;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's Counsel is awarded a fee of one-third of the common fund, consisting of the judgment amount of $29,773,250.00, offset by the $2,815,729.50 of attorney's fees recovered by Plaintiff; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's Counsel is awarded $643,584.50 in expenses, paid from the common fund, offset by the $1,227.28 in costs recovered for the Plaintiff; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's Counsel is therefore awarded $7,751,044.40 from the common fund under the preceding two paragraphs.

SO ORDERED.

_____

Hon. Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

Date: _____, 2017