IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR162 CORN LITIGATION	**Master File No. 2:14-MD-02591-JWL-JPO**
THIS DOCUMENT RELATES TO ALL CASES EXCEPT:	**MDL No. 2591**
Louis Dreyfus Company Grains Merchandising LLC v. Syngenta AG, et al., No. 16-2788-JWL-JPO	
Trans Coastal Supply Company, Inc. v. Syngenta AG, et al., No. 2:14-cv-02637-JWL-JPO	
The Delong Co., Inc. v. Syngenta AG et al., No. 2:17-cv-02614-JWL-JPO	
Agribase International Inc. v. Syngenta AG, et al., No. 2:15-cv-02279-JWL-JPO	

TOUPS/COFFMAN PLAINTIFFS' COUNSEL'S RESPONSE AND OBJECTIONS TO CERTAIN FEE AND EXPENSE MOTIONS

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Pursuant to the Court's July 18, 2018 Order (ECF No. 3613), Toups/Coffman Plaintiffs' Counsel files this Response and Objections to Certain Fee and Expense Motions, and respectfully state the following:

GENERAL OBJECTIONS TO THE FEE AND EXPENSE MOTIONS

I. Toups/Coffman Plaintiffs' Counsel object to the Court's acceleration of the fee and expense motion briefing schedule.

In its April 10, 2018 Order preliminarily approving the settlement (ECF No.3532), the Court established an October 17, 2018 deadline for filing any responses or objections to counsel's

fee and expense motions. *Id*., ¶ 17 (referencing the Approved Schedule for Final Approval Process at page 10 of the Order). The October 17 deadline makes perfect sense since it falls *after* the October 12 settlement claim filing deadline. Not only would the Court and the lawyers know the settlement claim filing statistics relevant to determining attorney fee and expense awards (including the number of settlement claimants represented by private counsel vs. the number of unrepresented claimants (*i.e*., "pure class members")), counsel would have sufficient time to (i) review, analyze, and identify duplicative and mischaracterized time, and (ii) thoroughly and precisely respond to the fee and expense petitions, supplements to the fee and expense petitions, and supporting memoranda and exhibits filed on behalf of over 400 law firms comprising over 12 ½ linear feet of paper (*i.e*., ten (10) banker boxes and more than 28,000 pages).

But a cursory review of the voluminous submissions, for example, identified a number of law firms that filed fee applications with more than one attorney group. Declaration of Mitchell A. Toups (Exhibit A). Additional time is needed to thoroughly analyze these fee applications to ascertain whether they are duplicative time submissions. *Id*. In addition, multiple law firms that are not class counsel appear to have coded the time spent working with their individual corn producer clients as class counsel approved common benefit time in their supplemental fee petitions even though their time was not claimed to be common benefit time in their original fee petitions. *Id.* Additional time is needed to thoroughly analyze these time submissions to ascertain whether such time, in fact, is class counsel approved common benefit time. *Id.* Additional time also is needed to thoroughly analyze whether any of the claimed litigation expenses, in fact, include the costs of prospective client mailers , other marketing expenses, overhead or private airplane travel. *Id.* For the Court's analysis of the fee and expense applications to be accurate and meaningful, sufficient time is necessary to insure an "apples to apples" comparison.

Nevertheless, in its July 18, 2018 Order (ECF No. 3613), the Court, sua sponte, and without giving a reason, vacated the October 17 deadline, accelerating it by sixty days to August 17, 2018. *Id*., ¶ 1. As such, counsel and the Court will not have the benefit of the relevant settlement claim statistics for fully and completely briefing the fee and expense motions, determining the fee and expense motions, and asserting and preserving their objections to the corresponding fee and expense awards—which prejudices Toups/Coffman Plaintiffs' Counsel and their clients.

Accelerating the deadline by two months also does not give Toups/Coffman Plaintiffs' Counsel sufficient time to review and analyze the voluminous fee and expense motions and supporting briefs and exhibits, and file thorough and complete responses and objections—which also prejudices Toups/Coffman Plaintiffs' Counsel and their clients. Thirty days is simply not enough time—especially in light of the Court imposing upon counsel the additional burden of filing detailed supplements to their fee and expense motions on or before August 3, 2018 in its July 18, 2018 Order.

There is no rational reason for accelerating the response and objection deadline by sixty days and ramming through the fee and expense awards without the benefit of the final claim filing statistics and sufficient time to properly review, analyze, and thoroughly and precisely respond to all of the filed fee and expense motions. The Court abused its discretion in accelerating the response and objection deadline by sixty days. It also is a violation of due process. For all of the above reasons, Toups/Coffman Plaintiffs' Counsel object to the Court's accelerated deadline to respond and object to counsel's voluminous fee and expense motions.

II. Toups/Coffman Plaintiffs' Counsel object to being compensated based on their time spent working on the litigation.

Toups/Coffman Plaintiffs' Counsel object to being required to report their time and expenses to the Court (other than the common benefit time spent working on behalf of their

bellwether plaintiff clients). Toups/Coffman Plaintiffs' Counsel are not class counsel. Rather, they represent their corn producer clients as individual opt-out direct action plaintiffs. Toups/Coffman Plaintiffs' Counsel have individual contingent fee contracts with each of their 9400+ corn producer clients.[1] As such, they were not required to keep and maintain contemporaneous time records under any Court order or principle of class action jurisprudence. *Id.*

Accordingly, Toups/Coffman Plaintiffs' Counsel object to being forced to reconstruct their time spent working on the litigation. Toups/Coffman Plaintiffs' Counsel also object to being compensated based on their reconstructed time. Toups/Coffman Plaintiffs' Counsel should be compensated according to the terms of the contingent fee contracts with their clients. There is no authority by which these contracts may be abrogated. *See, e.g., US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013) (confirming "if the agreement governs, the agreement governs").

III. Toups/Coffman Plaintiffs' Counsel object to the further involvement of Special Masters Ellen Reisman and Daniel Stack as part of the Attorney Fee/Expense Application process.

A. Appointment of the Special Master and Plaintiffs Negotiation Committee (PNC).

On March 21, 2016, the Court appointed Ellen K. Reisman as the Special Master "to explore settlement of all the cases, in all of the courts in which they are pending." ECF No. 1745 ("Special Master Appointment Order"). The Special Master Appointment Order specifically directs Ms. Reisman not to "act as an advocate, representative, fiduciary, or counsel for any party." *Id.* at 3. Nor did she have any "formal coercive authority to compel the making of any agreement

[1] *See* Declarations of Mitchell A. Toups and Richard L. Coffman, Exhibits A and B, respectively, to Toups/Coffman Plaintiffs' Counsel's Fee and Expense Motion (ECF Nos. 3566 and 3567) and Supplement to their Fee and Expense Motion (ECF No. 3646), all of which are incorporated by reference as if fully stated herein.

or the granting of any concession." *Id*. Pursuant to FED. R. CIV. P. 53(b)(3)(A), Ms. Reisman filed a declaration supporting her appointment, stating that there were no 28 U.S.C. § 455 grounds disqualifying her from serving as the Special Master. ECF No. 1746.

After her appointment, Ms. Reisman "requested that the Honorable Daniel Stack (ret.), who was the special discovery master in the Illinois state and federal cases, assist in settlement negotiations." ECF No. 3507 at 14 (quoting the Declaration of Christopher A. Seeger). Her request was granted, and Judge Stack joined her in overseeing the negotiations.

Thereafter, on August 8, 2017, the Court appointed the PNC, consisting of Christopher A. Seeger, Daniel E. Gustafson, Mikal Watts, and Clayton A. Clark. ECF No. 3366 ("PNC Appointment Order"). The Court clearly intended the PNC to represent the interests of *all* plaintiffs—to wit, the PNC Appointment Order specifically directed all four PNC lawyers to "confer with other Plaintiffs' counsel in the actions described above about such negotiations, and [] participate in such negotiations on their behalf." *Id.* at 2-3. The PNC Appointment Order also stated that the Court anticipated the PNC "will communicate with their co-counsel regarding settlement negotiations so that producer plaintiffs' interests are appropriately represented." *Id*. at 3. Unfortunately, this didn't happen.

B. The settlement negotiations.

Once the PNC was in place, it "met in person and by phone with counsel for Syngenta, the Special Master (Ms. Reisman), and Judge Stack on numerous occasions." Class Plaintiffs' Memorandum of Law Supporting their Motion for Preliminary Approval of the Settlement (ECF No. 3507) at 14.

But notwithstanding the PNC Appointment Order and the Special Master Appointment Order, the PNC, as directed and coerced by Ms. Reisman and Judge Stack, conducted their

negotiations and deliberations behind a veil of secrecy. Declaration of Mitchell A. Toups and Declaration of Richard L. Coffman (Exhibits A and B to Toups/Coffman Plaintiffs' Motion to Delay Consideration of the Request for Approval of the Mediated Settlement Agreement (ECF No. 3499)).[2] At no time after their appointment did the PNC members confer with Toups/Coffman Plaintiffs' Counsel (one of the largest groups of privately represented corn producers), or any other counsel similarly situated counsel, regarding the settlement negotiations, participate in such negotiations on behalf of Toups/Coffman Plaintiffs' Counsel and their clients, or communicate substantive information to Toups/Coffman Plaintiffs' Counsel regarding the negotiations to insure that Toups/Coffman Plaintiffs' interests were appropriately represented—even though Toups/Coffman Plaintiffs' Counsel represent the fourth largest group of individual corn producer plaintiffs after the Watts Group, Phipps/Clark Group (also sometimes referenced as the "Illinois Leadership Group"), and the Remele/Sieben Group. *See* Exhibit G. In fact, at Ms. Reisman's and Judge Stack's direction, the opposite occurred. *Id*. Nor did Ms. Reisman provide any information when specifically asked. *Id*. Ms. Reisman's and Judge Stack's secrecy mandate constitutes coercion in violation of Special Master Appointment Order.[3]

[2] ECF No. 3499 and the supporting Declarations and Exhibits are incorporated by reference as if fully stated herein.

[3] These are not new allegations. Toups/Coffman Plaintiffs' Counsel have made them several times. *See* ECF Nos. 3499, 3504, and 3516. Neither Ms. Reisman, nor the PNC, have ever denied them. *See, e.g*., "What We Know Now" in Toups/Coffman Plaintiffs' Reply in re their Motion to Delay Consideration of Class Counsel's Motion for Preliminary Approval (ECF No. 3516), which is incorporated, by reference, as if fully stated herein.

C. The settlement term sheet.

On September 25, 2017, the PNC and Syngenta signed a detailed settlement Term Sheet ("Term Sheet") (Exhibit B).[4] Prior to signing the Term Sheet, the PNC did not confer with Toups/Coffman Plaintiffs' Counsel about the terms of Term Sheet. Nor did the PNC, at Ms. Reisman's and Judge Stack's direction, circulate the Term Sheet after it was signed—even after Toups/Coffman Plaintiffs' Counsel repeatedly requested it. *See, e.g.*, February 19, 2018 email exchange between Toups/Coffman Plaintiffs' Counsel and PNC member Watts (Exhibit C) ("we on the Plaintiffs' Settlement Negotiation Committee are not allowed to disclose the details" and "I'm sorry I am not at liberty to disclose more information [at] this time.").[5]

Nevertheless, the detailed Term Sheet, which is an enforceable agreement, is a classic example of how a settlement is properly allocated and distributed in litigation comprising both a class action component and a large opt-out component. The fact that the PNC and Syngenta negotiated and executed the Term Sheet makes perfect sense on many levels. The 100,000 or so individual plaintiffs represented by private counsel—most of whom opted out of the class on or before April 1, 2017—drove the settlement since only eight states were ever certified with no possibility of a national class since lone legal claim asserted on behalf of the national class was dismissed in April 2017.

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[4] Toups/Coffman Plaintiffs' Counsel received a copy of the Term Sheet *after* Kansas Class Counsel filed their Motion for Preliminary Approval of the Settlement. Toups/Coffman Plaintiffs' Counsel, however, did not receive the Term Sheet from a PNC member, Ms. Reisman, or Judge Stack.

[5] In response to one of Toups/Coffman Plaintiffs' Counsel's inquiries, Ms. Reisman suggested that Toups/Coffman Plaintiffs' Counsel contact Mr. Seeger, the ostensible chair of the PNC. She did so with full knowledge that Mr. Seeger would not disclose any substantive information pursuant to her and Judge Stack's directive. That cannot be right or fair.

Among other things, the Term Sheet properly contemplated two groups of plaintiffs—class plaintiffs and individual corn producer plaintiffs—and required, among other things, (i) separate settlement agreements for both plaintiff groups (*id*., §§ 2(r), 2(ff), 3, 4(a), 4(b)); (ii) an allocation of the settlement proceeds between the two plaintiff groups and the creation of separate QSFs (*id*., §§ 2(c), 2(d), 2(q), 2(ee), 3, 4(d)(xiii)); (iii) a separate class plaintiffs Court (this Court) and an Individual Plaintiffs Court (23rd Judicial District Court, Brazoria County, Texas) to oversee the separate settlements (*id*., §§ 2(a), 2(c), 2(d), 2(p), 2(dd), 4(d)(vi))); and (iv) separate special masters for the two plaintiff groups (*id*., §§ 2(s), 2(gg)). In fact, § 2(ww) of the Term Sheet *specifically excluded* individual plaintiffs from the class settlement, stipulating jurisdiction over the individual plaintiffs in a Brazoria County, Texas state district court, regardless of whether a motion for class settlement was subsequently filed (as was done here).

The Parties also agreed "to negotiate in good faith to finalize formal settlement documents consistent with [the] Term Sheet." *Id.*, § 1(a). That, however, did not happen. None of the above provisions (or others identified in prior briefing by Toups/Coffman Plaintiffs' Counsel) are in the class settlement agreement. Rather, all U.S. corn producers are treated as members of a national settlement class regardless of whether they previously opted out of the national class in 2017. The Court basically forced corn producers that had previously opted out into a new class even though the Court had no jurisdiction over the opted-out corn producers.

So, what happened? How did the global settlement of this sprawling litigation morph from the classic and imminently workable two-tiered settlement outlined in the Term Sheet into the onerous "one size fits all" class settlement? The answer, of course, is money. Kansas Class Counsel and Minnesota Class Counsel ultimately realized that the vast majority of the settlement claims would be filed by individual corn producers represented by private counsel—which has certainly

proven to be the case—and, as a result, the majority of the settlement would be controlled by and distributed to individual corn producer plaintiffs. This, in turn, would negatively impact Kansas Class Counsel's and Minnesota Class Counsel's fees.

So, Kansas Class Counsel and Minnesota Class Counsel instituted a game plan to regain control of the settlement and distribute it via a national class action mechanism. But why would Messrs. Clark and Watts—who ostensibly lead the two largest groups of individual corn producer plaintiffs—ever agree to abandon the favorable Term Sheet and allow Kansas Class Counsel and Minnesota Class Counsel to run the show? The answer, of course, is money. And with the help of Ms. Reisman and Judge Stack, Kansas Class Counsel and Minnesota Class Counsel—through PNC members Seeger and Gustafson—got their way. This harmed Toups/Coffman Plaintiffs and all other individual corn producer plaintiffs that opted out of the class in that the Term Sheet settlement was ultimately abandoned, and all individual corn producer plaintiffs that had opted out of the class—over which the Court no longer had jurisdiction—were forced back into the class and forced the Toups-Coffman Plaintiffs, and others, to file class claim forms as opposed to the streamlined process set out by the Term Sheet. Further, under the Term Sheet process, there would be no Court intervention and now the Plaintiffs may have their settlement funds held up by an Appeal by some or all of the class issues.

D. The PNC fee negotiations.

Once the Term Sheet was signed by the Parties, the negotiations commenced regarding the formal settlement documents required by the Term Sheet. But it wasn't the classic negotiations between Syngenta and the PNC because as long as Syngenta was not required to pay more than $1.51 billion and its interests were protected, Syngenta did not care about the form of the formal settlement documents. Rather, the negotiations consisted of discussions—often times admittedly

heated—between the PNC members about how to split up the fee pie for themselves to the detriment of U.S. corn producers and their counsel. By that time, the PNC had long since abdicated its responsibilities under the PNC Appointment Order to negotiate on behalf of all plaintiffs and their counsel in the litigation.

Somewhere along the way, Messrs. Seeger and Gustafson, the PNC members ostensibly representing class plaintiffs, realized that two separate settlements consistent with the Term Sheet would not net Kansas Class Counsel and Minnesota Class Counsel enough attorneys' fees to satisfy them. They realized that most of the U.S. corn producers interested in the litigation had already hired private counsel, opted out of the class action, and filed individual cases.

The requirement imposed on corn producer plaintiffs early in the litigation to file Plaintiff Fact Sheets and supporting FSA Forms 578 within forty-five days of filing suit under penalty of a dismissal with prejudice—which Kansas Class Counsel asked the Court to institute—was also coming home to roost. Kansas Class Counsel and Minnesota Class Counsel knew how difficult it was for individual plaintiffs to comply with this mandate, and further realized that this difficulty would cut against them in the settlement claim filing process. They also knew that U.S. corn producers have been overwhelmed with mail about the litigation and most likely disregard settlement class notice. All of these factors pointed towards a depressed class plaintiff settlement take rate—which, in turn, would negatively impact their fee award.

Kansas Class Counsel and Minnesota Class Counsel had to do something to enhance their fee application. So, they came up with the idea of putting all of the corn producers (class plaintiffs and individual plaintiffs represented by private counsel) into one pot—the class settlement agreement—in order to pump up their settlement take rate numbers on the backs of the settlement claims filed by individual corn producer plaintiffs. Kansas Class Counsel and Minnesota Class

Counsel knew the private lawyers would do the "heavy lifting," and make sure their clients filed their settlement claims. Under a "one size fits all" class action settlement distribution mechanism, therefore, Kansas Class Counsel and Minnesota Class Counsel could control it all.

Over time, the pressure brought to bear by Mr. Seeger, Mr. Gustafson, Ms. Reisman, Judge Stack, and Andrew Karron, Ms. Reisman's law partner acting under her direction, steadily increased until it rose to the level of a "shit show." *See* Exhibit D. Messrs. Watts and Clark finally caved in, violated the Term Sheet requirement to finalize formal settlement documents consistent with it (with the help of Messrs. Seeger and Gustafson, Ms. Reisman, and Judge Stack), and agreed to the dramatically re-written class settlement agreement preliminarily approved by the Court. But why? Why would Messrs. Watts and Clark succumb to Ms. Reisman's and Judge Stack's coercion and walk away from the favorable settlement terms in the Term Sheet, and sell their clients (and all other individual corn producer plaintiffs for whom they were charged with the duty of negotiating) down the river? The answer is simple: money.

Messrs. Watts and Clark were promised guaranteed attorneys' fees and other concessions in a secret side deal ("Secret Fee Deal") (Exhibit E).[6] Under the proposed Secret Fee Deal, in exchange for walking away from the Term Sheet and agreeing to a national class action settlement distribution mechanism, the constituencies represented by the PNC members would receive guaranteed shares of 100% of the attorneys' fees awarded by the Court—to the exclusion of all other counsel who worked on the litigation—regardless of the number of their clients who actually

[6] The Secret Fee Deal ultimately signed by Messrs. Seeger, Gustafson, and Clark is no longer secret. The so-called "Illinois Leadership Group" of attorneys (a.k.a. the Phipps/Clark Group) submitted it as part of their fee and expense application as an exhibit to Mr. Clark's Declaration, and now unashamedly rely on it. *See* ECF No. 3598-5. That said, the Court certainly is not bound by an agreement between three lawyers to divide the attorneys' fees—especially to the exclusion of all of the other lawyers who worked on the litigation for years and for whom the PNC was ordered to negotiate and keep apprised.

file claims and regardless of the fact that Messrs. Clark and Watts were not appointed as class counsel in any Syngenta MIR 162 proceeding.

Mr. Watts ultimately did not agree to this arrangement because, on information and belief, he believed it to be unethical. It was also not filed with the Court, or otherwise disclosed to individual plaintiffs and their counsel during the negotiations as required by the PNC Appointment Order. The point here is that the Secret Fee Deal, wherein three of the PNC members engaged in self-dealing, violated the PNC Appointment Order, conspired with each other, and split the attorneys' fee pie for themselves to the exclusion of all other counsel, which was brokered and condoned by Ms. Reisman and Judge Stack.

In short, Ms. Reisman, Judge Stack, and the PNC knowingly violated the PNC Appointment Order, knowingly violated the Special Master Appointment Order, knowingly violated the Term Sheet, and knowingly violated their Court-assigned duties to *all* corn producer plaintiffs and their counsel. Respectfully, Ms. Reisman and Judge Stack should be not be allowed to handle the attorney fee/expense applications since they engineered a fee agreement that is not proper and not binding and is an agreement Toups/Coffman, and others, would expect them to stand by, even after the fee applications have been made, and even after one member of the PNC stated it may be unethical. They should be replaced by an independent, unbiased, and an objective Special Master/Mediator who can bring a fresh perspective to the proceedings, including, *inter alia*, assisting the Court with analyzing the pending fee and expense motions and other assigned administrative matters.[7] Ms. Reisman and Judge Stack certainly should not be involved in determining counsel's fee and expense awards.

[7] Alternatively, and as suggested by Toups/Coffman Plaintiffs' Counsel in their Fee and Expense Motion Supplement (ECF No. 3636), the Court should appoint Retired Judge W. Royal Furgeson, Jr. to mediate the fee and expense motions at the earliest possible date.

TOUPS/COFFMAN PLAINTIFFS' COUNSEL OBJECT TO THE COLLECTIVE FEE AND EXPENSE MOTIONS SUBMITTED BY KANSAS CLASS COUNSEL, MINNESOTA CLASS COUNSEL, AND THE PHIPPS/CLARK GROUP AS BEING EXORBITANT IN THIS MEGA-FUND SETTLEMENT

Kansas Class Counsel, Minnesota Class Counsel, and the Phipps/Clark Group must be viewed collectively for purposes of computing the class fee portion of the attorneys' fee award because they all functioned as class counsel (as evidenced by the magnitude of their common benefit time submissions), they controlled the PNC wherein they engaged in collusion and self-dealing, they all signed the Secret Fee Deal, and they all submitted common benefit time. *See* Kansas Class Counsel's Fee and Expense Motion (ECF No. 3585), Minnesota Class Counsel's Fee and Expense Motion (filed on July 10, 2018 in the Fourth Judicial District Court, Hennepin County, Minnesota), and the Phipps/Clark Group's Fee and Expense Motion (ECF No. 3597). Kansas Class Counsel, Minnesota Class Counsel, and the Phipps/Clark Group are collectively referred to as "Collective Class Counsel."

That said, Kansas Class Counsel asks the Court to award one-third of the $1.51 billion settlement fund as attorneys' fees, with 50% of that going to Kansas Class Counsel (ECF No. 3585), 12.5% going to Minnesota Class Counsel (Minnesota Class Counsel's Fee and Expense Motion), and 17.5% going to the Phipps/Clark Group (ECF No. 3597). Thus, Collective Class Counsel collectively seek for themselves attorneys' fees ($400.5 million)—or 26.5% of the settlement fund. That is too much for a common fund case of this size. Their collective class fee request does include the $9 million of common benefit time submitted by the Watts Group.

Common fund fee awards are an equitable tool designed to avoid unjust enrichment, not to cause it, and are permissible only "if made with moderation and a jealous regard to the rights of those who are interested in the fund." *Trustees v. Greenough*, 105 U.S. 527, 536-57 (1882); *see also City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098-99 (2d Cir. 1977).

The Supreme Court's common fund and equitable fund precedents have long called for relatively modest awards in these types of cases. For example, in *Central RR & Banking Co. v. Pettus,*113 U.S. 116, 128 (1885), an early common fund class action, the Supreme Court slashed a 10% common-fund fee award to just 5%.[8] The Supreme Court, in *Harrison v. Perea,* 169 U.S. 311 (1897), found the Territory of New Mexico Supreme Court's reduction of a $5,000 fee award (or about 14% of an equitable fund) to just 10% of the fund was "within the judicial discretion of the court." And in *United States v. Equitable Trust Co.,* 283 U.S. 738, 746-47 (1931), the Supreme Court reviewed a Second Circuit decision rejecting the district court's application of a 33⅓% benchmark and slashing the resulting equitable fund fee award to $100,000 – which the Supreme Court then cut in half. *See Barnett v. Equitable Tr. Co.,* 34 F.2d 916, 919 (2d Cir. 1929), *modified,* 283 U.S. at 746.

The Supreme Court's own fee decisions thus support modest awards of 10% or less in common fund cases and equitable fund cases. Although lower courts lately have allowed common fund awards to drift upward, moreover, "[t]he mean award in common fund cases is well below the widely quoted one-third figure, constituting 21.9 percent of the recovery across all cases for a comprehensive data set of published cases." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study,* 1 J. Empirical. Legal Stud. 27, 27 (2004). Economies of scale mandate sharply declining class fee percentages in cases like this that produce "mega-fund" recoveries in the hundreds of millions or billions of dollars.

[8] *See Pettus,* 113 U.S. at 128 ("It remains only to consider whether the sum allowed appellees was too great. We think it was. The decree gave them an amount equal to ten percent. upon the aggregate principal and interest of the bonds and coupons filed in the cause …. One-half the sum allowed was, under all the circumstances, sufficient.").

The Federal Judicial Center's *Managing Class Actions: A Pocket Guide for Judges* thus advises that class fees in a mega-fund cases like this, where recoveries may exceed a billion dollars, reasonable common fund attorneys' fees can be expected to fall to around 4%:

> In "mega" cases, be prepared to see attorney requests for truly huge amounts, up to hundreds of millions of dollars. In such cases, of course, the monetary recovery to the class typically is also in the hundreds of millions of dollars, even in the billions. *See, e.g., In re Prudential Insurance Co. of America Sales Practices Litigation*, 148 F.3d 283, 339–40 (3d Cir. 1998). *In such cases, you should be looking at a percentage of recovery far less than the typical range and perhaps as low as 4%.* MCL 4th § 14.121. Generally, as the total recovery increases the percentage allocated to fees should decrease.

Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 7, 33 (Federal Judicial Center, 3d ed. 2010) (emphasis added).

Even if some much smaller cases might warrant so-called "benchmark" awards of 20-25%, the *Manual for Complex Litigation* warns that application of such a "benchmark percentage for unusually large funds may result in a windfall" to class counsel in mega-fund cases. *Manual for Complex Litigation 4th* ("*MCL 4th*") §14.121, at 189 & n. 497 (Federal Judicial Center 2004). "Accordingly, in 'mega-cases' in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages to be appropriate." *Id*. at 188. As an example, *MCL 4th* approvingly cites *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 339–40 (3d Cir. 1998), where the Third Circuit noted common fund class fee awards as low as 4.1% in cases where the recovery exceeds $100 million, and remanded a 6.7% fee award in a billion dollar case "for a more thorough examination and explication of the proper percentage to be awarded to class counsel ... in light of the magnitude of the recovery."

Other circuits concur. The Seventh Circuit has observed that "'though the benchmark in common fund cases is 20%-30%, fee awards usually fall in the 13%-20% range for funds of $51-

$75 million, and in the 6-10% range for funds of $75-$200 million.'" *Florin v. Nationsbank of Georgia, N.A.*, 60 F.3d 1245, 1249 (7th Cir. 1995) (quoting *In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, 886 F.Supp. 445 (E.D. Pa. 1995)). Common fund class fee awards should fall even more dramatically – to significantly less than 10% – in cases like this, where the recovery is more than a billion dollars.

In *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956 (7th Cir. 2013), the Seventh Circuit explained that "it is almost as expensive to conduct discovery in a $100 million case as in a $200 million case. ... There may be some marginal costs of bumping the recovery from $100 million to $200 million, but as a percentage of the incremental recovery these costs are bound to be low." *Id.* at 959. "It is accordingly hard to justify awarding counsel as much of the second hundred million as of the first," *id.*, much less for the fourteenth or fifteenth $100 million, as in this case. "Awarding counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin (yet still preserving some incentive for lawyers to strive for these higher awards)." *Id.* at 959. If, as *Silverman* held, a 27.5% fee award was "at the outer limit of reasonableness" for a $200 million case, *id.*, then a 26.5% collective class fee award in this $1.5 billion case far exceeds the outer bounds of a reasonable award. *See id.*

Second Circuit decisions also are instructive. In *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 44-45, 52 (2d Cir. 2000), the Court affirmed a fee award coming to just 4% of a $54 million common fund settlement, observing that "empirical analyses demonstrate that in cases like this one, with recoveries of between $50 and $75 million, courts have traditionally accounted for these economies of scale by awarding fees in the lower range of about 11% to 19%." In *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 131-32 (2d Cir. 2008), the Second Circuit

affirmed the district court's finding that 8.5% percent of a $1.142 billion settlement fund would be excessive, holding that a 3% fee (a 2.04 multiplier of the attorneys' lodestar was reasonable). Holding that "the sheer size of the instant fund makes a smaller percentage appropriate" the Second Circuit, in *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F. 3d 96, 123 (2d Cir. 2005), affirmed a common fund fee award of 6.5% of a $3.38 billion settlement fund. *See also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005).

Countless decisions confirm that class fees in large cases producing settlements of a billion dollars or more should be far less than what Collective Class Counsel seek for themselves here.[9]

While Professor Klonoff cherry picks some mega-fund cases with larger fee awards – most of them involving settlements of well under $200 million – rigorous empirical studies demonstrate that fee awards from larger settlement common funds are at much lower percentages. Professors Eisenberg and Miller's landmark 2004 study of class action settlements from 1993 through 2002, for example, found that attorneys' fees in billion-dollar mega-fund cases were 10%-12% of the recovery: "In the highest decile of recovery, the mean client recovery was $929,100,000 in the decided cases data. The mean fee percent was 12.0 percent, with a median of 10.1 percent, and a standard deviation of 8.1 percent." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 74 (2004).

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[9] *See, e.g., In re Black Farmers Discrimination Litig*., 953 F.Supp.2d 82, 84 (D.D.C. 2013) (7.4% of $1.2 billion common fund); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 414 (D. Conn. 2009), *aff'd,* 355 F. App'x 523 (2d Cir. 2009) (summary order) (16% of $750 million common fund); *In re Royal Ahold N.V. Sec. & ERISA Litig*., 461 F.Supp.2d 383, 385 (D. Md. 2006) (12% of $1.1 billion common fund); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 106 F. Supp. 2d 721, 736 (D.N.J. 2000) (7.5% of $1.8 billion common fund); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D. N.Y. 1998) (14% of $1 billion common fund); *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig*., 268 F. Supp. 2d 907, 939 (N.D. Ohio 2003) (4.8% of $1 billion common fund).

Professors Eisenberg and Miller's follow-up 2010 study of class action settlements from the years 1993-2008 shows that common fund attorneys' fee awards fell to a mean of 12.0% and a median of 10.2% for funds exceeding $175.5 million. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 263-65 & Table 7 (2010). Their latest research confirms: "We continue to find a 'scaling' effect, in the sense that fees as a percentage of the recovery tend to decrease as the size of the recovery increases—an effect that appears to be due to the economies of scale that can sometimes be achieved in very large cases." Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 940 (2017).

Professor Fitzpatrick's 2010 study of 688 federal class-action settlements from 2006-2007 similarly confirms that "fee percentages are strongly and inversely associated with the size of the settlement." Brian T. Fitzpatrick, *Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811, 814, 837-38 (2010). According to Professor Fitzpatrick's 2010 study "fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent." *Id.* at 838-39.

Professor Fitzpatrick's July 14, 2016, expert declaration in the *Deepwater Horizon* case, supporting a 4.3% fee common-fund award from a $13 billion settlement, provides further perspective. *See* Declaration of Bryan T. Fitzpatrick, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, ECF No. 21098-3 (E.D. La., filed July 21, 2016) (Exhibit F). Professor Fitzpatrick acknowledged that for his published study "there were nine settlements in my dataset for $1 billion or more, and the mean and median fee

percentages in these cases were 13.7% and 9.5%, respectively." *Id.* ¶30. When Professor Fitzpatrick, in the *Deepwater Horizon* litigation, "examined all known billion dollar settlements in American history – the nine during the two years of my study and twelve more … in other years," he found that in 21 common fund class action settlements of $1 billion or more, the average attorneys' fee percentage came to 9.92% (total) and 10.97% (cash settlements), and the median average attorneys' fee percentage is 7.40% (total) and 7.50% (cash settlement). *Id.* ¶31 & Table 1. These results unequivocally confirm that the fee sought by Collective Class Counsel for themselves in this mega-fund case is far too high.

Courts should, moreover, cross-check any percentage fee award against class counsel's lodestar to ensure that the proposed percent-of-fund fee award is not excessive.[10] Yet here, for example, "[t]he multiplier on the Kansas Class Counsel's requested share of the requested class fee of $251.67 million [or 16.7% of the common fund] is 3.079." Mem. of Kansas MDL Co-Lead Counsel & Settlement Class Counsel Christopher Seeger, at 83 (ECF No. 3587). That is an excessive request by itself without including the other Collective Class Counsel's fee requests.

The Supreme Court's decisions concerning reasonable class fees in contingent fee class action litigation unequivocally mandate a strong presumption that Collective Class Counsel's

[10] *See Brytus v. Spang & Co.*, 203 F.3d 238, 247 (3d Cir. 2000) (directing district courts to "cross-check the fee from the percentage of recovery method against that from the lodestar method to assure that the percentage awarded does not create an unreasonable hourly fee"); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) ("we encourage the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage"); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 340-41 (3d Cir. 1998); *see generally* Hon. Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases,* 18 GEORGETOWN J. LEGAL ETHICS 1453 (2005).

unenhanced lodestar provides sufficient compensation. *See, e.g., Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542 (2010). A three-plus multiplier—as is requested here—is much too much.

Here, Collective Class Counsel attempt to stay under the mega-fund attorneys' fee bar by submitting individual fee applications for themselves of $250 million (Kansas Class Counsel), $62.5 million (Minnesota Class Counsel) and $88 million (Phipps/Clark Group)—a total of $400.5 million. (The Minnesota original application does include the Watts Group common benefit time). Collective Class Counsel's thinly disguised strategy, however, should not be countenanced. Since they all functioned as class counsel, controlled the PNC wherein they engaged in collusion and self-dealing, signed the Secret Fee Deal, and submitted common benefit time, Collective Class Counsel should be treated collectively for purposes of computing their attorneys' fee and expense awards.

That said, and in light of the huge recovery in this case, the Supreme Court's holdings that unenhanced lodestar constitutes a reasonable fee in contingency fee class actions (*Perdue,* 559 U.S. 542), its longstanding admonition that common fund fee awards must be "made with moderation and a jealous regard" for the interests of the class (*Greenough,* 105 U.S. at 536-37), and the many decisions holding that class counsel's attorneys' fees in mega-fund cases should be less than ten percent of the recovery, the attorneys' fee award requested by Collective Class Counsel here is clearly excessive and should be dramatically reduced. Collective Class Counsel's fee awards should be no more than the following: Kansas Class Counsel ($121.5 million at a 1.5 lodestar multiplier); Minnesota Class Counsel ($60 million at a 1.5 lodestar multiplier (including the Watts Group common benefit time)); and Phipps/Clark Group ($60 million at a 1.5 lodestar multiplier). Collective Class Counsel's collective fee awards total $241.5 Million, under the Toups/Coffman proposal, which equates to a collective 16% fee award of the total settlement. As

demonstrated above, it's also on the high side of the range of class fees awarded in mega-fund cases.

Toups/Coffman Plaintiffs' Counsel assert that $500 million is the maximum reasonable and appropriate amount to be allocated from the common fund to pay the fees and expenses of *all counsel* (Toups/Coffman Plaintiffs' Counsel do not object to this overall amount)—both Collective Class Counsel and individual plaintiffs' counsel. It's also consistent with *all counsel's* requested attorneys' fees and expenses. Handling attorneys' fees and expenses in this manner (*i.e.*, a settlement carve-out from which *all counsel* who worked on the litigation would be compensated) will put all corn producer settlement claimants on equal footing. That said, in the interest of resolving the fee and expense motions, and in further response to the Court's request for information to assist it with determining the fee and expense motions, Toups/Coffman Plaintiffs' Counsel suggest the fee and expense awards along the lines set forth in the attached Toups/Coffman Plaintiffs' Suggested Fee and Expense Awards chart (Exhibit G).[11] Toups/Coffman Plaintiffs' Counsel further object to any law firm receiving a fee award of more than a 1.5 lodestar multiplier, if the fees are ultimately decided by lodestar.

WHEREFORE, Toups/Coffman Plaintiffs' Counsel respectfully request the Court to appoint a mediator that is independent, unbiased, and objective who can bring a fresh perspective to the proceedings. The Court should not allow Ms. Reisman and Judge Stack to participate in the fee and expense allocation.

[11] To the extent the suggested fee award of any law firm (or law firm group) set forth in Exhibit G is less than its requested fee, the suggested reduction is an objection by Toups/Coffman Plaintiffs Counsel to such law firm's (or law firm group's) requested fee, but only to the extent that it is a reduction in order to determine a fair and reasonable fee for all fee applicants, since the total of all fee applications exceed the total fee requested.

Toups/Coffman Plaintiffs' Counsel further request the Court to reinstate the October 17, 2018 briefing deadline for responses and objections to the fee and expense motions to give all counsel sufficient time to review, analyze, and respond to such motions and in the meantime, allow the mediation process to go forward regarding the Fee and Expense applications.

In the alternative, should the Court proceed with determining how the fee and expense motions will be allocated, Toups/Coffman Plaintiffs' Counsel further request the Court to (i) allocate a maximum of $500 million from the common fund to pay the fees and expenses of all counsel in the litigation, and (ii) award attorneys' fees and expenses along the lines proposed in the Toups/Coffman Plaintiffs' Suggested Fee and Expense Awards chart (Exhibit G), or in the alternative, allow all private counsel the opportunity to determine what claims their clients filed, determine their awards, and then calculate the fees per the contracts their clients signed, after which the Court could then determine how the fees of $500 Million should be allocated.

In all things, Toups/Coffman Plaintiffs' Counsel respectfully request the Court to grant them such other and further relief to which they are justly entitled.

Date: August 17, 2018

Respectfully submitted,

By: /s/ *Mitchell A. Toups*
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TOUPS/COFFMAN PLAINTIFFS' COUNSEL

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Toups/Coffman Plaintiffs' Counsel's Response and Objections to Certain Fee and Expense Motions was served on all counsel of record, via the Court's electronic filing system, on August 17, 2018.

/s/ Mitchell A. Toups
Mitchell A. Toups

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR162 CORN LITIGATION	**Master File No. 2:14-MD-02591-JWL-JPO**
THIS DOCUMENT RELATES TO ALL CASES EXCEPT:	**MDL No. 2591**
Louis Dreyfus Company Grains Merchandising LLC v. Syngenta AG, et al., No. 16-2788-JWL-JPO	
Trans Coastal Supply Company, Inc. v. Syngenta AG, et al., No. 2:14-cv-02637-JWL-JPO	
The Delong Co., Inc. v. Syngenta AG et al., No. 2:17-cv-02614-JWL-JPO	
Agribase International Inc. v. Syngenta AG, et al., No. 2:15-cv-02279-JWL-JPO	

DECLARATION OF MITCHELL A. TOUPS

Pursuant to 28 U.S.C. § 1746, I, Mitchell A. Toups, declare as follows:

1. I am an attorney in good standing licensed to practice law in the States of Texas and New York. I am also admitted to practice in the United States District Courts for the Eastern, Northern, and Southern Districts of Texas, the Northern District of Illinois, the Eastern District of Wisconsin, the United States Court of Appeals for the First, Third, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits, the United States Court of Federal Claims, and the United States Supreme Court. I also have been, and am, admitted *pro hac vice* in various other state and federal courts across the United States.

2. I am a partner of Mitchell A. Toups, Ltd. ("Toups"). As a partner of Mitchell A. Toups, Ltd. and Weller, Green, Toups & Terrell, L.L.P. law firm in Beaumont, Texas, I am authorized to submit this Declaration on behalf of Mitchell A. Toups, Ltd. and Weller, Green, Toups & Terrell, L.L.P.

3. I have practiced law for over thirty-four years. I am Board Certified in Civil Trial Law and Personal Injury Law by the Texas Board of Legal Specialization and am Certified in Civil Trial Law and Civil Pretrial Practice by the National Board of Trial Advocacy. I am AV peer review rated by the Martindale-Hubbell Law Directory and a Texas Super Lawyer. For my entire legal career, my practice has focused on complex litigation, class actions, and mass actions in state and federal courts throughout the United States. I have served in leadership roles in MDL and non-MDL class action litigation. I also have represented opt-out plaintiffs in class action litigation. I am knowledgeable about class action and opt-out plaintiff jurisprudence.

4. I am co-counsel for the over 9,400 individual corn producer plaintiffs in forty-four states farming approximately 2.9 million acres of corn on the average during each year in the damages period commonly known as the Toups/Coffman Plaintiffs. I have personal knowledge of the statements in this Declaration and, if called as a witness, I could, and would, testify competently them.

5. I make this Declaration in support of the Toups/Coffman Plaintiffs' Counsel's Responses and Objections to Certain Fee and Expense Motions.

6. After a cursory review of the voluminous submissions, for example, I identified a number of law firms that filed fee applications with more than one attorney group. Based on our count, there are approximately 28,000 pages include in the filed fee applications and supplemental fee applications – approximately 12.5 linear feet of documents that would fill 10 banker boxes.

Additional time is needed to thoroughly analyze these fee applications to ascertain whether they are duplicative time submissions. In addition, multiple law firms that are not class counsel appear to have coded the time spent working with their individual corn producer clients as class counsel approved common benefit time in their supplemental fee petitions even though their time was not claimed to be common benefit time in their original fee petitions. Additional time is needed to thoroughly analyze these time submissions to ascertain whether such time, in fact, is class counsel approved common benefit time. Additional time also is needed to thoroughly analyze whether any of the claimed litigation expenses, in fact, include the costs of prospective client mailers and other marketing expenses, overhead expenses, or private airplanes. For the Court's analysis of the fee and expense applications to be accurate and meaningful, sufficient time is necessary to insure an "apples to apples" comparison.

7. Declarant has attached multiple exhibits to Toups/Coffman Plaintiffs' Counsel's Responses and Objections to Certain Fee and Expense Motions. Declarant would show that:

8. Exhibit "B" is a true and correct copy of the Plaintiffs and Syngenta Settlement Term Sheet dated September 25, 2017.

9. Exhibit "C" is a true and correct copy of Mr. Watts' February 19, 2018 email to me.

10. Exhibit "D" is a true and correct copy of an email from John Cracken to Mikal Watts dated January 11, 2018.

11. Exhibit "E" is a true and correct copy of a "Fee-Sharing Agreement" in the Syngenta MIR162 Litigation dated February 23, 2018.

12. Exhibit "F" is a true and correct copy of the Professor Fitzpatrick Declaration (filed in *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, ECF No. 21098-3 (E.D. La., filed July 21, 2016)).

13. Exhibit "G" is a copy of chart of Toups/Coffman Plaintiffs' Suggested Fee and Expense Awards. This chart is a culmination of the review of all Fee Applications and Supplemental Fee Applications submitted in *In re Syngenta AG MIR162 Corn Litigation.*

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

Executed on February 27, 2018, at Beaumont, Texas.

/s/ Mitchell A. Toups
Mitchell A. Toups

EXHIBIT "B"

HIGHLY CONFIDENTIAL| FOR SETTLEMENT DISCUSSION ONLY
PLAINTIFFS AND SYNGENTA
SETTLEMENT TERM SHEET

This Term Sheet is by and between the court-appointed Plaintiffs' Settlement Negotiation Committee (Clayton Clark, Dan Gustafson, Chris Seeger and Mikal Watts) (collectively, the court-appointed Plaintiffs' Settlement Negotiation Committee), on the one hand, and Syngenta AG and all affiliates and subsidiaries of Syngenta AG ("Defendant") (collectively, the "Parties").

1. Purpose.

a. The purpose of this Term Sheet is to set forth the terms and conditions to which the Parties have agreed to settle Plaintiffs' Claims against Syngenta. The Parties acknowledge that this Term Sheet must be superseded by more definitive written settlement agreements ("Agreements") executed by all Parties, which shall control over, supersede, and replace this Term Sheet. The Parties agree that they will continue to negotiate in good faith to finalize formal settlement documents consistent with this Term Sheet. Final settlement is contingent upon agreement on all terms and conditions in, and execution of, the Agreements.

b. Further, Syngenta and the members of the court-appointed Plaintiffs' Settlement Negotiation Committee agree that these settlement discussions and the terms of this Term Sheet are strictly confidential; and, when and if Class Counsel file their Motion for Preliminary Approval and the existence of the Agreements becomes public, the Parties agree to advocate in favor of and otherwise support the terms and condition of the Agreements in every material respect.

c. Further, no later than five (5) business days after the execution of this Term Sheet, the Parties shall file a joint motion to stay all proceedings for ninety (90) days pending execution of the Agreements in all courts where Claims are pending, including the Kansas MDL, the Minnesota MDL, and the respective federal and state courts in Illinois, Iowa, Ohio, Michigan, and Indiana.

2. Definitions.

a. "CAFA Notice" means the notice of the Class Plaintiff Class Settlement to be served by Defendant upon state and federal regulatory authorities as required by the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

b. "Claim Administrator" means the entity to be agreed by the Parties in final documentation, as agreed to by the parties, once approved by both the Class Plaintiff Court and the Individual Plaintiff Court.

c. "Claim Administrator's Final Report" means the Claim Administrator's final report to the Parties, the Class Plaintiff Court, and the Individual Plaintiff Court reporting (1) the total number of Class Plaintiffs and Individual Plaintiffs who properly and timely registered and made a claim for a recovery in connection with the Settlement Agreements, (2) the identity of

each such Plaintiff, (3) each such Plaintiff's Compensable Bushels, if any, for each of Marketing Years 2014-17, (4) the total number of Class Opt Outs and Individual Opt Outs, and (5) the Claim Administrator's final allocation of the Gross Settlement Proceeds among the Class Plaintiff QSF and the Individual Plaintiff QSF. Plaintiffs agree that they will negotiate in good faith to finalize a fair and reasonable method for the Claims Administrator to make a final allocation determination based on verifiable information. To the extent the Plaintiffs cannot agree, the Special Master will make a single final and unappealable determination of a fair and equitable method for final allocation.

d. "Claim Administrator's Preliminary Report" means the Claim Administrator's preliminary report to the Parties, the Class Plaintiff Court, and the Individual Plaintiff Court reporting (1) the total number of Class Plaintiffs and Individual Plaintiffs who properly and timely registered and made a claim for a recovery in connection with the Settlement Agreements, (2) the identity of each such Plaintiff, (3) each such Plaintiff's Compensable Bushels, if any, for each of Marketing Years 2014-17, (4) the total number of Class Opt Outs and Individual Opt Outs, and (5) the Claim Administrator's preliminary allocation of the Gross Settlement Proceeds among the Class Plaintiff QSF and the Individual Plaintiff QSF. Plaintiffs agree that they will negotiate in good faith to finalize a fair and reasonable method for the Claims Administrator to make a preliminary allocation determination based on verifiable information. To the extent the Plaintiffs cannot agree, the Special Master will make a single final and unappealable determination of a fair and equitable method for preliminary allocation.

e. "Claim Deadline" means the date that is no more than 60-90 days after Class Counsel publish Notice to the Class Members of the proposed Class Plaintiff Settlement Agreement.

f. "Claim Form" means the final form or forms approved by the Parties and the Class Plaintiff Court for use by Class Plaintiffs and approved by the Individual Plaintiffs Court for use by Individual Plaintiffs to make a recovery in connection with the Agreement applicable to them, which form will require a Plaintiff to provide (i) the identity of the Plaintiff, the Plaintiff's operations, and the Plaintiff's counsel (if an Individual Plaintiff), (ii) the Plaintiff's wet-ink signature[1], and (iii) documents sufficient to demonstrate ownership interests, years of the Plaintiff's FSA-578 forms, or comparable information for the Marketing Years 2013 and 2014, then that claim may include an estimate of the Plaintiff's recovery eligibility and volume to determine Compensable Bushels in 2015, 2016, and 2017 as agreed by the Parties based on an average calculated based on the documentation provided with respect to Marketing Years 2013 and 2014, and (iv), if, and only if, the Plaintiff desires to rely upon comparable information such as crop-insurance reports and/or additional FSA-578 forms, and/or grain elevator or ethanol plant sales receipts for a specific Marketing Year), copies of the Plaintiff's comparable information for the Marketing Years for which the Plaintiff desires to make a recovery.

[1] A Plaintiff's counsel may not sign the Claim Form; only the Plaintiff may sign the Plaintiff's Claim Form.

g. "Claims" means all claims made, or which could have been made, by any Plaintiff against any or all of the Released Parties in connection with Syngenta's commercialization of MIR 162 and Event 5307.

h. "Class Counsel" means Don Downing, Christopher A. Seeger and Daniel E. Gustafson.

i. "Class Definition" means a nationwide class(es) consisting of all corn Plaintiffs in the United States who priced any Corn for sale after September 15, 2013, excluding (i) the Class Plaintiff Court and its officers and employees, (ii) Syngenta and its directors, officers, employees, agents, and representatives, (iii) government entities, (iv) any Class Member who timely and properly opts-out; and (v) Eligible Individual Plaintiffs.

j. "Class Member" means a Plaintiff included in the Class Definition.

k. "Class Notice" means that Notice negotiated by the Parties, approved by the Class Plaintiff Court.

l. "Class Opt Out" means a Class Member who properly and timely opts out of the Settlement Class.

m. "Class Opt Out Deadline" means the date that is 60 days after Class Counsel publish Notice to the Class Members of the proposed Class Plaintiff Settlement Agreement.

n. "Class Opt Out Form" means the form or forms approved by Class Counsel and the Class Plaintiff Court for use by Class Plaintiffs to opt out of the Settlement Class, but one requiring the simultaneous delivery of the information required in the Claim Form.

o. "Class Plaintiff" means a Plaintiff not included in a Registration List provided by the Registration Deadline, and therefore, not an Eligible Individual Plaintiff.

p. "Class Plaintiff Court" means the United States District Court for the District of Kansas; Hon. John W. Lungstrum, presiding judge.

q. "Class Plaintiff QSF" means the Qualified Settlement Fund established by order of the Class Plaintiff Court and to be administered by Class Counsel under the direction and jurisdiction of the Class Plaintiff Court.

r. "Class Plaintiff Settlement Agreement" means the Settlement Agreement that provides the settlement and related full and final release of all Class Plaintiffs' Claims.

s. "Class Plaintiffs Special Master" means the person to be agreed to by the Parties and approved by the Class Plaintiff Court in final documentation.

t. "Compensable Bushel" means a corn bushel priced in a subject Marketing Year for which a Plaintiff is entitled to make a recovery in connection with the Agreement

applicable to such Plaintiff; the parties will agree to negotiate in good faith to reach a process to determine Compensable Bushels that capture all Plaintiffs' claims with enough specificity to verify all such claims.

u. "Corn" means corn and/or the byproducts resulting from corn and priced after September 15, 2013.

v. "Eligible Individual Plaintiff" means a Plaintiff represented by Individual Plaintiffs Counsel and others who are included on a timely provided Registration List by the Registration deadline, and their respective Landlords.

w. "Escrow Account" means the escrow account to be established by orders of the Class Plaintiff Court and Individual Plaintiff Court and to be administered by the Claim Administrator under the direction and jurisdiction of the Class Plaintiff Court and the Individual Plaintiff Court.

x. "Escrow Bank" means a financial institution in the United States agreed to by the parties, in an Escrow Account.

y. "Excluded Claim" means a Claim made by a Class Plaintiff Opt Out or by an Individual Plaintiff Opt Out.

z. "FSA" means the U.S.D.A.'s Farm Service Agency.

aa. "Gross Settlement Proceeds" means $1,500,000,000 plus a portion not to exceed $10,000,000.00 of the amount charged or reimbursed by the Claims Administrator, for administering the Settlement Agreements, including, without limitation, the Claims Administrator's reimbursement to Individual Plaintiffs Counsel for the costs, labor and otherwise properly documented expenses, of complying with PFS Orders, Opt-Out Orders entered prior to this Term Sheet by the Kansas MDL, obtaining FSA 578s and comparable information pursuant to orders entered by the Kansas MDL, the Minnesota MDL and other jurisdictions, the fees of the Claim Administrator, the Individual Plaintiff Special Master, and the Class Plaintiff Special Master for time expended after this Term Sheet is signed. Syngenta shall not, under any circumstances, be responsible for, or liable for, payment of any amount in this settlement above the $1,510,000,000.

bb. "Individual Opt Out" means an Individual Plaintiff who properly and timely opts out of the Individual Plaintiff Settlement Agreement.

cc. "Individual Plaintiffs' Counsel" means Mikal Watts and Clayton Clark.

dd. "Individual Plaintiff Court" means the 23rd Judicial District Court, Brazoria County, Texas; Hon. Ben Hardin, presiding judge.

ee. "Individual Plaintiff QSF" means the Qualified Settlement Fund to be established by order of the Individual Plaintiff Court and to be administered by Individual

Plaintiffs' Counsel under the direction and jurisdiction of the Individual Plaintiff Court.

ff. "Individual Plaintiff Settlement Agreement" means the Settlement Agreement by Individual Plaintiffs' Counsel, on the one hand, and Syngenta, on the other, that provides the settlement and related full and final release of all Eligible Individual Plaintiff Claims.

gg. "Individual Plaintiff Special Master" means the person to be agreed to by the Parties and approved by the Individual Plaintiff Court in final documentation.

hh. "Kansas MDL" means *In re: Syngenta AG MIR162 Corn Litigation*, No. 14-md-2591-JWL-JPO, United States District Court, District of Kansas.

ii. "Marketing Year" means from September 1st to August 31st. As used in this Term Sheet, Marketing Year 2014 refers to the period from September 1, 2013 to August 31, 2014.

jj. "Minnesota MDL" means *In re: Syngenta Litigation*, 27-CV-15-3785, Fourth Judicial District Court, Hennepin County, Minnesota.

kk. "Motion for Preliminary Approval" means Class Counsel's motion for preliminary approval of the Class Plaintiff Settlement Agreement.

ll. "Notice" means notice to the Class Members of the Class Plaintiff Settlement Agreement in the form established by order of the Class Plaintiff Court and to be administered by Class Counsel under the direction and jurisdiction of the Class Plaintiff Court. Class Plaintiff Counsel agree that other than under the Class Notice Plan authorized by the Class Plaintiff Court, that they will not contact or solicit in the future any Plaintiffs in connection with the prosecution of their Claims, disparage any other Counsel for Individual Plaintiffs or for Class Plaintiffs, nor claim the ability to outperform any other Counsel for Individual Plaintiffs or Class Plaintiffs in connection with the prosecution or settlement of an Individual Plaintiff's Claims.

mm. "Opt Out Orders" means that certain order entered by the Kansas MDL requiring wet-ink signatures for persons to opt out of the Preliminary Certification of the Class for litigation purposes.

nn. "PFS Orders" means those Plaintiff Fact Sheet Orders entered by the Kansas MDL, the Minnesota MDL or other jurisdictions.

oo. "Plaintiff" means any person or entity that priced Corn after September 15, 2013.

pp. "QSF" means qualified settlement fund.

qq. "Registration Deadline" means the date that is 10 (ten) days after both Syngenta and Class Counsel signed the Class Plaintiff Settlement Agreement, and after both Individual Plaintiffs Counsel and Syngenta sign the Individual Plaintiff Settlement Agreement

envisioned herein.

rr. "Registration List" means the lists to be provided by lawyers wishing to have their clients included within the Individual Plaintiffs Settlement Agreement. Each Registration List must include an excel spreadsheet with the identities of the Individual Plaintiffs represented by such lawyers as of the date of this Term Sheet, an agreement signed by counsel representing them that who is credited with representing such Eligible Individual Plaintiffs is based presumptively on the earliest representation contract, subject to further negotiation between counsel, and an averment that Counsel for Individual Plaintiffs agree that they will not solicit in the future any Plaintiffs in connection with the prosecution of their Claims, disparage any other Counsel for Individual Plaintiffs or for Class Plaintiffs, nor claim the ability to outperform any other Counsel for Individual Plaintiffs or Class Plaintiffs in connection with the prosecution or settlement of an Individual Plaintiff's Claims.

ss. "Release" means the release of Syngenta and other Released Parties included as part of the Claim Form, to be negotiated by the Parties no later than 10 days before the Registration Deadline.

tt. "Released Parties" means Syngenta AG, its direct and indirect subsidiaries, and its affiliates, as well as their respective shareholders (direct or indirect), directors, officers, employees, agents, and representatives, but does not include the Archer Daniels Midland Company, Bunge North America, Inc., Cargill, Incorporated or Cargill, Incorporated SA, Louis Dreyfus Commodities, LLC, or Gavilon Grain, LLC (the so-called A-B-C-D-G Defendants).

uu. "Releasing Parties" means Class Plaintiffs and Eligible Individual Plaintiffs, other than Class Opt Outs and Individual Opt Outs.

vv. "Settlement Agreements" means the Class Plaintiff Settlement Agreement and the Individual Plaintiff Settlement Agreement.

ww. "Settlement Class" means the settlement class(es) defined by the Class Definition and proposed by Class Counsel to the Class Plaintiff Court in connection with their Motion for Preliminary Approval, but does not include Eligible Individual Plaintiffs.

xx. "Special Master" means the Hon. Daniel J. Stack and Ellen K. Reisman.

yy. "Syngenta" means Syngenta AG, its subsidiaries, and its affiliates.

zz. "U.S.D.A." means the United States Department of Agriculture.

3. Gross Settlement Proceeds. Within thirty (30) days of the signing of the Class Plaintiff Settlement Agreement and the Individual Plaintiff Settlement Agreement, Syngenta agrees to pay an amount, to be agreed by the Parties within two (2) business days of the approval referenced in paragraph 6(d)(xvi), into the Escrow Account. Syngenta agrees to pay the remainder of the balance of the Gross Settlement Proceeds to settle all Claims, save Excluded Claims, to be paid according to a schedule to have been negotiated as part of those Settlement Agreements. The

Gross Settlement Proceeds reflect the total proceeds payable by Syngenta in connection with the Class Plaintiff Settlement Agreement and the Individual Plaintiff Settlement Agreement. Defendant shall not participate in any subsequent allocation processes and payment of the Gross Settlement Proceeds shall relieve Defendants of any liability with respect to that allocation plan.

4. Settlement Agreements.

a. Class Counsel, Individual Plaintiff Counsel and counsel for Defendant agree to negotiate in good faith the Class Plaintiff Settlement Agreement and the Individual Plaintiff Settlement Agreement. Such agreements, with the negotiated Claim Form, shall be negotiated by October 20, 2017 unless otherwise extended.

b. The Parties agree to execute two settlements agreements - the Class Plaintiff Settlement Agreement and the Individual Plaintiff Settlement Agreement. In the event the Parties are unable to timely agree to settlement agreements that are satisfactory to Defendant and the Plaintiffs' Negotiating Committee, either Party shall have the option to terminate this settlement.

c. The Class Plaintiff Settlement Agreement and the Individual Plaintiff Settlement Agreement shall not be binding unless and until the Class Plaintiff Settlement Agreement is approved by the Class Plaintiff Court.

d. Both Settlement Agreements will provide the following:

i. Class Counsel will file their Motion for Preliminary Approval within 10 days after the Settlement Agreements are executed by the Parties;

ii. Within 10 days of submission of the Class Plaintiff Settlement Agreement to the Class Plaintiff Court, CAFA Notice shall be served on state and federal regulatory authorities.

iii. Individual Plaintiffs Counsel shall provide their Registration Lists to Defendant and Class Counsel within 10 days after the Class Plaintiffs Court preliminarily approves the Class Plaintiff Settlement Agreement;

iv. Any Individual Plaintiff not included with the Individual Plaintiff Registration List shall automatically become a member of the Plaintiff Class, and will receive Class Notice;

v. Within 10 days after the receipt of Eligible Individual Plaintiffs Counsel's Registration Lists, Class Plaintiffs Counsel shall send the Class Notice to all Class Plaintiffs, but not to Eligible Individual Plaintiffs;

vi. Then, Class Counsel will file a motion with the Class Plaintiff Court to establish the Class Plaintiffs QSF, and Individual Plaintiffs Counsel will file a motion with the Individual Plaintiff Court to establish the Individual Plaintiff QSF;

vii. Those Class Plaintiffs who desire to opt out of the Settlement Class must file with the Claim Administrator before the Class Opt Out Deadline a complete Class Opt Out Form;

viii. Those Eligible Individual Plaintiffs who desire to opt out of the Individual Plaintiffs Settlement Agreement must file with the Claim Administrator before the Opt Out Deadline a complete Individual Plaintiff Opt Out Form;

ix. Those Class Plaintiffs who desire to make a recovery in connection with the Class Plaintiff Settlement Agreement must provide a completed Claim Form to the Claim Administrator before the Claim Deadline; and, those Eligible Individual Plaintiffs who desire to make a recovery in connection with the Individual Plaintiff Settlement Agreement must provide a completed Claim Form to the Claim Administrator before the Claim Deadline;

x. Then, the Claim Administrator will issue its Preliminary Report;

xi. Then, any Party may appeal the content of the report to the Special Master; and, within 60 days of such appeal, the Special Master will make a final and unappealable determination in connection with the issues presented on appeal and report the determination to the Parties, the Class Plaintiff Court, the Individual Plaintiff Court, and the Claim Administrator, which reports will be binding on the Parties and the Claim Administrator;

xii. Then, after all appeals to the Special Master, if any, are complete, the Claim Administrator will issue its Final Report;

xiii. Then, the Claim Administrator will issue its Final Report, to be reviewed by the Special Master for his recommendations, and to be approved by the Class Plaintiffs Court, who will then either find the proposed allocation fair to the Settlement Class and order the Escrow Bank to wire the Gross Settlement Proceeds, plus any interest earned thereon, to the Class Plaintiff QSF and to the Individual Plaintiff QSF in the amounts detailed in the Claim Administrator's Final Report as recommended by the Special Master;

xiv. The Special Master will determine the policies and procedures for the administration of the Class Plaintiff QSF; and, the Claims Administrator will implement such policies and procedures; provided, the Claim Administrator will distribute 85% of the QSF's corpus to the Class Plaintiffs eligible to make a recovery from the Class Plaintiff QSF in the amount as detailed in the Claim Administrator's Final Report; then, the Claim Administrator will distribute some or all of the remaining 15% of the Class Plaintiff's QSF's corpus, net of administrative costs, to those Class Plaintiffs who demonstrate that they outperformed the Claim Administrator's estimate of the Plaintiffs' Compensable Bushels for one or more Marketing Years; then, to the extent monies remain, the Claim Administrator will distribute the balance of such monies to the Class Plaintiffs to whom the Claim Administrator has already made distributions in proportion to such distributions; similarly, the Individual Plaintiff Special Master will determine the policies and procedures for the administration of the Individual Plaintiff QSF; and, the Claims Administrator will implement such policies and procedures; provided, for each QSF, the Claim Administrator will distribute 85% of such QSF's corpus to the Eligible Individual Plaintiffs

eligible to make a recovery from the QSF in the amount as detailed in the Claim Administrator's Final Report; then, the Claim Administrator will distribute some or all of the remaining 15% of such QSF's corpus, net of administrative costs, to those Eligible Individual Plaintiffs who demonstrate that they outperformed the Claim Administrator's estimate of the Plaintiffs' Compensable Bushels for one or more Marketing Years; then, to the extent monies remain, the Claim Administrator will distribute the balance of such monies to the Individual Plaintiffs to whom the Claim Administrator has already made distributions in proportion to such distributions;

xv. Whether the Settlement Agreements become effective will be subject to the following conditions among others to be set forth in the Settlement Agreements: (1) final approval of the Class Plaintiff Settlement Agreement; (2) the total number of Class Opt Outs may not exceed an amount to be agreed in final documentation; (3) the total number of Individual Opt Outs may not exceed an amount to be agreed in final documentation; (4) that Defendant does not exercise any walk-away right to terminate the Settlement Agreements under the terms to be set forth in the Settlement Agreements.

xvi. In addition to the conditions set forth above, and notwithstanding any other provision of this Term Sheet, Defendant shall have the right, in its sole discretion, to terminate the settlement and this Term Sheet in the event that Defendant Syngenta AG does not receive all necessary authorizations from its board of directors, shareholders and appropriate regulatory bodies within the People's Republic of China within three calendar days after this Term Sheet is executed.

xvii. The Class Plaintiff Court accepts exclusive and continuing jurisdiction over Class Counsel, the Class Plaintiffs, the Class Plaintiff Settlement Agreement, and the Class Plaintiff QSF; similarly, the Individual Plaintiff Court accepts exclusive and continuing jurisdiction over Individual Plaintiffs who do not opt out, Individual Plaintiffs Counsel, the Individual Plaintiff Settlement Agreement, and the Individual Plaintiff QSF;

xviii. Nothing in this Term Sheet or the Settlement Agreements or the filing of subsequent settlement class certification motions will subject Individual Plaintiffs Counsel, the Individual Plaintiffs or the Individual Opt Outs, or their respective counsel to the jurisdiction of any federal court in connection with the Individual Plaintiffs' Claims, the Individual Opt Outs' Claims, the Settlement Agreements, the Individual Plaintiff QSF, or with respect to fees contracted to be paid to Individual Plaintiffs Counsel or other lawyers providing a timely Registration List by the Registration Deadline;

xix. The Parties will move each of Hon. Brad Bleyer, David R. Herndon, John W. Lungstrum, and Laurie J. Miller, Amy Grace Gierhart, Thomas Clem, Steve C. Shuff, and Gary McMinimmee to enter an order in their respective courts that require Class Opt Outs and Individual Opt Outs to file a completed plaintiff fact sheet with all the documentation required therewith in the same form previously approved by the Kansas MDL, the Minnesota MDL or the respective Illinois federal and state courts, within 60 days of filing a case against any of the Released Parties alleging any of the Claims in those respective jurisdictions; and

xx. Any dispute between any of the Parties, their counsel, or any of their subsidiaries, affiliates, or heirs (each "Parties"), large or small, at law or in equity, arising out of or in any way relating to one or more of the Settlement Agreements, including, without limitation, the determination of whether this provision is applicable to a dispute, will be determined by a binding, mandatory arbitration administered by the Special Master (the "Arbitration"); provided, subject to paragraph 4(d)(xvii), that any Party to the Dispute may file an action in the Class Plaintiff Court (for disputes arising from the Class Plaintiff Settlement Agreement) or the Individual Plaintiff Court (for disputes arising from the Individual Plaintiff Settlement Agreement) to enforce this Arbitration provision; and, if any Party to a dispute fails to submit to Arbitration following the filing, then the Party to the Dispute failing to submit to Arbitration will bear the other Party's reasonable costs, including attorneys' fees, paid in connection with compelling Arbitration in this regard; judgment on the Special Master's award (the "Award") may be entered in any court of competent jurisdiction; the Arbitration and all related proceedings, including, without limitation, discovery, will occur in the Special Master's office; the rules and procedures applicable to the Arbitration will be determined by the Special Master; provided, the Special Master will issue the Special Master's Award with 30 days after the Special Master's receipt of a demand for Arbitration; the Special Master's Award will be a final and unappealable determination in connection with the issues presented in the Arbitration.

Signatures appear on the following pages.

AGREED, EFFECTIVE, and SIGNED on this the 25th day of September, 2017.

CLARK LOVE HUTSON GP

Clayton A. Clark

GUSTAFSON GLUEK PLLC

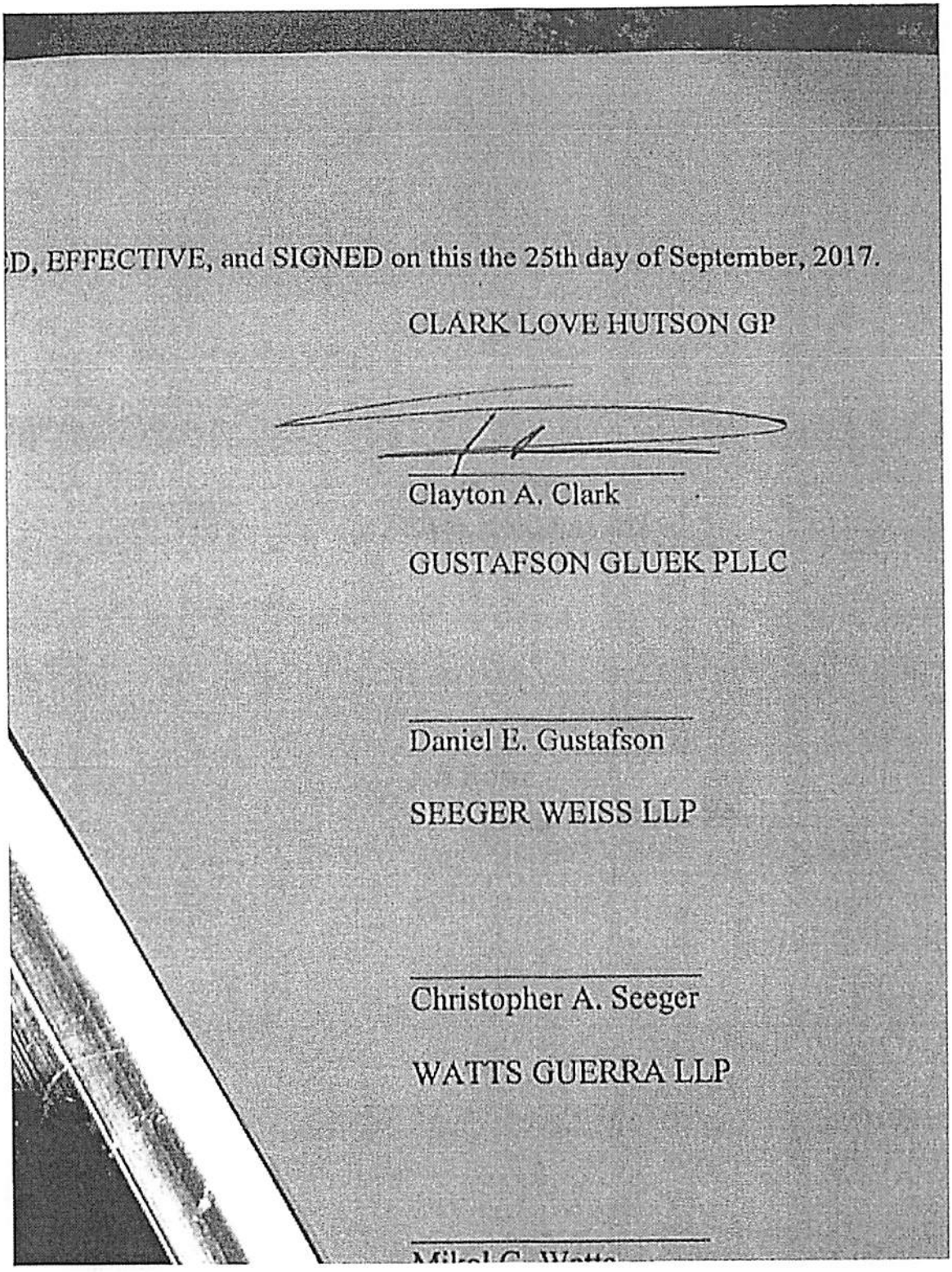
Daniel E. Gustafson

SEEGER WEISS LLP

Christopher A. Seeger

WATTS GUERRA LLP

Mikal C. Watts



D, EFFECTIVE, and SIGNED on this the 25th day of September, 2017.

CLARK LOVE HUTSON GP

Clayton A. Clark

GUSTAFSON GLUEK PLLC

Daniel E. Gustafson

SEEGER WEISS LLP

Christopher A. Seeger

WATTS GUERRA LLP

Mikal C. Watts

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CLARK LOVE HUTSON GP

Clayton A. Clark

GUSTAFSON GLUEK PLLC

Daniel E. Gustafson

SEEGER WEISS LLP

Christopher A. Seeger

WATTS GUERRA LLP

Mikal C. Watts

AGREED, EFFECTIVE, and SIGNED on this the 25th day of September, 2017.

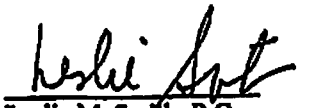
SYNGENTA AG

Erik Fyrwald
CEO, Syngenta AG

Jeff Rowe
CEO, Syngenta Seeds, Inc.

AGREED, EFFECTIVE AND SIGNED on this the 25th day of September, 2017:

KIRKLAND & ELLIS LLP



Leslie M. Smith, P.C.
Counsel for Syngenta AG

APPROVED AS TO FORM AND SUBSTANCE:

REISMAN KARRON GREENE LLP

Ellen K. Reisman
Court-Appointed Settlement Master

Hon. Daniel J. Stack
Special Master

APPROVED AS TO FORM AND SUBSTANCE:

REISMAN KARRON GREENE LLP

_____
Ellen K. Reisman
Court-Appointed Settlement Master

_____
Hon. Daniel J. Stack
Special Master

EXHIBIT "C"

Mitch Toups

From: Mikal Watts <mcwatts@wattsguerra.com>
Sent: Monday, February 19, 2018 3:22 PM
To: Mitch Toups
Subject: Re: Corn negotiations

Mitch:

Settlement negotiations continue; however, we on the Plaintiffs' Settlement Negotiation Committee are not allowed to disclose the details. By court order, the Settlement Special Master must announce a finalized settlement agreement by February 22, 2018, or we've been ordered to appear in Kansas City, Kansas federal court on February 26th until the agreement is finalized.

I'm sorry I am not at liberty to disclose more information that this at this time.

Mikal

> On Feb 19, 2018, at 3:06 PM, Mitch Toups <matoups@wgtlaw.com> wrote:
>
> Mikal --I have been asking for 6 weeks the status of these negotiations, as well as a copy of the term sheet itself--what is going on?

EXHIBIT "D"

From: John Cracken <JC@crackenlawfirm.com>
Date: January 11, 2018 at 12:12:39 PM GMT+7
To: Mikal Watts <mcwatts@wattsguerra.com>
Subject: MW/SYT (RULE 408)

Much changed tonight -

In NY.

Had dinner with Karron, Gustafson, Seeger, and Stack, and Seeger announced that everyone has accepted the 12/4 mediator's proposal, including Clark (who agreed to 15%), and now we're the only obstacle to same.

Seeger offered us 17.5%.

Karron, Gustafson, Seeger, and Stack all consider the 9/25 K irrelevant but for the fact that SYT is out for $1.5B; and, they've set up the 1/25 impromptu hearing to bludgeon us to take 17.5%.

Per them, Smith is prepared to wire around us and let us try to opt out of her national settlement class into the nuclear winter that will follow with a (very) uncooperative Judge M.

Unfortunately -

Judges H, L, and M are getting 100% of their news from Seeger, through Reisman/Stack. They don't know what they don't know.

It's fast becoming a shit show.

EXHIBIT "E"

FEE-SHARING AGREEMENT
Syngenta MIR162 Litigation

Pursuant to the terms of the Agrisure Viptera/Duracade Class Settlement Agreement ("Master Settlement Agreement"), Settlement Class Counsel shall make a Fee and Expense Application to the Court for an attorneys' fee and expense award.[1] This Fee-Sharing Agreement ("Agreement") governs the division of attorney's fees and expenses between the Parties associated with any fee and expense award ordered by the Court in *In re Syngenta AG MIR 162 Corn Litigation*, MDL 2591, in the United States District Court for the District of Kansas.

The Parties agree to divide any attorney's fees awarded by the Court as follows:

Party	Percentage (%)
Patrick J. Stueve *STUEVE SIEGEL HANSON LLP* Don Downing *GRAY, RITTER & GRAHAM, PC* William B. Chaney *GRAY REED & MCGRAW, LLP* Scott A. Powell *HARE WYNN NEWELL & NEWTON*[2]	50%
Daniel E. Gustafson *GUSTAFSON GLUEK PLLC*[3]	12.5%

[1] The Clayton A. Clark group shall submit expenses on their own behalf to Settlement Class Counsel, who will include them in the Attorneys' Fee and Expense Petition.

[2] This group includes Patrick J. Stueve (Stueve Siegel Hanson LLP), Don M. Downing (Gray, Ritter & Graham, PC), William B. Chaney (Gray Reed & McGraw, LLP), Scott A. Powell (Hare Wynn Newell & Newton), Christopher M. Ellis (Bolen Robinson & Ellis, LLP), David F. Graham (Sidley Austin LLP), Jayne Conroy (Simmons Hanly Conroy), John W. Ursu (Greene Espel PLLP), Richard M. Paul, III (Paul McInnes, LLP and Paul LLP)(Kansas MDL common benefit work), Robert K. Shelquist (Lockridge Grindal Nauen)(Kansas MDL common benefit work), Scott E. Poynter (Emerson Poynter LLP), Stephen A. Weiss (Seeger Weiss Law Firm), and Thomas V. Bender (Walters Bender Strohbehn & Vaughan, PC) and all "Referring Counsel." "Referring Counsel" means a law firm engaged with the named law firm in the joint representation of one or more Claimants in connection with the prosecution of their Claims. The four Kansas MDL Co-Lead Counsel (William B. Chaney, Don Downing, Scott Powell and Patrick J. Stueve) will allocate the fees represented by this percentage among all firms that provided common benefit work in the Kansas MDL consistent with the Kansas MDL Court's orders. The four Kansas MDL Co-Lead Counsel will have the right to review, revise and approve any common benefit time and expense submissions for common benefit work performed in the Kansas MDL that will be submitted by Settlement Class Counsel to the Kansas MDL Court consistent with the Kansas MDL Court's orders.

[3] This group also includes Lewis A. Remele, Jr. (Bassford Remele), William R. Sieben (Schwebel Goetz & Sieben, P.A.), Richard M. Paul, III (Paul McInnes LLP and Paul LLP)(Minnesota work), Will Kemp (Kemp, Jones &

Clayton A. Clark *CLARK, LOVE & HUTSON, GP*[4]	17.5%

The remaining 20% of any attorneys' fees awarded by the Court will be allocated by the Kansas MDL Court, in consultation and agreement with the Minnesota MDL Court and Judge Herndon of the United States District Court for the Southern District of Illinois, taking into consideration the recommendation by the Special Masters.

The Parties to this Agreement agree that it is in the Parties' and Class Members' best interest to consummate this Agreement and to cooperate with each other and take all actions reasonably necessary to obtain Court approval of this Agreement. The Parties also agree to take all actions necessary to obtain entry of Orders required to implement this Agreement, and that all Orders entered to implement and approve this Agreement shall be final. The Parties further agree to waive any right to appeal any Order implementing and approving this Agreement.

The Parties agree that no signatory to this Agreement, or their co-counsel, partners, or referring counsel will seek to void this Agreement or take any actions in any Court contrary to any provision in this Agreement. In the event that any Party challenges this Agreement for any reason, any dispute shall be submitted exclusively to the Honorable David R. Herndon, John W. Lungstrum, and Laurie J. Miller for final resolution, with no right of appeal, and consistent with the terms of the Master Settlement Agreement.

Coulthard, LLP), Tyler Hudson (Wagstaff & Cartmell, LLP), Robert K. Shelquist (Lockridge Grindal Nauen)(Minnesota work), and Paul Byrd (Paul Byrd Law Firm PLLC) and all Referring Counsel. Daniel E. Gustafson and Lew Remele will allocate fees represented by this percentage among all firms that provided common benefit work in the Minnesota MDL consistent the Minnesota MDL Court's orders. Daniel E. Gustafson and Lew Remele will have the right to review, revise and approve any common benefit time and expense submissions for common benefit work performed in the Minnesota MDL that will be submitted by Settlement Class Counsel to the Kansas MDL Court consistent with the Minnesota MDL Court's orders.

[4] This group also includes Peter J. Flowers (Meyers & Flowers) and Martin J. Phipps (Phipps Anderson Deacon LLP), as well as Clark's, Flowers' and / or Phipps' Referring Counsel, co-counsel and / or joint venture partners. Clayton A. Clark shall petition the Honorable David R. Herndon of the United States District Court for the Southern District of Illinois concerning the allocation of fees among the members of this group.

All Parties must consent before any Party may amend or supplement this Agreement. If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws, the legality, validity, and enforceability of the remaining provisions of this Agreement shall not be affected. This Agreement shall be liberally construed so as to carry out the intent of the Parties. It shall be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting same. If any Party perceives another may be in default in connection with this Agreement, such Party shall provide such other Party notice of, and a reasonable opportunity to cure, such default; if the latter cures such default, or if the former provides the latter notice of the former's intent to waive such default, then there shall have been no default under this Agreement. To the extent this Agreement requires a Party consent to, or give notice of, anything, such consent or notice must be in writing and signed by such Party, and a copy of such consent or notice must delivered to each of the other Parties.

The Parties also agree that this Agreement, along with the Master Settlement Agreement and the separate fee agreement between Seeger Weiss LLP and Kansas MDL Co-Lead Counsel (collectively, "Fee Agreements"), embodies the entire agreement between the Parties with respect to its subject matter and, if the Master Settlement Agreement is granted final approval, this Agreement supersedes and cancels all prior oral or written agreements by and among the parties, other than the Fee Agreements, including, without limitation, the March 23, 2015 Joint Prosecution Agreement ("JPA"), the June 18, 2015 JPA, and the January 21, 2016 JPA. All parties to the JPAs will sign a separate agreement confirming that this Agreement supersedes and cancels all JPAs if the Master Settlement Agreement is granted final approval. No party that signed a JPA may receive any fee or expense reimbursement from the monies awarded by the Court without signing this separate agreement.

Finally, the Parties further agree to take all actions reasonably necessary to effectuate the terms of the Master Settlement Agreement and ensure all participation thresholds are met. In the event that the Master Settlement Agreement is not granted final approval, this Agreement shall be null and void.

SIGNED on this the 23rd day of February, 2018.

STUEVE SIEGEL HANSON LLP

By: Patrick J. Stueve
Title: Partner

GRAY, RITTER & GRAHAM, PC

By: Don Downing
Title: Shareholder

GRAY REED & MCGRAW, LLP

By: William B. Chaney
Title: Partner

HARE WYNN NEWELL & NEWTON

By: Scott Powell
Title: Partner

SEEGER WEISS LLP

By: Christopher A. Seeger
Title: Partner

GUSTAFSON GLUEK PLLC

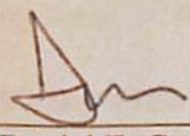
By: Daniel E. Gustafson
Title: Member

CLARK LOVE HUTSON GP

By: Clayton A. Clark
Title: Partner

By: Christopher A. Seeger
Title: Partner

GUSTAFSON GLUEK PLLC



By: Daniel E. Gustafson
Title: Member

CLARK LOVE HUTSON GP

By: Clayton A. Clark
Title: Partner

SEEGER WEISS LLP

By: Christopher A. Seeger
Title: Partner

GUSTAFSON GLUEK PLLC

By: Daniel E. Gustafson
Title: Member

CLARK LOVE HUTSON GP

By: Clayton A. Clark
Title: Partner

EXHIBIT "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010

MDL No. 2179

DECLARATION OF BRIAN T. FITZPATRICK

I. Background and qualifications

1. My name is Brian Fitzpatrick and I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Appendix 1.

2. Like my research at New York University before it, my teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, Complex Litigation, and Comparative Class Actions courses at Vanderbilt. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the NYU Journal of Law & Business, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been invited to speak at symposia and other events about class action litigation, such as the ABA National Institute on Class Actions in 2011, 2015 and 2016, and the ABA Annual Meeting in 2012. Since 2010, I have also served on the

Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). Unlike other studies of class actions, which have been limited to certain subject areas or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study sought to examine *every* class action settlement approved by a federal court over a two-year period, 2006-2007. *See id.* at 812-13. As such, not only is my study not biased toward particular settlements, but the number of settlements included in my study is several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 43 from the Fifth Circuit alone. *See id.* at 817. This study has been relied upon by a number of courts, scholars, and testifying experts. *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at * 17 (S.D.N.Y. Apr. 24, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litigation*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive*

Co. ERISA Litig., 36 F.Supp.3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F.Supp.2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Federal National Mortgage Association Securities, Derivative, and "ERISA" Litigation*, 4 F.Supp.3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Products Liability Litigation*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litigation*, 953 F.Supp.2d 82, 98-99 (D.D.C. 2013) (same); *In re Southeastern Milk Antitrust Litigation*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

4. I have been asked by class counsel to opine on whether the attorneys' fees they have requested and will request in this litigation are reasonable. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel; I have attached a list of these documents (and noted how I refer to these documents herein) in Appendix 2. As I explain, based on my study of settlements across the country and in the Fifth Circuit in particular, I believe the fees are well within the range of reason.

II. Case background

5. These lawsuits were filed against several BP entities, Transocean, and Halliburton by plaintiffs seeking compensation for economic and physical harms caused by the April 20,

2010, Deepwater Horizon offshore drilling disaster. They arose out of the consolidation of related cases before this court by the Judicial Panel on Multidistrict Litigation on August 10, 2010. After nearly two years of discovery and motions practice, the plaintiffs and the BP entities (hereinafter "BP") came to agreement on two settlements, one for the class of plaintiffs with economic harms and one for the class of plaintiffs with physical harms. The court preliminary approved these settlements on April 25, 2012.

6. Before these settlements were reached, BP already had in place a process to pay some claims resulting from the disaster known as the Gulf Coast Claims Facility ("GCCF").[1] The GCCF had planned to accept claims until August 23, 2013, but, once these settlements were preliminarily approved, the GCCF was terminated early and payments were instead immediately distributed from the settlement in anticipation of the court's final approval. On December 21, 2012, the court granted final approval and certified settlement-only economic and physical harms classes.

7. Despite agreeing to the economic harms settlement, BP nonetheless appealed the court's final approval of it to the Fifth Circuit and the United States Supreme Court. *See Deepwater Horizon II,* 739 F.3d 790 (5th Cir. 2014), *rehearing en banc denied,* 756 F.3d 320 (5th Cir. 2014), *cert. denied,* 135 S.Ct. 754 (2014). BP also challenged various interpretations of the settlement by the settlement administrator before this court and the Fifth Circuit. *See, e.g.*, *Deepwater Horizon I,* 732 F.3d 326 (5th Cir. 2013); *Deepwater Horizon III,* 744 F.3d 370 (5th Cir. 2014), *rehearing denied,* 753 F.3d 509 (5th Cir. 2014), *rehearing en banc denied,* 753 F.3d 516 (5th Cir. 2014); *In re Deepwater Horizon,* 785 F.3d 986 (5th Cir. 2015) ("*Rule 79*

[1] Although the GCCF was voluntarily established by BP to satisfy its statutory obligations under the Oil Pollution Act of 1990, the court has recognized that class counsel's efforts here enhanced even the recoveries in the GCCF. *See* Account and Reserve Order pp. 4-6.

Decision"); *In re Deepwater Horizon,* 785 F.3d 1003 (5th Cir. 2015) ("*Non-Profits Decision*"); *In re Deepwater Horizon,* 793 F.3d 479 (5th Cir. 2015) ("*Data Access Appeal*"). Almost all of this additional litigation has now concluded.[2]

8. The persons included in the economic and physical harms settlement classes are set forth in detail in the settlement agreements. *See* BP Economic Settlement Agreement § 1; BP Medical Settlement Agreement § I. In exchange for the release of their claims against BP, *see* BP Economic Settlement Agreement § 10, BP agreed to pay all economic harm claims received within six months of that settlement's effective date (which became June 8, 2015, after BP's appeals were rejected) according to various formulas depending on the type of class member injury. *See* BP Economic Settlement Agreement §§ 4.4.4, 4.4.8. Similarly, BP agreed to pay all physical harm claims received within one year of the effective date of that settlement (which became February 12, 2014). *See* BP Medical Settlement Agreement § V.A. There are no limits in the settlements to the amount of money BP is obligated to pay (with the exception of claims for economic harm incurred by commercial fishermen, for which BP will pay $2.3 billion, *see* BP Economic Settlement Agreement § 5.2). The economic harms settlement further obligated BP to fund a $57 million advertising campaign to promote economic activity in the Gulf region. *See* BP Economic Settlement Agreement § 5.13. It also assigned to the economic harms class BP's claims against Halliburton and Transocean, *see* BP Economic Settlement Agreement Ex. 21; those claims were settled during a thirteen-week, two-phase trial for $337 million, *see* Neutral Allocation p. 4 (allocating $337 million of total settlements against Haliburton and Transocean to the economic harms class). BP also agreed to turn over to the economic harms

[2] The economic harms class still has an appeal pending (currently stayed) on an interpretive issue that was remanded to this court in October 2013. In addition, there continue to be adversarial disputes between BP and class counsel (generally as *amicus*) on interpretative issues with regard to appeals of individual awards.

class any proceeds it received from Transocean's insurer, *see* BP Economic Settlement Agreement § 5.14, which it has now done in the amount of $82 million, *see* Transocean Insurance Order p. 1. The physical harms settlement further obligated BP to pay for medical evaluations for class members and to fund a $105 million health outreach program; it also permits class members to sue BP for physical harms that manifest in the future. *See* BP Medical Settlement Agreement §§ VIII, IX. In addition to all of these obligations, BP has agreed to pay all costs of administering the settlements and to pay class counsel up to $600 million in attorneys' fees and expenses. *See* BP Economic Settlement Agreement § 5.12 & Ex. 27; BP Medical Settlement Agreement § XXI & Ex. 19.

9. As of May 24, 2016, BP had already paid claims to individual class members pursuant to the economic harms settlement of $7.5 billion. *See* Public Statistics for the Deepwater Horizon Economic and Property Damages Settlement (May 24, 2016), *available at* http://www.deepwaterhorizoneconomicsettlement.com/docs/statistics.pdf (hereinafter "Public Statistics"). On April 26, 2016, BP told its shareholders that its total obligations pursuant to the economic harms settlement agreement *alone* would be "significantly" more than $12.9 billion. BP p.l.c., Group results, First quarter 2016 (April 26, 2016) p.18, *available at* https://www.bp.com/content/dam/bp/pdf/investors/bp-first-quarter-2016-results.pdf. In addition, as of March 24, 2016, BP had already paid individual class members over $12 million to compensate them for their physical harms. *See* Cummings Email. The administrator of the physical harms settlement predicts those payments will grow to $63.5 million with an additional $2 million eventually going to medical evaluations for class members. *See id.*

10. At the time class counsel pursued the economic harms class's assigned claims from BP against Transocean and Halliburton, class counsel simultaneously pursued punitive

damages claims on behalf of a new class of plaintiffs against those defendants. All these claims were settled under one structure (albeit at different times by Halliburton and Transocean) during a two-phase trial. *See generally* Halliburton Settlement Agreement; Transocean Settlement Agreement. The Transocean/Halliburton settlement agreement will pay the new class $902 million. *See* Neutral Allocation p. 4 (allocating $902 million of total settlements against Haliburton and Transocean to the new class). The court preliminarily approved this settlement on April 12, 2016.

11. Class counsel are now moving for an award of fees of approximately $555.2 million in the economic and physical harms settlements—the estimated amount that will be remaining after expenses are reimbursed from the $600 million BP agreed to pay in fees and expenses—and they intend to seek an award of fees of $124.95 million in the Transocean/Halliburton settlement. In this declaration, I will give my opinion on whether each of these requests is reasonable. As I explain below, the request in the economic and physical harms settlements is equal to less (probably much less) than 4.3% of the approximate benefits class counsel generated for the classes in these settlements. In the Transocean/Halliburton settlement, the request will be equal to 12.1% of the benefits generated for the new class (and 9.2% of the benefits generated there for both the new class and the economic harms class). Based on my study of class action settlements across the country and in the Fifth Circuit in particular, it is my opinion that these requests are well within the range of reason.

III. Assessment of the reasonableness of the request for attorneys' fees in the economic and physical harms settlements

12. The economic and physical harm settlements are so-called "common fund" settlements where the efforts by attorneys for the plaintiffs have created settlement funds for the benefit of class members. Although BP agreed to pay class counsel's fees separately and on top of its payments to class members, because these are class actions, the court still must approve the fees as reasonable. *See* Fed. R. Civ. P. 23(h). When a fee-shifting statute is inapplicable in such cases (as it is here), courts usually evaluate the fees as if they were to come from the common fund instead of separately from the defendant. That is, courts in such cases create a so-called "hypothetical" or "constructive" common fund by adding together 1) the fees the defendant agreed to pay separately and 2) the value of the fund created for the benefit of the class. The court then evaluates whether it would be reasonable to "award" the fees from this "fund" in the same way it would fees in any common fund class action. *See, e.g., In re Heartland Payment Sys., Inc. Customer Data Security Breach Litig.*, 851 F.Supp.2d 1040, 1072 (S.D. Tex. 2012).

13. At one time, courts that awarded fees in common fund class action cases did so using the familiar "lodestar" approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043, 2051 (2010) (hereinafter "Class Action Lawyers"). Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.* Over time, however, the lodestar approach fell out of favor in common fund class actions. It did so largely for two reasons. First, courts came to dislike the lodestar method because it was difficult to calculate the lodestar; courts had to review voluminous time records

and the like. Second—and more importantly—courts came to dislike the lodestar method because it did not align the interests of class counsel with the interests of the class; class counsel's recovery did not depend on how much the class recovered, but, rather, on how many hours could be spent on the case. *See id.* at 2051-52. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is predominantly injunctive in nature (and the value of the injunction cannot be reliably calculated). *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of settlements).

14. The more popular method of calculating attorneys' fees today is known as the "percentage" method. Under this approach, courts select a percentage that they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product. The percentage approach became popular precisely because it corrected the deficiencies of the lodestar method: it is less cumbersome to calculate, and, more importantly, it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2052. Indeed, the percentage method is virtually always used in large common fund cases like this one. I show this in Table 1, below, where I list all known billion-dollar class action settlements in American history; column three shows the method used by the court to award fees in each case.

15. In the Fifth Circuit, courts have discretion to use either the lodestar method or the percentage method in awarding attorneys' fees in common fund class actions, but the choice between the two methods is not particularly stark in this Circuit because the same factors guide both methods. *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir.

2012) ("We join the majority of circuits in allowing our district courts the flexibility to choose between the percentage and lodestar methods in common fund cases, with their analyses under either approach informed by the *Johnson* considerations."). Indeed, some courts "blend" the two approaches into one by "crosschecking" the percentage method with class counsel's lodestar. *See, e.g.*, *Heartland*, 851 F.Supp.2d at 1075-89 (awarding 20% of $3 million settlement); *In re Enron Corp. Secs. Derivative & ERISA Litig.*, 586 F.Supp.2d 732, 766-803 (S.D. Tex. 2006) (awarding 9.52% of $7.2 billion settlement); *In re Vioxx Products Liab. Litig.*, 2013 WL 5295707, *1-*5 (E.D. La., Sep. 18, 2013) (awarding 33% of $95,000 settlement); *Evans v. Tin, Inc.*, 2013 WL 4501061, *6-*10 (E.D. La., Aug. 21, 2013) (awarding 25.89% of $13.5 million settlement).

16. In light of the well-recognized disadvantages of the lodestar method and the well-recognized advantages of the percentage method, it is my opinion that courts should generally use the percentage method in common fund cases whenever the value of the settlement can be reliably calculated. Only where the value of the settlement cannot be reliably calculated is it my opinion that courts should use the lodestar method; in these circumstances, the lodestar method is the only feasible choice. In this case, I believe the settlement can be reliably valued and therefore the percentage method should be used. In fact, I do not believe it is even possible to use the lodestar method here because it is impossible for class counsel to disaggregate the time they have spent on behalf of the classes here from the time they have spent on behalf of the other plaintiffs in this MDL. *See* Herman-Roy Declaration ¶124. (The difficulty in applying the lodestar method was, as I noted, one of the reasons that courts abandoned the method in favor of the percentage method.)

17. It is also my opinion that courts should not employ the lodestar crosscheck when they use the percentage method—i.e., that they should not use the "blended" method at all—because the lodestar crosscheck reintroduces through the "back door" all of the same undesirable characteristics that the lodestar method brought in through the "front door" before courts abandoned it in favor of the percentage method. Nonetheless, because the lodestar crosscheck is sometimes employed in the Fifth Circuit, I attempt to undertake a very rough lodestar crosscheck and evaluate the fee request under the blended method as well.

18. In my opinion, the fee request here is reasonable no matter whether the percentage method or the blended method is used.

Percentage method

19. Under the percentage method, courts must 1) calculate the value of the settlement and then 2) select a percentage of that value to award to class counsel. When calculating the value of the settlement, courts usually include any cash compensation to class members, cash the defendant must pay to third parties, non-cash relief that can be reliably valued, attorneys' fees and expenses, and administrative costs paid by the defendant. *See, e.g., In re: Heartland Payment*, 851 F.Supp. at 1080. When selecting the percentage, courts in the Fifth Circuit usually examine the factors from *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974): (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted this case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation,

and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Valuation of the settlements

20. In this case, the most challenging aspect of the inquiry is the first step, calculating the value of the settlements. Here, we know the amount that will ultimately be paid to class members with commercial fishing economic harms ($2.3 billion), the requested attorneys' fees ($555.2 million) and expenses ($44.8 million), the class's recovery from BP's assigned claims ($337 million), and the class's recovery from Transocean's insurer ($82 million). Moreover, the cost of some of the non-cash relief can be reliably ascertained (such as the $57 million advertising campaign and the $105 million health outreach program). But the gravamen of the settlements is the cash compensation for non-commercial fishing economic harms, and, because the settlements are uncapped and BP is still paying claims, it is not known how much BP will ultimately pay out (and, for the same reason, how much it will ultimately shoulder in administrative costs). Moreover, because BP might have paid some of these claims under its GCCF program had these settlements never materialized, assessing how much value was actually added by the settlements is not obvious. Nonetheless, as I explain below, I believe even a *conservative* valuation of the settlements suggests they have generated *at least* $13 billion of benefits to class members.

21. First, BP told its shareholders on April 26, 2016, that it expects to pay at least $12.9 billion under the *economic harms settlement alone* in cash compensation and other expenses. *See* BP p.l.c., Group results, First quarter 2016 (April 26, 2016) p.18, *available at* https://www.bp.com/content/dam/bp/pdf/investors/bp-first-quarter-2016-results.pdf. Moreover, BP acknowledged that "[t]he total cost . . . is likely to be significantly higher than the amount

recognized to date . . . because the current estimate does not reflect business economic loss claims not yet received, processed and paid." *Id.* Thus, BP will likely pay more than even $12.9 billion before the economic harms settlement agreement has run its course. This is consistent with the estimate calculated by Magistrate Wilkinson. He estimated that *only a portion* of BP's payments from the economic harms settlement would eventually grow from what is now $7.5 billion (it was $6.5 billion when Magistrate Wilkinson made his estimate) to $10.825 billion. *See* Neutral Allocation p. 16. (As Magistrate Wilkinson noted, this estimate is itself conservative; he thought BP might eventually payout as much as $12.1 billion for the portion of the economic harms claims he assessed. *See id.*) As a result, $12.9 billion is a *conservative* estimate of how much BP will pay pursuant to the economic harms settlement agreement.

22. In addition, as part of the economic harms settlement, BP assigned to the economic harms class BP's claims against Halliburton and Transocean. These claims have now settled for over $337 million, monies that will result in additional cash distributions for class members. *See* Neutral Allocation p. 4 (allocating $337 million of total settlements against Haliburton and Transocean to the classes). BP also agreed to turn over any proceeds it received from Transocean's insurers. Those proceeds have now been delivered in the amount of $82 million. *See* Transocean Insurance Order p. 1.

23. Second, with respect to the physical harms settlement, BP will pay, as I noted, $105 million for the health outreach program. In addition, it is estimated that BP will eventually pay out $63.5 million in payments to class members for their injuries and another $2 million in medical evaluations. *See* Cummings Email. Thus, it is reasonable to estimate that BP will ultimately pay over $170 million pursuant to the physical harms settlement.

24. Finally, although, as I said, I believe BP's payments pursuant to the settlement agreements should be offset by payments BP would have made anyway under the GCCF had it not been interrupted, I believe the GCCF would have paid only a small fraction of the above monies. According to the GCCF's administrator, Kenneth Feinberg, by the time the settlement agreements interrupted the GCCF, the GCCF had paid out 92% of all claims that qualified under the GCCF. *See, e.g.*, *From 9/11 to BP to GM*, N.Y. Times (June 30, 2014); *Fienberg Lays Out GM Victim Compensation Plan*, Detroit Free Press (July 1, 2014); *U.S. Tort Expert Feinberg Discusses Compensating for Tragedy and Loss*, Business First of Buffalo (Oct. 13, 2014); *Former Claims Czar Kenneth Feinberg Calls BP's $20 Billion Oil Spill Fund an "Aberration" at Tulane Talk*," www.nola.com (April 9, 2015); *BP's Gulf Oil Spill Was "Less of an Environmental Disaster" Than Media Portrayed*, The Street (April 20, 2015). Given that the GCCF paid out $6.2 billion, *see* BDO Report p. 59, this means that Mr. Feinberg believed there was only approximately $500 million in additional claims that could have been compensated by the GCCF.[3] In order to be *as conservative as possible*, I will deduct this entire amount from the benefits class counsel have conferred on the class *despite the fact* that the court here has already found that even the GCCF payments were enhanced due to class counsel's work. *See* Account and Reserve Order pp. 4-6. Thus, the calculations I make here *necessarily understate* the value that class counsel have created for class members.

25. With that said, when a *conservative* estimate of the cash and other components of the economic harms settlement that BP will pay ($12.9 billion) is added to the monies the class

[3] Indeed, Mr. Feinberg has gone so far as to say that he thought BP had been too generous when it set aside $20 billion to pay persons injured by the disaster because he could not find that much harm in the Gulf to compensate. *See* Kenneth Feinberg, WHO GETS WHAT 174 (2012) ("With the benefit of hindsight, it at least appears that . . . BP was more than generous in pledging $20 billion. The scale and impact of the disaster now seems to be much less than originally feared."). Class counsel found the harm that Mr. Feinberg could not.

will receive from BP's assigned claims ($337 million) and Transocean's insurers ($82 million), the total comes to over $13.3 billion. When the estimate of the components of the physical harms settlement ($170 million) is added, the total comes to approximately $13.5 billion. When an estimate of the compensation that would have been paid under the GCCF ($500 million) is subtracted, the total value of the benefits generated by the settlements is still some $13 billion. Because this is a conservative estimate, I am confident declaring that *the total value of the benefits generated by these settlements is above $13 billion.*

26. Why has BP paid so much more pursuant to these settlement agreements than it would have under the GCCF? I believe there are three reasons. First, the settlement agreements extended the deadline by which claims could be filed from August 23, 2013, to June 8, 2015; the extra two years surely brought in additional claims. Second, and more importantly, the settlement agreements made new persons eligible for relief who had not been eligible under the GCCF. The GCCF's administrator, Mr. Feinberg, has himself acknowledged this. *See* Kenneth Feinberg, WHO GETS WHAT 181-82 (2012). To begin with, almost the entire physical harms class would not have received compensation under the GCCF; the GCCF did not compensate physical harms except to rig workers for traumatic physical injuries. *See id.* at 181 ("The announced settlement agreement does promise some important substantive changes from GCCF payment rules. It plans to pay health-related claims . . . ."). But much of the economic harms class would not have been compensated under the GCCF, either. For example, Mr. Feinberg has noted that the GCCF did not pay what he called "recreational subsistence claims" like the settlement does. *See id.* at 182. In addition, most real property claims payable under the settlement would not have been compensable under GCCF, and none of the vessels-of-opportunity charter payments and vessel physical damage payments payable under the settlement

were payable under the GCCF. *See, e.g.*, GCCF Overall Program Statistics pp. 5-6. Third, and most importantly of all, the economic harms settlement is more generous even for the claims that were eligible under the GCCF. The average payment under the economic harms settlement has been *almost three times as large* as the average payment under the GCCF. *Compare generally, e.g.*, Public Statistics, *supra*, *with* GCCF Overall Program Statistics. Indeed, *every type* of claim is more generously compensated under the economic harms settlement. As scholars have documented, the risk-transfer multipliers class members receive over their past damages are higher for every type of claim under the settlement than they were under the GCCF. *See* Samuel Issacharoff[4] & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 La. L. Rev. 397, 406 (2014) (Figure 1); *id.* at 411 (showing relative generosity for commercial fishing claims in Figure 3); Catherine M. Sharkey, *The BP Oil Spill Settlements, Classwide Punitive Damages, and Societal Deterrence*, 64 DePaul L. Rev. 681, 702 (2015) (Table 2); *id.* at 697 (noting that the "multipliers offered under the GCCF" were "much lower"). The settlement is also more generous because it is more flexible in the manner in which class members can calculate their damages than the GCCF was. *See* Issacharoff & Rave, *supra*, at 409-10 ("By allowing claimants to choose a three-month comparison period to calculate economic loss, the class settlement allowed them to take maximum advantage of . . . variability.").

Selecting the percentage

27. Class counsel have requested $555.2 million in fees. This request is less than 4.3% of what I noted is a conservative estimate ($13 billion) of the value of these settlements.

[4] Professor Issacharoff worked with class counsel in this case.

As I now explain, there is little doubt that this percentage is reasonable in light of the *Johnson* factors.

28. Consider first the factors that go to how this request measures up against other cases: "(5) the customary fee for similar work in the community" and "(12) awards in similar cases." Like other scholars and some courts, I believe that, ideally, courts would assess these factors by trying to determine what class members would have freely contracted to pay class counsel in a competitive market for class representation. *See, e.g.*, *Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("When attorneys' fees are deducted from class damages, the district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."). But because this is very difficult to determine in the vast majority of cases without conducting an auction—even if plaintiffs sometimes contract with lawyers for the types of claims brought in class actions, and they often do not, it is hard to translate prices in the market for individual representation to the market for class representation where one might expect economies of scale to drive prices down further, *see* Fitzpatrick, *Class Action Lawyers, supra*, at 2063-64—courts almost always assess these factors by examining what other courts have awarded in class action litigation. And this is what I will do as well.

29. According to my empirical study, the most common fee percentages awarded in common fund class actions are 25%, 30%, and 33%, with the mean and median at 25%. *See* Fitzpatrick, *Empirical Study*, *supra*, at 833, 838 (Figure 6). In the Fifth Circuit, the mean and median percentages are 26.4% and 29%, respectively. *See id.* at 836 (Table 6). These numbers are consistent with the only other large-scale academic empirical study of class action fees. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010) (finding average and median

percentages of 24% and 25% nationwide and 24% and 23% in the Fifth Circuit among federal courts from 1993-2008).[5] Needless to say, the fee request here is much, much lower than the typical award in other cases. As such, these factors support the fee request.

30. It should be noted that the nationwide data in my empirical study (again, consistent with the Eisenberg-Miller study) showed that settlement size had a statistically significant but inverse relationship with the fee percentages awarded—*i.e.*, that federal courts awarded lower percentages in cases where settlements were larger. *See* Fitzpatrick, *Empirical Study, supra,* at 838, 842-44. For example, there were nine settlements in my dataset for $1 billion or more, and the mean and median fee percentages in these cases were 13.7% and 9.5%, respectively. *See id.* at 839. Many courts and commentators, including me, do not endorse this bigger-settlement-smaller-fee approach because it creates bad incentives for class counsel.[6] Nonetheless, even if it is followed here, class counsel's fee request is *still* below the mean and median for *even billion dollar settlements*. Indeed, in the entire universe of 688 cases in my

[5] The fee-percentage numbers in the Eisenberg-Miller study are often slightly lower than in my study because their methodology led them to oversample larger settlements. *See* Fitzpatrick, *Empirical Study, supra*, at 829.

[6] *See, e.g., In re Cendant Corp. Litigation*, 264 F.3d at 284 n. 55 ("Th[e] position [that the percentage of a recovery devoted to attorneys fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply." (alteration in original)); *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1213 (S.D.Fla. 2006) (awarding fees of 31.33% of $1.075 billion because "[w]hile some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, that approach is antithetical to the percentage of the recovery method . . . . . By not rewarding class counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for class counsel to settle too early for too little"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (awarding 30% of $410 million and quoting *Allapattah*); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 8:10ML-02151-JVS, at 17 n.16 (C.D. Cal., Jun. 17, 2013) ("The Court also agrees with . . . other courts, e.g., *Allapattah*, which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class."). Consider the following example: if courts award class counsel 30% of settlements if they are under $100 million, but only 20% of settlements if they are over $100 million, then rational class counsel will prefer to settle cases for $90 million (*i.e.*, a $27 million fee award) than $125 million (*i.e.*, a $25 million fee award). Such incentives are obviously perverse.

empirical study, there was only one case where the court used the percentage method and awarded a fee smaller than the one requested here. In this one case, class counsel was awarded only 3%. *See In re Nortel Networks Corp. Sec. Litig.*, No. 01-cv-1855 (S.D.N.Y., Jan. 29, 2007). But, at the time of that fee award, class counsel's law firm had been criminally indicted for paying illegal kickbacks in other class action cases. *See* Julie Creswell, *Milberg Weiss Is Charged With Bribery and Fraud*, N.Y. Times (May 18, 2006). Thus, it is not hard to understand why the court awarded so little. Needless to say, these special circumstances are not present here.

31. It is true that no court has ever seen a class action settlement as large as the economic harms settlement here; this settlement is the biggest class action settlement in American history. But courts have seen class action settlements not so far off, and the fee request here is modest compared even to the *biggest* billion dollar cases. The largest class action settlement in my study was the Enron securities fraud settlement, which was also litigated in the Fifth Circuit. That case settled for $7.2 billion, yet the court awarded class counsel 9.52% in fees—*more than twice as much* as the request here. *See In re Enron Corp.*, 586 F.Supp.2d 732 (S.D.Tex. 2008). My study is not aberrational: even when I examined all known billion dollar settlements in American history—the nine during the two years of my study and twelve more of which I am aware in other years—the request here is still *well below* the average and median fee percentages. I list these settlements in Table 1, with the fee percentages awarded by the court in the last column. In other words, no matter how you slice the data, the fee request here is modest in comparison to the awards in other cases.

Table 1: All common fund class action settlements of $1+ billion

Case	Settlement Amount	Fee Method	Lodestar Multiplier	Fee Percentage
Enron Securities Fraud (2008)[7]	$7.2 billion	Percent	5.2	9.52%
Diet Drugs Products Liability (2008)[8]	$6.4 billion	Percent	2.6+	6.75%
WorldCom Securities (2005)[9]	$6.1 billion	Percent	4.0	5.5%
Payment Card Interchange Fees Antitrust (2014)[10]	$5.7 billion	Percent	3.4	9.56%
Visa Antitrust (2003)[11]	$3.4 billion	Percent	3.5	6.5%
Tyco Securities (2007)[12]	$3.3 billion	Percent	2.7	14.5%
Cendant Securities (2003)[13]	$3.2 billion	Percent	Not calculated	1.73%
AOL Securities (2006)[14]	$2.65 billion	Percent	3.7	5.9%
Bank of America Securities (2013)[15]	$2.4 billion	Not specified	Not calculated	6.5%
Toshiba Diskette (2000)[16]	$2.1 billion (total) $1 billion (cash)	Both	Not calculated	7.1% (total) 15% (cash)
Toyota Unintended Acceleration (2013)[17]	$1.6 billion (est. total) $757 million (cash)	Percent	2.9	12.3% (total) 26.4% (cash)

[7] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008).

[8] *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 553 F. Supp. 2d 442 (E.D. Pa. 2008).

[9] *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005).

[10] *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437 (E.D.N.Y. 2014).

[11] *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003).

[12] *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249 (D.N.H. 2007).

[13] *In re Cendant Corp. Litig.*, 243 F. Supp. 2d 166 (D.N.J. 2003).

[14] *In re AOL Time Warner, Inc. Sec.*, 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006).

[15] *In re Bank of America Corp. Sec., Derivative, and ERISA Litig.*, No. 09-md-2058 (S.D.N.Y., Apr. 8, 2013).

[16] *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000).

[17] *In re Toyota Motor. Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Litig.*, No. 10-ml-2151 (C.D. Cal., June 17, 2013).

Prudential Insurance (2000)[18]	$1.8 billion	Percent	2.1	7.5%
Black Farmers Discrimination (2013)[19]	$1.2 billion	Percent	<2.0	7.4%
Tobacco Antitrust (2003)[20]	$1.2 billion	Lodestar	4.5	5.9%
TFT-LCD Antitrust (2013)[21]	$1.1 billion	Percent	≈2.5	28.5%
Nortel Securities I (2006)[22]	$1.1 billion	Percent	2.1	3%
Nortel Securities II (2006)[23]	$1.1 billion	Percent	Not calculated	8%
Royal Ahold Securities (2006)[24]	$1.1 billion	Percent	2.6	12%
Allapattah Contract (2006)[25]	$1.1 billion	Percent	Not calculated	31.33%
Nasdaq Antitrust (1998)[26]	$1 billion	Percent	4.0	14%
Sulzer Hip (2003)[27]	$1 billion	Both	2.4	4.8%
N = 21			Low = <2.0 High = 5.2 Avg = 3.14 Med = 2.80	Low = 1.73% High = 31.33% Avg = 9.92% (total) 10.97% (cash) Med = 7.40% (total) 7.50% (cash)

32. Consider next the factors that assess the results obtained by class counsel in light of the strength of the cases and the risks class counsel faced: "(8) the amount involved and the

[18] *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 106 F. Supp. 2d 721, 736 (D.N.J. 2000).

[19] *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82 (D.D.C. 2013).

[20] *DeLoach v. Phillip Morris Cos.*, 2003 WL 23094907 (M.D.N.C. Dec. 19, 2003).

[21] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013).

[22] *In re Nortel Networks Corp. Sec. Litig.*, No. 01-cv-1855 (S.D.N.Y., Jan. 29, 2007).

[23] *In re Nortel Networks Corp. Sec. Litig.*, No. 04-cv-2115 (S.D.N.Y., Dec. 26, 2006).

[24] *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383 (D. Md. 2006).

[25] *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006).

[26] *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998).

[27] *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 939 (N.D. Ohio 2003).

results obtained," "(2) the novelty and difficulty of the issues," "(3) the skill required to perform the legal service adequately," and "(10) the undesirability of the case." Courts examine these factors in order to incentivize class counsel to squeeze the greatest value for the class from their cases; the better class counsel did, the better class counsel should be compensated. There can be no doubt that the class's recovery here is outstanding. For example, as I noted, economic harms class members will receive *100%* of their potential compensatory damages—*plus much more* on account of the risk-transfer multipliers designed to gird against the possibility that spill-related losses may reappear and to compensate class members for their punitive damages claims. In my experience, it is extraordinary for an entire class to receive 100% of its compensatory damages, let alone a multiple of that. Usually class members must accept a large discount off their potential damages to reflect the risks and longevity of successful class litigation.[28]

33. It is true that BP was paying class members 100% of their compensatory damages plus a risk-transfer multiplier under the GCCF. It is therefore important to ask what risk class counsel faced in bringing this litigation if BP was already paying class members. But the classes faced plenty of risks had this litigation not settled. First, BP's GCCF program arose from its obligations under the Oil Pollution Act ("OPA"). *See* 33 U.S.C. 2705(a). The defendants argued that the Act (and its short three-year statute of limitations) displaced the common law maritime claims brought by the classes. *See* Motion to Dismiss Order pp. 18-26. If the defendants had prevailed on this argument, the classes might have received very little because, as I noted, the GCCF's administrator had paid almost all of the claims that he had deemed qualifying under the

[28] The best studies of class member recoveries come from securities fraud cases. *See, e.g., Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review, available at* http://www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf at 9, 33 (finding that the median securities fraud class action between 1996 and 2015 settled for between 1.3% and 7.0% of a measure of investor losses, depending on the year).

GCCF at the time the settlements here had been reached. Second, even if the classes had won on this point, it is not clear they would have been awarded damages at trial nearly as generous as those provided in the settlement. For example, BP argued that much of the injury suffered by the economic harms class was caused by the economy rather than the disaster; yet, the settlements presume that all losses from a simple before-and-after comparison are due to the disaster. It is true that the GCCF made this presumption as well, but most class members were ineligible under the GCCF, and, as I also noted above, even those who were eligible have much more flexibility in how they calculate the before-and-after comparison than they did under the GCCF; I cannot imagine the class winning flexibility like this from a trial. Moreover, as I further noted above, the risk-transfer multipliers under the settlement are much more generous than those BP was paying under the GCCF; it is wholly uncertain the economic harms class could have won such generous multipliers at trial. Indeed, it is almost certain the class would *not* have won such generous multipliers: a portion of the multiplier was designed to award class members something for their punitive damages claims against BP; yet, the court has now rejected the legal basis on which BP could have been held liable for punitive damages at trial. *See* Phase One Findings and Conclusions pp. 140-142. Third, there were risks that some of the BP defendants (i.e., the smaller subsidiaries) might end up judgment proof by entering into bankruptcy. Indeed, although the largest BP defendants—BP North America Inc. and BP plc—were not "responsible parties" under the OPA and were not ultimately found by the court to be liable under the general maritime law, *see id.*, the settlements nonetheless obligate those entities to guarantee the payment of the classes' claims. *See* Economic Settlement Agreement Ex. 24. This eliminated the risk that the classes might win at trial yet be unable to collect their winnings. Finally, there is no better witness to the classes' success against the risks they faced going forward than BP itself:

BP tried to rescind its consent to the economic harms settlement once it realized how lucrative it was to class members. That is, BP's own considered and sophisticated judgment is that it is better off going forward with this litigation than sticking with that settlement. In other words, even BP now thinks the plaintiffs are getting a better deal with these settlements than they would have obtained after enduring the risks of trial. I have never before seen a defendant have such second thoughts about a class action settlement. And there is no better testament to class counsel's success in light of the risks of going forward. These factors, too, support class counsel's fee request.

34. Consider next "(1) the time and labor required." Courts often examine this factor to ensure that class counsel dug far enough into the case to know how much it was worth before settling; it serves to help guard against class counsel rushing cases to settlement just for quick fee awards. There is no reason to think this case has been rushed. Class counsel have spent over 520,000 common benefit hours in this MDL. *See* Garrett Fee Affidavit ¶¶12-14; Herman-Roy Declaration ¶¶117-123. Although, as I noted, it is impossible to disaggregate the hours spent on behalf of the classes from those spent on other plaintiffs in this MDL, *see* Herman-Roy Declaration ¶ 124, it is obvious that class counsel have spent an incredible number of hours here. Indeed, in my experience, I have never seen a case this complex nor one that required more of class counsel. The number of moving parts here was—and this is an understatement—dizzying. The law, the facts, the science—all of it was far more challenging than perhaps any class action case I have ever seen. And so were the procedural hurdles. Class counsel took *hundreds* of depositions and analyzed *over 90 million pages* of documents. *See* Herman-Roy Declaration ¶¶ 36-45, 91. They even did something that almost never happens in a class action: *they went to trial*—the thirteen-week, two-phase trial to resolve the economic harms class's assigned claims

against Transocean and Halliburton. Finally, they had to do something that I have *never* seen class counsel have to do: fight a defendant's efforts to rescind its own settlement. All of these things have meant this litigation has transpired much longer than the typical class action. According to my empirical study, the typical class action case is resolved after only three years of litigation. *See* Fitzpatrick, *Empirical Study*, *supra*, at 820 (finding average and median durations of 1196 days and 1068 days, respectively). We are now at six years—and counting (as class counsel are still pursuing final approval of the Transocean and Halliburton settlements as well as other matters, *see* n.2, *supra*). This factor, too, supports the fee request.

35. Consider next "(4) the preclusion of other employment by the attorney because he accepted this case" and "(6) whether the fee is fixed or contingent." To be entirely frank, I usually do not focus on these factors because every time a lawyer takes a case, it precludes the lawyer from accepting other work; class actions are not special in this regard. Moreover, class counsel work on contingency in nearly every class action; there is usually not anything special to say in that regard either. As such, I usually roll these factors into consideration of other *Johnson* factors. But this case *is* special. In light of the demands of this uniquely complex case, many of the firms working on behalf of the classes were forced to *move* to New Orleans and *give up* their entire practices for years. *See* Herman-Roy Declaration ¶18. Moreover, the contingent aspect of their compensation meant that class counsel risked not only years of their lives; they also risked *millions of their own dollars*. Until these settlements were approved (and BP thereby transferred established funds to pay class counsel's expenses), class counsel had at risk some *$22 million* in expenses they had paid out of their own pockets. *See* Garrett Expense Affidavit ¶ 8. In the *hundreds* of cases in my empirical study, there were only *two* settlements where class counsel risked more of their own money in expenses than class counsel did here: *Enron* and the Tyco

securities fraud settlement. *See In re Enron Corp. Securities, Derivative & ERISA Litigation*, 586 F.Supp.2d 732, 769 (S.D.Tex. 2008) ("The Court has previously approved six expense reimbursement motions and awarded a total of $39 million to plaintiffs' counsel. Counsel estimates that an additional $6 million has been incurred and will be the subject of future reimbursement requests."); *In re Tyco Intern. Ltd., Securities Litigation*, 2009 WL 873727 at *6 (D.N.H., Mar. 27, 2009) (approving $28.9 million in expenses). In short, this case presented class counsel with special personal burdens. These factors, too, support the fee request.

36. Consider finally the remaining factors: "(7) time limitations imposed by the client or the circumstances," "(9) the experience, reputation, and ability of the attorneys," and "(11) the nature and length of the professional relationship with the client." Because I was not privy to the attorney-client relationships in this litigation, I cannot speak in great detail about these factors. I can say, however, that the class action lawyers who worked on this case include among their number some of the finest and best-regarded plaintiff's lawyers in the United States. As such, these factors, too, support the request.

37. For all these reasons, it is my opinion that the fee requested in the economic and physical harms settlements is reasonable under the percentage method.

Blended Method

38. Under the blended approach, courts "crosscheck" the percentage method with class counsel's lodestar. *See, e.g., Heartland Payment*, 851 F.Supp.2d at 1075, 1086-87. The lodestar is calculated by multiplying the number of hours they worked on the case (to the extent the hours were reasonable) by a reasonable hourly rate. When courts undertake the lodestar crosscheck with the percentage method, they try to streamline the lodestar calculation; this was,

of course, one of the reasons courts turned to the percentage method and away from the pure lodestar method to begin with. *See, e.g., In re Avandia Mktg., Sales Practices & Products Liab. Litig.*, 2012 WL 6923367, at *8 (E.D. Pa. Oct. 19, 2012) ("When used as a cross-check, the lodestar analysis may be abridged, requires 'neither mathematical precision nor bean counting,' and need not involve a review by the district court of actual billing records." (citation omitted)); *Hicks v. Stanley*, 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005) ("Where the lodestar method is simply used as a 'cross-check,' the court does not need to scrutinize counsel's documentation of hours expended on the case in the same depth as is appropriate where the lodestar is used as the sole fee determination."). The court then evaluates whether any multiplier over the lodestar that the fee request would produce is reasonable in light, again, of the *Johnson* factors.

39. In this case, as I noted, class counsel are unable to report how many hours they have worked on behalf of the economic and physical harms classes because they are unable to disaggregate those hours from those spent working on behalf of other plaintiffs in this MDL. *See* Herman-Roy Declaration ¶124. This is perfectly understandable. Many of the plaintiffs in this MDL had claims that overlapped with others; work for one necessarily benefited the others. As such, in my opinion the best the court can do here is to consider *all of the common benefit time* class counsel have spent in this MDL and use that number in the lodestar calculation. Yet, because that number is overinclusive of the work for the classes here, I think the court should compare it to *all of the common benefit fees* class counsel will seek from this MDL—not just the $555.2 million they seek here, but the fees they will seek from the Transocean/Halliburton settlement as well as the fees they have already received from BP's settlements with Louisiana

and Alabama. As I explain below, the multiplier that results from this comparison is still well within the range of reason in light of the *Johnson* factors.

40. Class counsel have reported working some 527,000 common benefit hours to date in this MDL, *see* Garrett Fee Affidavit ¶¶12-14; Herman-Roy Declaration ¶¶ 117-123, with 268,298 hours charged by partners, 180,302 hours charged by associates, and 78,482 hours charged by paralegals and law clerks, *see* Herman-Roy Declaration ¶¶119, 123.

41. Because this is a case of obvious nationwide importance—not to mention of unprecedented size, complexity, and need for specialized lawyering—it is appropriate to value the time in this case using average nationwide rates as opposed to the idiosyncratic rates that might have been charged in the jurisdiction where this case was litigated or in the jurisdictions where the lawyers who worked on the case resided. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 232 (2d Cir. 1987) ("[T]he use of national hourly rates in exceptional multiparty cases of national scope, where dozens of non-local counsel are involved, appears to be the best available method of ensuring adherence to the principles of the lodestar analysis."); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 689 n.12 (D. Md. 2013) ("These hourly rates, while somewhat high for this district, are within a reasonable range for firms with national class action practices."); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 386 (D. Md. 2006) ("These hourly rates, while somewhat high for this district, are within a reasonable range for the national firms that prosecuted the case . . . ."); *In re BankAmerica Corp. Sec. Litig.*, 228 F.Supp.2d 1061, 1065 (E.D.Mo.2002) ("[W]hile the hourly rates ranging up to $695 are high for the Eastern District of Missouri, they are nonetheless within the range of reasonableness in the realm of nationwide securities class actions."); *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 788 (E.D. Va. 2001) ("[T]he hourly rates charged by counsel, although

high for this locality, are nonetheless within the range of reasonableness for [securities fraud] cases, where the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials."); *Edmonds v. United States*, 658 F. Supp. 1126, 1147 (D.S.C. 1987) ("Even though this rate is higher than the rates he typically charges his clients, the relevant inquiry is the market rate for the services he provided in these cases. The Court concludes that lead counsel services for a national class action should be compensated at the top rate in the market . . . ." (citations omitted)). In order to find nationwide rates for attorneys in large, complex litigation like this, I consulted the 2014[29] nationwide survey of large law firm rates by the National Law Journal. *See* Karen Sloan, *$1,000 Per Hour Isn't Rare Anymore*, The National Law Journal (Jan. 13, 2014). Other courts have relied upon this survey to perform the lodestar crosscheck in class action cases. *See, e.g., In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *23 (C.D. Cal. July 28, 2014) (relying on 2014 National Law Journal Survey because "[c]ourts can use survey data to evaluate the reasonableness of attorneys' rates"). According to this survey, the average nationwide rate for partners was $604 and the average nationwide rate for associates was $370. The survey did not ask about paralegal and law clerk rates, but I believe these can be estimated from other sources to be roughly half of the rate for associates, or $185.[30] (I suspect these numbers are *well below* the rates the

[29] Courts usually calculate the lodestar crosscheck using current reasonable hourly rates rather than historic hourly rates in order not to doubly punish lawyers who work on contingency by denying them the time value of money. *See, e.g., In re AOL Time Warner, Inc. Sec.*, 2006 WL 3057232, at *26 (S.D.N.Y. Oct. 25, 2006) ("[I]t is acceptable to use counsel's current rates to compensate them for the lengthy delay in payment."). Unfortunately, however, 2014 is the most recent survey by the National Law Journal to report average rates for partners and associates. As such, class counsel's lodestar is *necessarily understated* in my analysis.

[30] I came to this estimate by examining the relationship between paralegal/law-clerk rates and associate rates in the so-called "Laffey Matrix" maintained by the Department of Justice and the Adjusted Laffey Matrix (which uses a different rate of inflation). The paralegal/law-clerk rates are roughly half of the associate rates in these matrices. *See* http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf; http://www.laffeymatrix.com/see.html. It should be noted that these matrices are also often relied upon by courts to

defendants paid their own counsel.) Using these numbers, an estimate of class counsel's total common benefit lodestar in this MDL is *over $243 million*.

42. As I noted above, I believe the court should compare this *total* common benefit lodestar to the *total* common benefit fees class counsel have sought or will seek from this MDL in order to roughly crosscheck the fee request. Those fees consist of the approximate $555.2 million class counsel are seeking from the economic and physical harms settlements, the $40 million they have already received from the settlement between the defendants and Louisiana and Alabama, *see* Gulf States Order Ex. A, and the $124.95 million, discussed below, they plan to seek from the Transocean/Halliburton settlement, *see* Halliburton Settlement Agreement § 23(b); Transocean Settlement Agreement § 23(b). These fees total to $720.15 million. The multiplier that would result would therefore be 2.96. In my opinion, this multiplier would be well within the range of reason in light of the *Johnson* factors.

43. I will not repeat what I said above with respect to most of the *Johnson* factors because almost everything I said applies with equal force under the blended method. But the factors that go to how the fee request measures up against other cases—"(5) the customary fee for similar work in the community" and "(12) awards in similar cases"—should be reassessed because now the court must compare the 2.96 multiplier with the multipliers awarded in other percentage method cases where the lodestar crosscheck was performed. This comparison shows the fee request is still reasonable.

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assess reasonable hourly rates in lodestar calculations, but, because these matrices are designed to describe rates only in the Washington, D.C., area, and it would be difficult for me to modify them to generate a "nationwide" rate, I do not rely upon them here except to determine the relationship between paralegal/law-clerk rates and associate rates. I will note, however, that the partner and associate rates from the National Law Journal survey fall in the middle of the partner and associate rates in these matrices. *See* http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf (partners between $460 and $520 per hour depending on experience; associates between $255 and $300); http://www.laffeymatrix.com/see.html (partners between $661 and $796 per hour; associates between $331 and $406).

44. In my empirical study, the mean and median lodestar multipliers in cases using the percentage method with the lodestar crosscheck were 1.65 and 1.34, respectively. *See* Fitzpatrick, *Empirical Study, supra*, at 834. These numbers are in line with the only other large-scale academic study of class action fees. *See* Eisenberg & Miller, *supra*, at 273 (finding mean multiplier of 1.81). The multiplier that would result here would be higher than the typical case, but, then again, there is nothing typical about this case. For example, the relationship between settlement size and lodestar multipliers is the opposite of that between settlement size and fee percentages: as the settlement size increases, the lodestar multiplier class counsel receives typically increases as well. *See id.* at 274 ("As the recovery decile increases, the multiplier also tends to increase, with the multiplier in the highest recovery decile more than triple that of the multiplier in the lowest recovery decile."). As the economic harms settlement here alone is the largest class action settlement in American history, it would therefore not be unexpected that the lodestar multiplier here would be greater than in the average case. Indeed, what is surprising is how little above average it is. Indeed, when compared to other billion dollar cases, it is decidedly *below* average. In Table 1, above, I also listed the lodestar multipliers (if the courts calculated them) that resulted from the percentage awards in all of the billion dollar settlements of which I am aware. As column four shows, the mean multiplier in these cases was over 3.0—i.e., *higher* than the multiplier that would result here—and the median multiplier was only slightly below the multiplier that would result here. In fact, the second largest class action settlement in American history (the *Enron* case, also from this Circuit) resulted in a lodestar multiplier of 5.2—nearly *double* what would result here.

45. For all these reasons, it is my opinion that the fee requested is reasonable under the blended method as well.

IV. Assessment of the reasonableness of the request for attorneys' fees in the Transocean/Halliburton settlement

46. Much of what I said above with respect to the fee request in the economic and physical harms settlements applies with equal force to the fee request from the Transocean/Halliburton settlement. In particular, this settlement, too, is a common fund settlement, and, for all the same reasons, it is my opinion that the court should use the percentage method to evaluate the fee request, but, for many of the same reasons, it is also my opinion that the fee request is within the range of reason no matter whether the court uses the percentage method or the blended method. I again address each method in turn.

Percentage Method

47. Class counsel intend to seek fees equal to $124.95 million in the Transocean/Halliburton settlement. As I explain below, this request will equal 12.1% of the benefits conferred on the new class by that settlement. It is my opinion that this percentage would be reasonable in light of the *Johnson* factors for many of the same reasons I stated above. Below, I note the few differences and explain why they still support the fee request.

48. First, there is no concern here with respect to valuing the benefits that class counsel have conferred on the new class. This is an all-cash settlement that will amount to $902 million (if given final approval by the court), and none of that money would have been paid out under BP's GCCF program. In addition, Halliburton and Transocean have agreed to attorneys' fees on top of that amount. *See* Halliburton Settlement Agreement § 23(b); Transocean Settlement Agreement § 23(b). Thus, the value of the common benefits conferred to the new

class by class counsel are equal to $902 million plus the $124.95 million fee request, or $1.027 billion; as such, the fee that will be requested is equal to 12.1% of those benefits.[31]

49. Second, to the extent the court wishes to compare the fee percentage that will be requested here to settlements of similar dollar magnitude—a practice, again, I do not endorse—this settlement is of much smaller magnitude than the economic and physical harms settlements. Nonetheless, it still compares favorably to its peers. For example, as I noted above, there were nine settlements in my dataset like this one for $1 billion or more, and the mean and median fee percentages in these cases were 13.7% and 9.5%, respectively. *See id.* That is, the fee request here will be *below* the average in billion dollar cases (which includes many cases for *multiple* billions). This is confirmed by Table 1. If one takes all of the settlements in Table 1 below $2 billion (i.e., *twice* as large as the settlement here), the average and median fee awards were 13.5% (or 12.3% if one considers the total value as opposed to the cash value of the Toyota settlement) and 8%, respectively. Again, the request here will be *below* the average *even in bigger cases*.

50. Third, the assessment of the factors that go to the risks versus recovery here are a bit different than in the economic and physical harms settlements. To begin with, as I noted, the economic harms class is recovering over 100% of its potential damages; this is unheard of, and,

[31] The fee request is equal to 9.2% of the *total* Transocean/Halliburton settlement (including fees), but a portion of that settlement went to the economic harms class and the fee request I assessed in the previous section covered class counsel's work for that class. I therefore exclude this portion from the analysis in this section in order to be as conservative as possible. If, however, one wishes to include the portion that went to the economic harm class in the denominator here, the fee request would obviously still be reasonable because 9.2% is even lower than the 12.1% I conclude is reasonable in this section. Likewise, if one wishes to look at the fee requests on behalf of the economic harms class, the physical harms class, and the new class together, the percentage would still be reasonable. In that case, the total fees requested would equal $680 million (i.e., $555.2 million + $124.95 million) and the total benefits conferred would equal *well more* than $14 billion (i.e., well more than $13 billion + $1.36 billion) for a fee percentage of no more than 4.9%. This is barely greater than the 4.3% I assessed as reasonable above, and, for all the same reasons, it is reasonable as well.

unsurprisingly, the new class does not fare quite as well. According to Magistrate Wilkinson, the total potential punitive damages that the new class might have recovered if everything went its way at trial and on appeal was $3.6 billion. *See* Neutral Allocation p. 27. The recovery here is only 25% of that, but that is because that is the same chance that Magistrate Wilkson thought the class had to recover those punitive damages in light of the risks of the case. *See id.* What were those risks? To begin with, there was the question whether Transocean or Halliburton would be found "grossly" negligent, the standard needed to win punitive damages. This would have been especially difficult to prove in light of Fifth Circuit case law requiring *corporate* gross negligence as opposed to simply gross negligence by an employee. *See* Phase One Findings and Conclusions pp. 140-142 (citing *In re: P&E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989)). Second, there was the question whether punitive damages here were displaced altogether by the OPA. Indeed, in light of this court's eventual finding that Transocean and Halliburton were *not* grossly negligent, one wonders whether Magistrate Wilkinson overstated the class's probability of success here. If so, the class's recovery here is considerably better than the class's probability of success. But, at worst, the class's recovery here is equal to its probability of success. As such, there is little reason not to award class counsel a fee that is right at the average in comparable cases.

51. For all these reasons, it is my opinion that the fee that will be requested in the Transocean/Halliburton settlement is reasonable under the percentage method.

Blended Method

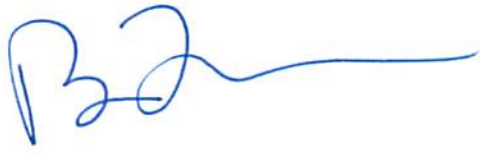
52. Because it is, again, impossible to disaggregate the time class counsel spent on behalf of the new class from the other plaintiffs in this MDL, the only analysis that is possible here is the exact same "all in" analysis I performed with respect to the economic and physical

harms settlements. In other words, for exactly all the same reasons stated above, it is my opinion that the fee that will be requested is reasonable under the blended method as well.

53. My compensation in this matter has been $595 per hour.

Nashville, TN

July 14, 2016



Brian T. Fitzpatrick

Appendix 1

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Professor*, 2012-present
- *FedEx Research Professor*, 2014-15; *Associate Professor*, 2010-12; *Assistant Professor*, 2007-10
- Classes: Civil Procedure, Federal Courts, Complex Litigation
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

ACADEMIC ARTICLES

An Empirical Look at Compensation in Consumer Class Actions, 11 NYU J. L. & BUS. 767 (2015) (with Robert Gilbert)

The End of Class Actions?, 57 ARIZ. L. REV. 161 (2015)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 VA. L. REV. 839 (2012)

Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012)

An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

Do Class Action Lawyers Make Too Little?, 158 U. PA. L. REV. 2043 (2010)

Originalism and Summary Judgment, 71 OHIO ST. L.J. 919 (2010)

The End of Objector Blackmail?, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

The Politics of Merit Selection, 74 MISSOURI L. REV. 675 (2009)

Errors, Omissions, and the Tennessee Plan, 39 U. MEMPHIS L. REV. 85 (2008)

Election by Appointment: The Tennessee Plan Reconsidered, 75 TENN. L. REV. 473 (2008)

Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 MICH. J. RACE & LAW 277 (2007)

BOOK CHAPTERS

Civil Procedure in the Roberts Court in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, 2016)

Is the Future of Affirmative Action Race Neutral? in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, 2016)

ACADEMIC PRESENTATIONS

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, Florida (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, New York (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, California (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, Florida (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, Florida (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability, Corporate Law Center, Fordham Law School (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered,* Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

Lessons from Tennessee Supreme Court Retention Election, THE TENNESSEAN (Aug. 20, 2014)

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

Kagan is an Intellect Capable of Serving Court, THE TENNESSEAN (Jun. 13, 2010)

Confirmation "Kabuki" Does No Justice, POLITICO (July 20, 2009)

Selection by Governor may be Best Judicial Option, THE TENNESSEAN (Apr. 27, 2009)

Verdict on Tennessee Plan May Require a Jury, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

Tennessee's Plan to Appoint Judges Takes Power Away from the Public, THE TENNESSEAN (Mar. 14, 2008)

Process of Picking Judges Broken, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

Disorder in the Court, LOS ANGELES TIMES (Jul. 11, 2007)

Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club of Nashville (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Referee, Journal of Empirical Legal Studies
Reviewer, Oxford University Press
Reviewer, Supreme Court Economic Review
Member, American Law Institute
Member, American Bar Association
Fellow, American Bar Foundation
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights, 2009-2015
Board of Directors, Tennessee Stonewall Bar Association
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia

COMMUNITY ACTIVITIES

Board of Directors, Nashville Ballet; Nashville Talking Library for the Blind, 2008-2009

Appendix 2

Documents Reviewed:

- Pretrial Order No. 9 (document 508, filed 10/8/10)
- Order and Reasons as to Motions to Dismiss the B1 Master Complaint (document 3830, filed 8/26/11) ("Motion to Dismiss Order")
- Order and Reasons as to Motions to Dismiss the B3 Master Complaint (document 4159, filed 9/30/11)
- Motion to Establish Account and Reserve for Litigation Expenses (document 4507, filed 11/7/11), including PSC Status Report and Memorandum in Support of Motion to Establish Account and Reserve for Litigation Expenses (document 4507-1)
- Reply Brief in Further Support of the PSC's Motion to Establish Account and Reserve for Litigation Expenses (document 4717, filed 11/23/11)
- Sur-Reply Brief in Further Support of the PSC's Motion to Establish Account and Reserve for Litigation Expenses (document 4739-1, filed 11/28/11)
- Order Establishing Court-Supervised Account and Reserve for Common Benefit Litigation Expenses (document 4739-2, filed 11/28/11)
- Order and Reasons as to the Motion to Establish Account and Reserve for Litigation Expenses (document 5022, filed 12/28/11) ("Account and Reserve Order")
- Order Amending the Court's previous Order of December 28, 2011, establishing an account and reserve (document 5064, filed 1/4/12)
- Opposition to BP's Motion to Reconsider the Court's Order Relating to the Establishment of a Court-Supervised Reserve (document 5153, filed 1/11/12)
- Order Amending and Superseding the Court's Previous Orders of December 28, 2011 and January 4, 2012, establishing an account and reserve (document 5274, filed 1/18/12)
- *Deepwater Horizon* Medical Benefits Class Action Settlement Agreement, as Amended on May 1, 2012 (document 6427-1, filed 5/3/12) ("BP Medical Settlement Agreement")

- *Deepwater Horizon* Economic and Property Damages Settlement Agreement as Amended on May 2, 2012 (document 6430-1, filed 5/3/12) ("BP Economic Settlement Agreement")
- GCCF Overall Program Statistics (Status Report as of February 10, 2012) ("GCCF Overall Program Statistics")
- Independent Evaluation of the Gulf Coast Claims Facility Report of Findings & Observations to the Department of Justice (June 5, 2012) ("BDO Report")
- Plaintiffs' Memorandum in Support of Final Approval of Economic and Property Damages Class Settlement (document 7104, filed 8/13/12), including Expert Report of Robert H. Klonoff (document 7104-3), Declaration of Samuel Issacharoff (document 7104-4), Declaration of Stephen J. Herman (document 7104-5), and Declaration of Joseph F. Rice (document 7104-6)
- Plaintiffs' Reply Brief in Response to Objections and in Further Support of Final Approval of Economic and Property Damages Class Settlement (document 7727, filed 10/22/12), including Supplemental Expert Report of Robert H. Klonoff (document 7727-4)
- Order and Reasons Granting Final Approval of the Economic and Property Damages Settlement Agreement (document 8138, filed 12/21/12)
- Order and Judgment Granting Final Approval of Economic and Property Damages Settlement and Confirming Certification of the Economic and Property Damages Settlement Class (document 8139, filed 12/21/12)
- Motion for Reimbursement and Payment of Shared Expenses by Plaintiffs Liaison Counsel (document 8472, filed 2/2/13), including Affidavit of Philip A. Garrett (document 8472-2) ("Garrett Expense Affidavit")
- Reply Regarding Remand of BEL Issue by Business Economic Loss (BEL) Claimants and the Economic & Property Damages Settlement Class (document 11833, filed 11/12/13), including the Declaration of Stephen J. Herman (document 11833-1)

- Memorandum in Support of Motion to Appoint Special Master (document 12807-3, filed 4/30/14)
- Findings of Fact and Conclusions of Law Phase One Trial (document 13381-1, filed 9/9/14) ("Phase One Findings and Conclusions")
- Order Regarding Insurance Proceeds for Transocean Personnel (document 13424, filed 9/22/14) ("Transocean Insurance Order")
- Transocean Punitive Damages and Assigned Claims Settlement Agreement (document 14644-1, filed 5/29/15) ("Transocean Settlement Agreement")
- Pretrial Order No. 59 (Appointment of Common Benefit Fee and Cost Committee and Guidelines for Common Benefit Attorneys' Fees and Costs Reimbursement) (document 14863, filed 7/15/15)
- HESI Punitive Damages and Assigned Claims Settlement Agreement (Amended as of September 2, 2015) (document 15322-1, filed 9/4/15) ("Halliburton Settlement Agreement")
- Order Regarding Payment of the Gulf States' Attorneys' Fees and Costs (document 15441, filed 10/5/15) ("Gulf States Order")
- Neutral Allocation and Reasons (Halliburton and Transocean Settlements) (document 15652, filed 12/11/15) ("Neutral Allocation")
- Report by the Claims Administrator of the Deepwater Horizon Economic and Property Damages Settlement Agreement on the Status of Claims Review (document 15825, filed 2/2/16)
- Email from Hilary Cummings to Steve Herman (April 4, 2016) ("Cummings Email")
- Memorandum of Law in Support of Preliminary Approval of HESI and Transocean Punitive Damages and Assigned Claims Class Action Settlements; Preliminary Certification of the Proposed New Punitive Damages Settlement Class; Approval of Class

Notice and Class Notice Plan; And Scheduling of Final Fairness Hearing (document 16161-1, filed 4/7/16)

- Petition for Reimbursement for Expenses and Collective Common Benefit Award (filed herewith), including the Declaration of Stephen J. Herman and James Parkerson Roy ("Herman-Roy Declaration"), the Affidavit of Philip A. Garrett ("Garrett Fee Affidavit"), and the Declaration of Elizabeth J. Cabraser

EXHIBIT "G"

TOUPS/COFFMAN PLAINTIFFS' SUGGESTED FEE AND EXPENSE AWARDS

LAW FIRM	NO. OF CLIENTS	REQUESTED FEES	REQUESTED EXPENSES	Toups/Coffman Suggested Fee Awards	Multiplier on Lodestar	Toups/Coffman Suggested Fee and Expense Awards
Bassford Remele (Remele/Sieben Group)	17,000	Part of Minnesota Application	Part of Minnesota Application	$0.00		$0.00
Beasley Allen	36	$192,744.00	$20,762.81	$192,744.00		$213,506.81
Benjamin F. Marshall, IV and Associates, LLC		$25,000.00	$0.00	$25,000.00		$25,000.00
Brad Morris Law Firm, PLLC	88	$500,000.00	$0.00	$500,000.00		$500,000.00
Dunk & Associates, PLLC	50	$45,000.00	$41,755.99	$45,000.00		$86,755.99
Eiland Law Firm	1,146	$7,300,937.00	$53,685.00	$5,500,000.00		$5,553,685.00
Gustafson - Minnesota Leadership Application (Collective Class Counsel) - Includes Watts Common Benefit Time		$62,500,000.00	$6,000,000.00	$60,000,000.00	Approximately 1.5	$66,000,000.00
Hodge Law Firm	83	$565,887.50	$46,897.87	$565,887.50		$612,785.37
Hossley Embry	650	$2,684,775.00	$285,645.56	$2,000,000.00		$2,285,645.56
James Rogers	Washington State Class	$39,975.00	$19,709.12	$39,975.00		$59,684.12
Johnson Becker	3,257	$8,000,000.00	$138,130.94	$5,500,000.00		$5,638,130.94
KS MDL Co-Lead Counsel and Settlement Class Counsel		$250,000,000.00	$6,695,350.05	$121,500,000.00	Approximately 1.5	$128,195,350.05
Paul Byrd Law Firm	2,500	Part of Minnesota Application	Part of Minnesota Application	$0.00		$0.00
Paul, LLP	1,641	Part of Minnesota Application	Part of Minnesota Application	$0.00		$0.00
Pavlack Law	49	$82,955.00	$3,154.71	$82,955.00		$86,109.71
Pendley, Baudin & Coffin		$115,820.50	$5,196.43	$115,820.00		$121,016.43
Phipps/Clark Group (Collective Class Counsel)	16,000	$88,000,000.00	$7,665,415.37	$60,000,000.00	Approximately 1.5	$67,665,415.37
Shields Law Group, LLC	2,521	$9,851,683.25	$402,285.74	$7,000,000.00		$7,402,285.74
Special Master Ellen Reisman		$0.00	$205,720.10	$0.00		$205,720.10
Toups/Coffman	9,400	$34,000,000.00	$392,056.14	$31,500,000.00		$31,892,056.14
Vonachen, Lawless, Trager & Slevin	312	$1,000,000.00		$1,000,000.00		$1,000,000.00
Wagstaff & Cartmell	704	$1,194,663.50	$14,977.50	$1,194,663.50		$1,209,641.00
Watts Guerra (Non-Common Benefit Time)	57,000	$150,000,000.00	$12,846,863.41	$125,000,000.00		$137,846,863.41
Wright Schulte	1,049	$1,876,470.00	$62,936.82	$1,876,470.00		$1,939,406.82
TOTALS	**113,486**	**$617,975,910.75**	**$34,900,543.56**	**$423,638,515.00**		**$458,539,058.56**
					*This leaves approximately $41.4 Million to distribute to any additional fee applications or to increase any fees suggested herein	