IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re Morgan Stanley Data Security Litigation	Civil Action No. 1:20-cv-05914-PAE

MEMORANDUM OF LAW IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH DEFENDANT MORGAN STANLEY SMITH BARNEY, LLC

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I. Introduction

Plaintiffs,[1] by and through the undersigned Settlement Class Counsel,[2] on behalf of themselves and the Settlement Class, respectfully submit this Memorandum of Law in support of their motion pursuant to Federal Rule of Civil Procedure ("Rule") 23(e) requesting final approval of this proposed class action settlement ("Settlement") on the terms set forth in the Settlement Agreement dated December 31, 2021 (ECF No. 81-2) and for certification of the Settlement Class.[3]

If approved, the Settlement will successfully resolve the claims of millions of individuals nationwide who were notified of Data Security Incidents in 2016 and 2019. The Settlement brings meaningful resolution and significant benefits to the Settlement Class without requiring further delay, risk, and expense. As discussed below, the Settlement calls for Morgan Stanley to establish a non-reversionary Qualified Settlement Fund of $60 million ("Settlement Amount") for the benefit of eligible Class Members.[4] Additionally, Morgan Stanley will pay for the retention of Kroll, a third-party firm, to continue efforts to locate and retrieve missing Morgan Stanley IT Assets. Morgan Stanley also has committed to maintain substantial business practice changes in

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[1] Plaintiffs are Mark Blythe, Cheryl Gamen, Richard Gamen, Amresh Jaijee, Howard Katz, Richard Mausner, John Nelson, Midori Nelson, Desiree Shapouri, Silvia Tillman and Vivian Yates (collectively, "Plaintiffs").

[2] Judge Analisa Torres appointed Jean S. Martin of Morgan & Morgan Complex Litigation Group and Linda P. Nussbaum of Nussbaum Law Group, P.C. as Settlement Class Counsel. *See* Order dated January 18, 2022, ECF No. 82 at ¶ 2.

[3] Unless otherwise defined, all capitalized terms have the meanings set forth in the Settlement Agreement or in the Declaration of Linda P. Nussbaum in Support of Plaintiffs' Motion for Final Approval of Settlement ("Nussbaum Decl. 7/22/2022") submitted herewith and the Declaration of Settlement Class Counsel Linda P. Nussbaum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs (ECF No. 102) ("Nussbaum Decl. 4/20/2022"). Both Nussbaum Declarations are an integral part of this submission and, for the sake of brevity herein, Plaintiffs respectfully refer the Court to the Nussbaum Decl. 4/20/2022 for a detailed description of, *inter alia*: the procedural history of the Action and the claims asserted, the negotiations resulting in the Settlement and the risks of continued litigation.

[4] The Settlement Amount has been deposited into escrow and is earning interest.

relation to its data security. Further, Morgan Stanley will pay all costs of notice and administration, presently estimated to be at least $8.2 million.

On January 18, 2022, Judge Analisa Torres preliminarily approved the Settlement, finding that the Court "will likely be able to approve the proposed Settlement as fair, reasonable, and adequate" and "will likely be able to certify the Settlement Class for purposes of judgment on the Settlement because it meets all the requirements of Rule 23(a) and the requirements of Rule 23(b)(3)." Preliminary Approval Order ¶ 1 (ECF No. 82). The Court-ordered Notice Plan has since been executed; nothing has changed to alter the Court's initial assessment that the Settlement is fair, reasonable, and adequate. The Settlement Class's reaction to the Settlement has been overwhelmingly positive. Of the 15,369,743 individual potential Class Members who were sent Notice, only 300 have timely requested exclusion and 43[5] have submitted timely objections. This response weighs in favor of final approval.

For the reasons detailed below, Plaintiffs and Settlement Class Counsel respectfully submit that the Settlement meets the standards for final approval under Rule 23, and is a fair, reasonable, and adequate result for the Settlement Class. Plaintiffs request the Court to finally approve the Settlement, grant Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs, and enter a final judgment dismissing this case.

II. Summary of the Action and Settlement

[5] The Settlement Administrator reports 45 objections to the Settlement. As explained in Appendix A, the Parties have reviewed all 45 filings and agree that one objection, which was not filed with the Court, was actually an exclusion, and the other was a motion to proceed in his individual capacity (ECF No. 92), which Morgan Stanley has already responded to (ECF No. 96). As such, the Parties count the total number of objections as 43.

Appreciating this Court's preference for brevity in memoranda of law,[6] Plaintiffs respectfully refer the Court to their Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval (ECF No. 81-1) and their Memorandum of Law in Support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs (ECF No. 101) for a thorough recitation of the substantive and procedural background of this litigation. For the purposes of final approval, Plaintiffs highlight the following:

A. Background

Plaintiffs allege that in 2016 and 2019, Morgan Stanley failed to properly dispose of retired IT assets containing personally identifiable information ("PII') of over 15 million of its current and former clients. Some of this equipment was then re-sold to third parties, without being properly wiped of data. At the outset of litigation, Class Counsel diligently engaged in comprehensive discovery and expert analysis to uncover how these incidents occurred and what was breached. Despite facts uncovered by Class Counsel, Morgan Stanley continued to vigorously defend the case and filed two motions to dismiss, stressing a lack of proof of any access by any unauthorized third party to any Morgan Stanley client PII. (ECF Nos. 47, 63). Morgan Stanley mounted challenges to the forensic findings of Plaintiffs' expert, holding steadfast to its claim that there was no evidence that any downstream purchasers had nefarious intent when purchasing the devices, and there was a lack of evidence any PII had been accessed or misused, citing for example, the absence of finding Morgan Stanley customer data for sale on the dark web. Class Counsel persisted and through many months of intensive discovery, expert analysis, legal analysis of Morgan Stanley's defenses, and three full days of in-person mediation, Class Counsel were in a well-informed position to accept a mediators' proposal and reach the very favorable Settlement before

[6] *See* Judge Paul A. Engelmayer Individual Rules and Practices in Civil Cases, Revised April 2021.

the Court. Judge Diane Welsh (Ret.), the mediator whose proposal ultimately led to the Settlement, has submitted a declaration in support of final approval of the Settlement. *See* Declaration of Hon. Diane M. Welsh (Ret.) of JAMS in Support of Final Approval of Class Settlement, filed herewith ("Welsh Decl. 6/21/2022").

B. Terms of the Settlement

If the Settlement receives final approval, the $60 million non-reversionary Qualified Settlement Fund established by Morgan Stanley will be used to: 1) provide at least two years of comprehensive financial account fraud monitoring and insurance services for the entire Class (Aura's Financial Shield), without the need for a claimant to submit a Claim; 2) pay for out-of-pocket expense reimbursement up to $10,000 per Class Member for all unreimbursed actual, incurred costs or expenditures that are fairly traceable to the Data Security Incidents; and 3) pay for both attested lost time reimbursement (up to $100 per class member) and documented lost time reimbursement. Settlement Agreement ¶¶ 1.34, 2.2, 3.1, 4.1, 5.1. The Settlement Amount will also be used to pay for attorneys' fees and costs and service awards to the named Plaintiffs, as approved by the Court. *Id.* at ¶ 2.2. Morgan Stanley will separately bear the costs of notice and settlement administration, estimated to be at least $8.2 million. *Id.* at ¶¶ 7.1, 7.2. Morgan Stanley has also agreed to maintain business practice changes related to data security and to engage Kroll at its additional expense in an effort to locate and retrieve additional IT devices, which is significant in that it provides further protection from future potential harm for Class Members.

Based upon their extensive experience in complex litigation and data privacy, Class Counsel believe that the $60 million Settlement Amount will be ample to pay the claims of Settlement Class Members. However, if there are insufficient monies to pay all claims, claims for out-of-pocket losses and lost time will be reduced on a pro rata basis. *Id.* at ¶ 6.2. If monies remain in the Qualified Settlement Fund after the payment of all claims, attorneys' fees, costs, expenses,

and service awards to the Class Representatives, the remaining funds will be used to extend the coverage period for Aura's Financial Shield for all participants. No monies will revert to Morgan Stanley. *Id.* at ¶ 6.1.

In all, the total settlement value is greater than the $68.2 million that Morgan Stanley is paying to create the Qualified Settlement Fund and for costs of notice and claims administration. The Settlement uniquely provides for current compensation as well as meaningful protection against future harm and is one of the most substantial relief packages ever achieved on a per-Class Member basis in a data security class action.[7]

III. Preliminary Approval and Notice

On December 31, 2021, Plaintiffs moved Judge Torres to grant preliminary approval of the Settlement, approve the proposed Notice Plan, direct notice be given to the Settlement Class, and Schedule a Final Approval Hearing. (ECF No. 81). On January 18, 2022, Judge Torres granted Plaintiffs' motion. (ECF No. 82). Pursuant to the Preliminary Approval Order, the Settlement Administrator implemented the Notice Plan, disseminating notices to 15,369,743 potential members of the Settlement Class via U.S. mail and e-mail. *See* Declaration of Cameron R. Azari, Esq. at ¶ 25 ("Azari Decl."). Publication Notice was also placed in THE WALL STREET JOURNAL and INVESTOR'S BUSINESS WEEKLY. *Id.* at ¶ 26.[8]

[7] *See* Chart of Data Breach Settlements, Nussbaum Decl. 7/22/2022 at ¶ 15.

[8] On April 28, 2022, the parties advised the Court that Morgan Stanley discovered that 61,000 potential Class Members had been excluded from the notice distribution list due to a minor technical error. (ECF No. 109). At the request of the Parties, the Court directed that notice be provided to these additional potential Class Members, extended the deadline for exclusions and objections to July 12, 2022, extended the postmark deadline for claim submission to August 11, 2022, and set the final approval hearing for August 5, 2022. (ECF No. 110). At the direction of the Court, the Settlement Website was updated with these new deadlines and Epiq commenced Notice to the additional 61,000 potential Class Members. Azari Decl. at ¶¶ 14, 31.

Notice instructed Class Members of their legal rights and options in this Settlement, including: the option to submit a Claim Form to receive monetary payment for losses suffered; the option to ask to be excluded from the Settlement and retain the right to bring an individual action against Morgan Stanley; the option to object to the Settlement; the option to attend the Final Approval Hearing; and the option to do nothing and not receive a monetary payment from the Settlement, but remain entitled to enroll in Aura's Financial Shield services. (ECF No. 81-2, Ex. 4). The deadline for Class Members to exclude themselves or object to the proposed Settlement passed on July 12, 2022, and only 300 exclusion requests and 43 objections have been received. The claim deadline is August 11, 2022, and approximately 118,808 claims have been received to date. Azari Decl. ¶¶ 30-32.

IV. The Settlement Merits Final Approval by the Court

A. Plaintiffs Have Article III Standing

Plaintiffs have adequately alleged that they are at a substantially increased risk of identity theft after Morgan Stanley disregarded proper policies and protocols for disposal and decommissioning of its IT Assets containing Plaintiffs' PII. *See, e.g.*, Consolidated Amended Class Action Complaint ("CAC"), ECF No. 60, ¶¶ 279, 290, 300, 312, 324, 333, 343, 353. Such allegations exceed the standards for standing set forth by the Second Circuit in *McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295 (2d Cir. 2021). *McMorris* requires courts to consider the following non-exhaustive factors: "(1) whether the plaintiffs' data has been exposed as the result of a targeted attempt to obtain that data; (2) whether any portion of the dataset has already been misused, even if the plaintiffs themselves have not yet experienced identity theft or fraud; and (3) whether the type of data that has been exposed is sensitive such that there is a high risk of identity theft or fraud." *Id.* at 303. The sensitive and confidential PII contained on the Morgan Stanley servers was the same type of PII at issue in *McMorris*, which made it "more likely that" victims

"will be subject to future identity theft or fraud." 995 F.3d at 302 (citing *Attias v. Carefirst*, F.3d 620,628 (D.C. Cir. 2017); *see also Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010) (Social Security numbers sufficiently sensitive for Article III standing analysis).

Additionally, Plaintiffs allege in their CAC that their data has been misused. CAC ¶¶ 263, 283, 316, 337. They further allege that Morgan Stanley's internal records, disclosed during discovery, reflect reports of fraud and identity theft by Class Members. CAC ¶¶ 13, 23. The allegations in Plaintiffs' CAC are more than sufficient to confer Article III standing. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247 (11th Cir. 2021) ("Given the colossal amount of sensitive data stolen, including Social Security numbers, names, and dates of birth, and the unequivocal damage that can be done with this type of data, we have no hesitation in holding that Plaintiffs adequately alleged that they face a 'material' and 'substantial' risk of identity theft.").

B. The Settlement Meets the Standards for Final Approval Under Rule 23(e)

Rule 23(e) requires judicial approval for any compromise or settlement of class action claims. "A court may approve a proposed class action settlement, provided it determines that the settlement is 'fair, adequate, and reasonable, and not a product of collusion.'" *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 661 (S.D.N.Y. 2015) (quoting, *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)). As this Court stated in *JPMorgan Treasury Spoofing*, in exercising its discretion over a proposed settlement, a court should review the settlement in light of "the general judicial policy favoring settlement." *In re JPMorgan Treasury Spoofing Litig.*, No. 1:20-cv-03515-PAE, Fairness Hearing Transcript, (S.D.N.Y. May 31, 2022)[9] (hereafter "*Treasury Spoofing*") at 16 (citing *Hart v. RCI Hospital Holdings, Inc.*, No. 09-cv-3043-PAE, 2015 WL 5577713, at 6

[9] The *In re JPMorgan Treasury Spoofing Litig.* transcript is attached hereto as Exhibit 1.

(S.D.N.Y. Sep. 22, 2015)). The Second Circuit has noted that the policy favoring settlement is strong, "particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d. Cir. 2005). Moreover, absent fraud or collusion, the Court "should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *City of Providence v. Aéropostale, Inc.*, No. 11-cv-7132-CM-GWG, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

In undertaking the Rule 23(e) evaluation, a court must consider "both the settlement's terms and the negotiating process leading to the settlement" and review the settlement for both procedural and substantive fairness. *Meredith*, 87 F. Supp. 3d at 662 (quoting *Wal-Mart Stores*, 396 F.3d at 116). In making the determination of whether the settlement is "fair, reasonable, and adequate," amended Rule 23(e)(2) provides that a court should consider whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

See Rule 23(e)(2).

Consistent with this guidance, courts in the Second Circuit have long considered the factors set forth in *City of Detroit v. Grinnell Corp.* in evaluating the adequacy of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020) (noting "factors set forth in Rule 23(e)(2) have been applied in tandem with the Second Circuit's *Grinnell* factors"); *Treasury Spoofing transcript* at 18-19.[10]

After considering the Rule 23(e)(2) factors at the preliminary approval stage, Judge Torres determined the Settlement is fair, reasonable, and adequate, subject to further consideration at the Fairness Hearing. Preliminary Approval Order, ¶ 1 (ECF No. 82). Judge Torres' conclusion applies equally now.

1. Plaintiffs and Settlement Class Counsel Have Adequately Represented the Settlement Class in this Action

In determining whether to approve a class action settlement, the Court should first consider whether Class Representatives and Class Counsel "have adequately represented the class." Rule 23(e)(2)(A); *see generally In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) ("Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation."). As this Court has held, "[a] presumption of fairness may attach to a proposed settlement when the terms of that settlement were reached by experienced counsel during arm's-length negotiations undertaken after meaningful discovery." *Meredith*, 87 F. Supp. 3d at 662. The Parties were represented by "estimable, indeed outstanding, counsel with significant experience in litigating complex class

[10] The advisory committee's notes to the December 1, 2018 amendments to Rule 23 explain that the four Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Rule 23 advisory committee's notes to 2018 amendments, subdivision (e)(2). Accordingly, Plaintiffs discuss below, the fairness, reasonableness, and adequacy of the Settlement principally in relation to the four Rule 23(e)(2) factors, but also discuss the application of the factors identified in *Grinnell*.

actions;" the settlement was the product of "lengthy, arms-length negotiation, facilitated by" an "experienced and wise" mediator – Judge Diane M. Welsh (Ret.) – and before the parties arrived at settlement, extensive discovery had been exchanged. Nussbaum Decl. 4/20/2022 ¶¶ 21-71 and Welsh Decl. at ¶ 5.

Class Representatives have adequately represented the Settlement Class in both their prosecution of the Action and in negotiating and securing the Settlement. Class Representatives' claims, all of which are based on a common course of alleged wrongdoing by Morgan Stanley, are aligned with those of the Settlement Class and Class Representatives have no interests antagonistic to the Settlement Class. Nussbaum Decl. 4/20/2022 at ¶ 105. Class Representatives have an interest in obtaining the largest possible recovery from Defendant. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members."). Throughout the Action, Class Representatives have provided invaluable assistance to Class Counsel—supplying information necessary to the filing of the original and amended complaints, producing documents, and communicating with counsel on case developments and during the settlement negotiations. Nussbaum Decl. 4/20/2022 at ¶¶ 103-105.

Likewise, Class Counsel have also "adequately represented the class." Rule 23(e)(2)(A). Class Counsel have extensive class action, consumer and complex litigation experience and used this expertise to pursue Plaintiffs' claims and ultimately negotiate a favorable recovery for the Settlement Class.[11] *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009), *aff'd, Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (noting

[11] *See* Declaration of Linda P. Nussbaum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement dated 12/31/2021 at ¶ 45 (ECF No. 81-2); Nussbaum Decl. 4/20/2022 at ¶¶ 98-99.

"extensive" experience of counsel in granting final approval); *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331-CM-MHD, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (giving "great weight" to experienced class counsel's opinion that the settlement was fair). At all times, Class Counsel was fully informed about the facts, risks, and challenges of this novel action and had a sufficient basis on which to negotiate a very significant settlement. Mediator Diane M. Welsh noted that Class Counsel performed high caliber work on the case and in the settlement negotiations. *See* Welsh Decl. 6/21/2022 at ¶ 12 (noting that "based upon my observations of the diligence and work product produced by counsel, that the lawyering in this case was of the highest caliber and that plaintiff and defense counsel left no stone unturned, and no argument unmade, in the representation of their respective clients").

2. The Settlement Was Negotiated at Arm's Length and Aided by a Respected and Experienced Mediator

The Court should next consider whether the settlement was "negotiated at arm's length." Rule 23(e)(2)(B). This includes consideration of other related circumstances to ensure the procedural fairness of a settlement, including whether there was sufficient discovery prior to settlement. *See Meredith*, 87 F. Supp. 3d at 662; *In re Facebook, Inc., IPO Secs. & Deriv. Litig.*, 343 F. Supp. 3d 394, 408 (S.D.N.Y. 2018) ("When a settlement is the product of arms-length negotiations between experienced, capable counsel after meaningful discovery, it is afforded a presumption of fairness, adequacy, and reasonableness.") (cleaned up). To assess the integrity of the process, the key question is whether "plaintiffs' counsel is sufficiently well informed" to adequately advise and recommend the settlement to the class representatives and settlement class. *See In re GSE Bonds*, 414 F. Supp. 3d at 699.

This Settlement is the culmination of over six months of hard-fought negotiations between highly qualified counsel, working with a very experienced mediator, who sought to obtain the best

possible result for their respective clients. Welsh Decl. 6/21/2022 at ¶¶ 6, 7, 12. The Parties and their counsel were extremely well informed about the strengths and weaknesses of the case before reaching their agreement to settle. *Id.* at ¶ 5; Nussbaum Decl. 4/20/2022 at ¶¶ 46-60. *See generally* William B. Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:49 (5th ed. 2012) ("NEWBERG") (approval of a settlement is warranted "[w]here a court can conclude that the parties had sufficient information to make an informed decision about settlement"). Prior to reaching the Settlement, Class Counsel had, *inter alia*: (i) researched and drafted two detailed, lengthy amended complaints (Nussbaum Decl. 4/20/2022 at ¶¶ 11, 25-26); (ii) briefed a motion to dismiss (*id.* at ¶¶ 28-31); (iii) engaged in extensive discovery, including the review of over 163,300 pages of documents from Defendant and a dozen third parties (*id.* at ¶¶ 40-58); (iv) conferred with various experts in navigating the complexities of Plaintiffs' data security claims (*id.* at ¶¶ 59-60); and (v) taken party and non-party depositions and interviewed key witnesses, including former Morgan Stanley employees (*id.* at ¶¶ 52-55, 58).

Arm's length settlement negotiations began in earnest in May 2021 and continued until November 3, 2021, and included a series of meetings, telephonic conferences, correspondence, and three in-person, day-long, formal mediation sessions. *Id.* at ¶¶ 61-69. Judge Welsh provided significant assistance and ultimately, to bridge an impasse, made a mediator's proposal which the parties accepted. *Id.* at ¶ 69. As this Court held in *Treasury Spoofing*, "[t]he fact that the proposed settlement reflects a successful mediation further supports the court's finding of procedural fairness." *Treasury Spoofing* at 18 (citing *Kelen v. World Fin. Network Nat. Bank*, 302 F.R.D. 56, 68 (S.D.N.Y. 2014) (the involvement of an experienced and qualified mediator in settlement negotiations further affirms the fairness of the process)); *see also Belton v. GE Capital Consumer Lending, Inc.*, No. 21-cv-9493-CM, 2022 WL 407404, at *4 (S.D.N.Y. Feb. 10, 2022) (mediation

session with a "highly regarded mediator" satisfied the court's inquiry into the thoroughness of the negotiations); *see also* NEWBERG § 13:50.

3. The Relief Provided for the Class Is Adequate

Courts consider whether the relief provided for the class is adequate in order to assess substantive fairness. To undertake this analysis, courts account for the following factors: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." FED. R. CIV. P. 23(e)(2)(C). The Court is also required to confirm that the Settlement "treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D).

a. The Relief Provided is Superior to Continued Litigation

Rule 23(e)(2)(C)(i) and the first *Grinnell* factor support final approval, as courts consistently recognize that the expense, complexity, and possible duration of the litigation are key factors in evaluating the reasonableness of a settlement. *See In re Luxottica Grp. S.p.A. Secs. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation."). As this Court has found, the greater the "complexity, expense and likely duration of the litigation," the stronger the basis for approving a settlement. *Meredith,* 87 F. Supp. 3d at 663; *Treasury Spoofing* at 19. "Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015).

The costs, risks, and delay of trial and appeal are significant in all data security cases, but particularly in cases involving facts such as these. While Plaintiffs are confident in the merits of

their claims, the risks involved in prosecuting a class action through trial cannot be disregarded. Due at least in part to their cutting-edge nature and the rapidly evolving law, data security cases like this one generally face substantial hurdles—even just to make it past the pleading stage. *See Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08-cv-6060-RMB-RLE, 2010 WL 2643307, at *1 (S.D.N.Y. Jun. 25, 2010) (collecting data breach cases dismissed at the Rule 12(b)(6) or Rule 56 stage). Class certification is another hurdle that would have to be met—and one that has been denied in other data breach cases. *See, e.g.*, *McGlenn v. Driveline Retail Merch., Inc.*, No. 18-cv-2097-SEM, 2021 WL 165121, at *11 (C.D. Ill. Jan. 19, 2021); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 33 (D. Me. 2013). In fact, this District has recognized that the risk of maintaining a class through trial "weighs in favor of settlement where it is likely that defendants would oppose class certification if the case were to be litigated." *In re GSE Bonds*, 414 F. Supp. 3d at 694; *see also In re AOL Time Warner, Inc. Sec. and "ERISA" Litig.*, No. 02-cv-5575-SWK, 2006 WL 903236, at *12 (S.D.N.Y. Apr. 6, 2006) ("[T]he process of class certification would have subjected Plaintiffs to considerably more risk than the unopposed certification that was ordered for the sole purpose of the Settlement."). Through the Settlement, Plaintiffs and Class Members gain significant benefits without having to face further risk.

b. The Reaction of the Settlement Class

As this Court has held, "[a] positive reaction of the class to the proposed settlement favors its approval by the Court." *Meredith*, 87 F. Supp. 3d at 663; *Treasury Spoofing* at 19-20. The class's reaction to a proposed settlement is an important factor to be weighed in considering its fairness and adequacy. *See, e.g.*, *Meredith*, 87 F. Supp. 3d at 663; *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." (citation omitted)); *Grinnell*, 495 F.2d at 462-63. That being said, "[a] certain number of objections

are to be expected in a class action like this one with an extensive notice campaign and a potentially large number of class members. If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 511 (E.D.N.Y. 2003) (quoting 4 Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 11.41, at 108 (4th ed. 2002) (holding that the "extremely small number of objectors – a mere 18 out of approximately five million Class members—weighs heavily in favor of final approval.")); *see also, e.g.*, *D'Amato v. Deutsche Bank,* 236 F.3d 78, 86-87 (2d Cir. 2001) (holding that "[t]he District Court properly concluded that this small number of objections [18 where 27,883 notices were sent] weighed in favor of the settlement"); *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010) ("Of the 11,800,514 class members, only 127 opted out and 24 objected. Such a small number of class members seeking exclusion or objecting indicates an overwhelmingly positive reaction of the class."); *Charron v. Pinnacle Group NY LLC*, 874 F. Supp. 2d 179, 190 (S.D.N.Y. 2012) (approving settlement in a RICO action as "fair, reasonable, and adequate to the class as a whole" where 26,000 tenants received the notice and 118 written objections were received, 141 elected to opt out, there was strident opposition from those who did object and the six named plaintiffs and class representatives did not support the settlement), *aff'd sub nom, Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013). *Cf. In re Countrywide Financial Corp Customer Data Sec. Breach Litig.*, No. 3:08-md-01998, 2010 WL 3341200, at *7 (W.D. Ky. Aug. 23, 2010) (approving data breach settlement with 17 million class members, 2,943 opt outs and 89 objections). This Action certainly involved an extensive notice campaign, with over 18 million notices sent directly to potential Class Members, in addition to Publication Notice.

The reaction of Class Members to the Settlement has been overwhelmingly positive and

weighs in favor of approval. The deadline to opt out of or object to the settlement was July 12, 2022. Of the 15,369,743 potential Class Members who received Notice, 300 have timely excluded themselves and 43 have timely objected. These numbers suggest that the overwhelming majority of Class Members are satisfied with the Settlement, weighing strongly in favor of approval of the Settlement. *See Charron*, 874 F. Supp. 2d at 198 ("The Court cannot help but conclude that the silence and acquiescence of 99% of the Class Members speaks more loudly in favor of approval than the strident objections of the 1% against it.").

Once a court is itself satisfied that a settlement is fair, reasonable, and adequate to the class as a whole, "the burden is on the objectors to make a 'clear and specific showing that vital material was ignored by the District Court'…" *In re Nissan Radiator*, No.10-CV-7493, 2013 WL 4080946, at *10 (S.D.N.Y. May 30, 2013) (quoting *Grinnell*, 495 F.2d at 464); *see also Rievman v. Burlington N.R. Co.*, 118 F.R.D. 29, 32 (S.D.N.Y. 1987) (explaining that the burden shifts to the objectors after the "initial showing of fairness and reasonableness"); *Schwartz v. Novo Industri A/S*, 119 F.R.D. 359, 362 (S.D.N.Y. 1988) (discussing burden shifting to objectors after initial determinations in favor of class settlement).

None of the objections in this case carry the applicable burden. Plaintiffs' specific responses to each of the objectors are addressed in detail in Appendix A attached hereto. In summary, the objections that have been filed are either facially invalid or substantively without merit. In the Notice they received, potential Class Members were instructed that in order to object to the Settlement, they must file a written objection with the Clerk of Courts and mail a copy of the objection to Class Counsel and Counsel for Morgan Stanley. Of the 43 timely objections, it appears that 28 have not followed the filing procedure approved by the Court. Further, six objections are identical, copy and pasted objections from the same family and two are from

"professional objectors."[12] Otherwise, the objections aggregate toward two central themes: that the Settlement is insufficient insofar as Class Members are not getting enough or Morgan Stanley is not paying enough, and the unreasonableness of Class Counsel's fee request.

Simply complaining that the settlement should be "better" is not a valid objection. *Henderson v. Volvo Cars of N. Am., LLC*, No. 09-cv-4146, 2013 WL 1192479, at *9 (D.N.J. Mar. 22, 2013); *In re Merrill Lynch & Co., Inc. Res. Rep. Sec. Litig.*, 246 F.R.D. 156, 168 (S.D.N.Y. 2007) (rejecting objection that settlement is "unreasonably low" and "not in the investors class" interests as conclusory). "Contrary to objectors' expectations, the settlement is not a wish-list of class members that the Defendant must fulfill." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 65 (S.D.N.Y. 2003) (internal quotations omitted). Or, as the *Charron* court noted, "[t]he Settlement is not, and cannot be, all things to all people." *Charron*, 874 F. Supp. 2d at 184. The Court should not allow this to become "a case where the perfect could easily become the enemy of the good; [as] that would not be in the best interests of the class as a whole. *Id.*; *see also Cagan v. Anchor Sav. Bank FSB*, 1990 WL 73423, at *12, 13 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million"); *Morris v. Affinity Health Plan, Inc*., 859 F. Supp. 2d 611, 621 (S.D.N.Y. 2012) ("[E]ven if . . .the best possible recovery was $125 million, it would not bar approval of the settlement,

[12] *See, e.g.*, *Brown v. Hain Celestial Grp., Inc.*, No. 3:11-cv-03082-LB, 2016 WL 631880, at *9, 10 (N.D. Cal. Feb. 17, 2016) (finding that objectors, which included Helfand, are "professional" objectors and that "courts across the country have repeatedly turned aside their efforts to upend settlements"); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1260 n.11 (C.D. Cal. 2016). *See also In re: Whirlpool Corp. Front–loading Washer Products Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at *21 (N.D. Ohio Sep. 23, 2016) ("In nearly every class action settlement today, professional objectors file objections (often frivolous ones) simply in order to obtain standing to appeal the district court's final approval order. The professional objector hopes that class counsel, in order to settle the appeal and gain access to the fee award, will pay the objector to go away" (internal footnote omitted)).

given the risk."); *Dupler*, 705 F. Supp. 2d at 246-47 (noting that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); *Joel A. v. Giuliani*, 218 F.3d 132, 144 (2d Cir. 2000) ("[A] settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate and fair.").

Further, Aura's Financial Shield Service, which is being offered to all, whether or not a Claim is filed, is a substantial benefit that would not have been available without the Settlement. Contrary to several objections, the Aura service is vastly different and covers fraud that is not related to the Morgan Stanley Data Security Incidents. It is more robust than the Experian credit monitoring that was previously offered to Class Members by Morgan Stanley in the aftermath of the Data Security Incidents. *See* Affidavit of Gerald Thompson ¶ 9. ("Thompson Aff."). Aura's Financial Shield service uses the most powerful and comprehensive monitoring of a person's financial assets while also providing identity authentication alerts. *Id*. at ¶ 10. Unlike Experian, Aura includes: $1 million in Insurance backed by AIG to replace any money lost by theft; dark web monitoring; transaction monitoring of all registered financial accounts; home title and property title monitoring; security freeze capability; monthly credit score information; monthly spending graphs to show members daily how much is being spent, deposited, transferred; and identity authentication alerts. *Id*. ¶¶ at 10-11. Objections that Aura's Financial Shield service is not a "benefit" to Class Members should be overruled.

The second theme of objections concern the requested fees for Class Counsel, with most objectors making conclusory statements that the requested amount is "too high." The percentage requested by Class Counsel (29.2% of the Settlement value (the Settlement Amount of $60 million plus $8.2 million in costs of notice and administration) or 33.3% of the $60 million non-revisionary

Settlement Amount) is both reasonable and well within the range of typically awarded by courts.[13] *See In re Zinc Antitrust Litig.*, No. 14-cv-3728-PAE (S.D.N.Y. Feb. 16, 2022) (ECF No. 327 at 1) (awarding 33.3% of settlement fund); *In re JPMorgan Treasury Futures Spoofing Litig.*, No. 1:20-cv-03515-PAE (S.D.N.Y. Jun. 3, 2022) (ECF No. 96 at ¶ 3) (awarding 33.3% of settlement fund); *Spicer v. Pier Sixty LLC*, No. 08-cv-10240-PAE, 2012 WL 4364503, at *4 (S.D.N.Y. Sep. 14, 2012) (approving award of 33.3% of settlement fund as "consistent with the trend in this Circuit"); *Montalvo v. Flywheel Sports, Inc.*, No. 16-cv-6269-PAE, 2018 WL 7825362 (S.D.N.Y. Jul. 27, 2018) (approving award of 33% of the settlement fund in a case that settled rather quickly and did not involve onerous discovery and holding "courts in this district will often approve multipliers between two and four times"); *In re Giant Interactive Group, Inc. Securities Litig.*, 279 F.R.D. 151, 166 (S.D.N.Y. 2011) (awarding 33% of the settlement fund); *Hart v. RCI Hospitality Holdings, Inc.*, No. 09-cv-3043-PAE, 2015 WL 5577713 at *17 (S.D.N.Y. Sep. 22, 2015) (awarding 32.9% of gross settlement); *Hernandez v. Compass One, LLC*, No. 20-cv-7040-LJL, 2021 WL 4925561, at *4 (S.D.N.Y. Oct. 21, 2021) (noting "[d]istrict courts in this Circuit typically approve fee requests between 30% and 33% of the settlement").

A lodestar "cross check" confirms the reasonableness of the requested fee award. Regarding the lodestar cross-check, "district courts in this Circuit award fees frequently that amount to multiples of the lodestar. That is for a variety of reasons, including in recognition of the investment of time and capital that contingency cases inherently present, the risk that these will never be recouped, and the practical reality that other such cases on the docket of a lawyer paid by

[13] *See* Declaration of Professor Brian T. Fitzpatrick dated April 12, 2022, originally filed in support of the Motion for An Award of Attorneys' Fes, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs (ECF No. 106) and annexed hereto as Exhibit 2 for the Court's convenience.

contingency fees may yield no recovery at all." *Treasury Spoofing* at 29-30. When Plaintiffs filed their Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs, the lodestar and expense numbers presented were based on figures incurred as of March 1, 2022. At the time, Class Counsel had expended 9,952.55 hours, resulting in a lodestar of $7,188,201.81. Class Counsel submitted declarations supporting the reasonableness of their rates and the resulting lodestar multiplier (approximately 2.75), which fell within or below the range commonly awarded by courts throughout the district, as well as across the country. *See, e.g.*, *Spicer*, 2012 WL 4364503, at *4 (awarding 3.36 multiplier of the lodestar, as well within the range of reasonableness and citing cases approving multipliers of 4.34, over 4 and nearly 5); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Asare v. Change Grp. of N.Y., Inc*., No. 12-cv-3371-CM, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *City of Providence*, 2014 WL 1883494, at *13 (noting "lodestar multiples of over 4 are awarded by this Court"); *Maley*, 186 F. Supp. 2d at 371 (describing a 4.65 lodestar multiple as "modest" and "fair and reasonable").

Since the filing of the Fee Motion, Class Counsel have expended substantial time preparing for final approval, speaking with class members and answering their questions regarding the Settlement and claims process, and fielding questions and navigating matters with the Settlement Administrator and coordinating with Kroll and defense counsel with respect to the Kroll engagement by Morgan Stanley as part of the Settlement. Class Counsel will continue to expend hours throughout the final approval process and in coordinating with Kroll over their one-year term to commence after Final Approval. Class Counsel do not intend to request any further fees in

this matter for the additional work that they will do. Nussbaum Decl. 7/22/2022 at ¶ 21.

For the reasons stated above and within Appendix A, this Court should overrule the objections.

c. Stage of the Proceedings and Amount of Discovery Completed

The third *Grinnell* factor considers the amount of discovery completed, with a "focus[ ] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *Fleisher v. Phx. Life Ins. Co.*, No. 11-cv-8405 and 14-cv-8714-CM, 2015 WL 10847814, at *7 (S.D.N.Y. Sep. 9, 2015). Here, Plaintiffs had engaged in significant party and third-party discovery; reviewed and analyzed hundreds of thousands of documents; interviewed and deposed witnesses; filed a lengthy consolidated amended complaint supported by facts and documents from discovery; conferred with experts; exchanged mediation statements and presentations; briefed Defendant's motion to dismiss; and mediated on three separate occasions over a six-month period. Nussbaum Decl. 4/20/2022 at ¶¶ 25-69. Class Counsel's knowledge of the strengths and weaknesses of the claims is more than adequate to support the settlement. *See* Welsh Decl. 6/21/2022 at ¶ 5; *see also Treasury Spoofing* at 21 (approving settlement with regulatory discovery only where "counsel had worked with experts and consultants to assess the case and the extent of JPMorgan's exposure" and potential damages).

d. The Risks of Continued Litigation

In assessing the fairness, reasonableness, and adequacy of a settlement, a court should also consider "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." *Grinnell*, 495 F.2d at 463. In this assessment, "the Court [is not required] to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Payment Card Interchange Fee & Merc. Disc. Antitrust Litig.*, 330 F.R.D. 11,

36-37 (E.D.N.Y. 2019). *See also Treasury Spoofing* at 21-24 (approving settlement where plaintiffs identified various hurdles to be cleared including "rigorous standards of certification and summary judgment" and noting, as here, the defendant had not conceded liability and damages "at a minimum would have been hotly disputed in a 'battle of experts'").

In assessing this factor, "the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation." *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F.Supp.3d 290, 303 (E.D.N.Y 2015). As discussed above, here, the risk of establishing liability and damages is substantial. Plaintiffs faced a motion to dismiss the entire case that had not been decided when the settlement was reached. If the action had continued, Plaintiffs would have moved for certification of the class. While Plaintiffs and Class Counsel believe that the Action is appropriate for class treatment, the outcome of a contested motion and future appeals of a certification order via Rule 23(f) are far from certain. Courts have certified Rule 23(b)(3) damages classes of consumers in only two data breach cases in 2021 and 2022. In both cases, plaintiffs were forced to re-litigate standing; partially lost *Daubert* motions to exclude some of their expert damages models supporting the motions; had the courts narrow the class definitions in order to grant any certification of a class; had the courts reject class certification of some of the claims and classes; and faced numerous, very serious issues on damages calculations, predominance and causation, both generally and for plaintiffs suffering multiple-breach class member damages. *See Brinker Data Incident Litig.*, No. 3:18-cv-686-TJC-MCR, 2021 WL 1405508, at *13 (M.D. Fla. Apr. 14, 2021) (noting that "if it becomes obvious at any time that the calculation of damages (including accounting for multiple data breaches) will be overly burdensome or individualized, the Court has the option to decertify the class"); *In re Marriott Int'l Inc. Customer Data Sec. Breach Litig.*, No. 19-md-2879, 2022 WL 1396522, at *24 (D. Md. May

3, 2022) (approving only the overpayment damages theory where the information necessary to calculate damages is "objective and administrative in nature" and holding if the individual inquiries metastasize to an impermissible level, the court could modify the order, create subclasses, bifurcate liability and damages or decertify the class). Moreover, even if the class was certified, there is always the risk or possibility of decertification. The Settlement avoids any uncertainty with respect to this issue.

The risks of continued litigation here are at the highest level and there is a genuine possibility that Plaintiffs could have failed to establish liability, damages and class certification through summary judgment and trial. As this Court found in *Meredith* and *Giant Interactive*, these risks all support the approval of a settlement ending this litigation. *See Meredith*, 87 F. Supp. 3d at 664-65; *Giant Interactive*, 279 F.R.D. at 162.

e. The Ability of Morgan Stanley to Withstand Greater Judgment

The financial obligation the Settlement imposes on Morgan Stanley is substantial. While Morgan Stanley could withstand a greater judgment than the amount paid in settlement, "'[a] defendant is not required to 'empty its coffers' before a settlement can be found adequate.'" *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) and *Giant Interactive*, 279 F.R.D. at 162 (quoting *In re Sony SCRD Rear Projection Television Class Action Litig.*, No. 06-cv-5173-RPP, 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008)). The possibility that Morgan Stanley could have sustained a greater judgment is not determinative of substantive fairness or unfairness, "'where, as here, other *Grinnell* factors weigh in favor of approval, this factor alone does not suggest the settlement is unfair.'" *Meredith*, 87 F. Supp. 3d at 665 and *Giant Interactive*, 279 F.R.D. at 162. "[A]s a matter of law, the ability to withstand a greater judgment does not 'standing alone … suggest that settlement is unfair.'" *Treasury Spoofing* at 24 (citing *In re*

Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 178 n.9 (S.D.N.Y. 2000) (citations omitted)).

f. The Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and the Risks of Litigation

The eighth and ninth *Grinnell* factors—the reasonableness of the settlement in light of the best possible recovery and the risks of litigation—also weigh in favor of approving the Settlement. As the Second Circuit has explained, there is "a range of reasonableness with respect to a settlement" that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Treasury Spoofing* at 25 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). As this Court has noted, the adequacy of the amount achieved in the settlement should not be judged on the best of all possible worlds, but rather in light of the strengths and weaknesses of the case. *Meredith*, 87 F. Supp. 3d at 665-66; *Treasury Spoofing* at 25.

The settlement value falls well within the range of the reasonable. The monetary relief is significant and in line with, or in excess of, that recovered by the classes in many other data breach class action settlements. Aura's Financial Shield Service provided by this Settlement for at least two years offers very meaningful relief for the over 88,300 Class Members that have registered for the reminder email, indicating their interest in taking advantage of this settlement benefit (Class Members can enroll at any time during the 24 month of coverage). *See* Thompson Aff. at ¶ 17; Nussbaum Decl. 7/22/2022 at ¶¶ 10-12.

The Settlement here is well within the range of reasonableness in light of the risks presented by this litigation. The gravamen of the litigation is Plaintiffs' contention that Morgan Stanley violated its duty to Class Members by failing to undertake reasonable security measures, leading to the exposure of their personal information. The remediation measures to be continued by

Defendant, as well as funding efforts for Kroll to continue to search for and recover missing IT assets will prevent and mitigate further harm. Furthermore, the cash compensation to which eligible Class Members will be entitled—reimbursement of the Class Members' losses of time and money—is significant relative to economic damages incurred. In short, further litigation against Defendant would be time-consuming, expensive, and, given the risks associated with data privacy cases in general and this case specifically, might not result in a greater benefit to the Settlement Class than that provided by the Settlement.

4. The Remaining Rule 23(e)(2) Factors Support Final Approval

In evaluating the Settlement, Rule 23(e)(2) instructs courts to also consider: (i) the effectiveness of the proposed method of distributing the relief provided to the class, including the method of processing class-member claims; (ii) the terms of any proposed award of attorneys' fees, including the timing of payment; (iii) any other agreement made in connection with the proposed settlement; and (iv) whether class members are treated equitably relative to each other. Rule 23(e)(2)(C)(ii)-(iv) & (e)(2)(D). These factors also support final approval of the Settlement.

First, the proposed method of claims processing ensures equitable treatment of Settlement Class Members. *See* Rule 23(e)(2)(C)(ii) & (e)(2)(D). The Net Settlement Fund will be allocated to Settlement Class Members who submit valid Claim Forms. The Court-approved Settlement Administrator, Epiq, will review and process all Claim Forms received, provide claimants with an opportunity to cure any deficiency in their submissions, and will distribute funds to eligible Settlement Class Members. *See generally* Azari Decl. Importantly, none of the Settlement proceeds will revert to Defendant. *See* Nussbaum Decl. 4/20/2022 at ¶ 72(e); Welsh Decl. 6/21/2022 at ¶ 8. No other agreement was made in connection with the proposed Settlement.

Second, the relief provided by the Settlement remains adequate upon consideration of the terms of the proposed award of attorneys' fees, including the timing of any such Court-approved

payments. *See* Rule 23(e)(2)(C)(iii). As discussed in their Memorandum of Law in Support of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs, (ECF. No. 101), the requested fee, to be paid only upon the Court's approval, is reasonable in light of the efforts devoted by Plaintiffs' Counsel, the very favorable recovery obtained for the Settlement Class, and the significant risks Settlement Class Counsel shouldered at every step.[14] (ECF Nos. 100-106). The requested fee is also in line with attorneys' fee percentages awarded to counsel in other comparable class action settlements in this Circuit. *See Meredith Corp.*, 87 F. Supp. 3d at 668 (noting "in numerous common fund cases, fees have been awarded that represent one-third of the settlement fund" and collecting cases).[15]

For the reasons set forth above and in the Nussbaum Declarations 4/20/2022 and 7/22/2022, the Settlement is fair, reasonable, and adequate when evaluated under any standard or set of factors and, therefore, warrants the Court's final approval.

V. The Court Should Certify the Settlement Class

Certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *Meredith*, 87 F. Supp. 3d at 658 (quoting *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995)). When Judge Torres preliminarily approved the Settlement, she found that the Settlement Class preliminarily satisfied the requirements of Rules 23(a) and

[14] In connection with their fee request, Settlement Class Counsel also seek payment from the Settlement Amount of Plaintiffs' Counsel's out-of-pocket costs and expenses in the total amount of $253,994.53 as well as service awards to Plaintiffs in the aggregate amount of $55,000. *See* ECF No. 101 at 29-32.

[15] Pursuant to the Settlement Agreement, Court-awarded attorneys' fees will be paid in the amount approved by the Court five business days after the Defendant gives written notice to the Settlement Administrator and after entry of the final approval of the settlement and Final Judgment. Settlement Agreement, ¶ 12.2.

(b)(3). (ECF No. 82, ¶¶ 1, 3). There have been no changes that would undermine Judge Torres' initial determination. *See Treasury Spoofing* at 26 (adopting the arguments made in support of settlement "best outlined in plaintiffs' memorandum in support of preliminary approval" and where "no changes in the case that would warrant deviating from my initial view"). *See also In re Bear Stearns Cos., Inc. Sec., Derivative and ERISA Litig.*, 909 F. Supp. 2d 259, 264 (S.D.N.Y. 2012) (finally approving settlement where there "have been no material changes to alter the proprietary of [the court's] findings" at the preliminary approval stage).

For the same reasons previously argued (ECF No. 81-1 at 24-30), the Court should grant final certification of the Class for purposes of the Settlement. Bolstering Class Plaintiffs' earlier arguments in support of certification of the Settlement Class is the fact that Notices were sent to over 15 million potential Class Members. *See* Azari Decl. at ¶ 25. Thus, the size of the potential Class easily satisfies the numerosity requirement under Rule 23(a).

The adequacy requirement of Rule 23(a)(4) involves an inquiry as to whether: (1) the plaintiffs' interests are antagonistic to the interests of the other members of the Class; and (2) plaintiffs' counsel are qualified, experienced, and capable of conducting the litigation. As this Court found in *Giant Interactive*, the very small number of objectors and opt outs, as well as the above-average recovery in this case compared to other data breach cases, supports the Court finding the answers to these questions are no and yes, respectively. *Giant Interactive*, 279 F.R.D. at 159. "The fact that the vast majority of class members neither objected nor opted out is a strong indication that the proposed settlement is fair, reasonable, and adequate." *Wright v. Stern*, 553 F. Supp. 2d 337, 345 (S.D.N.Y. 2008).

Accordingly, Plaintiffs respectfully request that the Court finally certify the Settlement Class under Rules 23(a) and (b)(3) for purposes of effectuating the Settlement.

VI. Notice To the Settlement Class Satisfied Rule 23 and Due Process

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [settlement]." FED. R. CIV. P. 23(e)(1)(B). The standard for the adequacy of notice to the class is reasonableness. FED. R. CIV. P. 23(c)(2)(B) (for actions certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart*, 396 F.3d at 114. The Settlement Class Members have received adequate notice and have been given sufficient opportunity to weigh in on or exclude themselves from the Settlement.

Plaintiffs have provided the Settlement Class with adequate notice of the Settlement. In accordance with the Court's Preliminary Approval Order, Epiq emailed, mailed and remailed copies of the Notice Packet to 15,369,743 potential Settlement Class Members. Azari Decl. at ¶ 25. The direct-mailed and emailed notice effort successfully reached 90% of potential Settlement Class Members. *Id.* The settlement website as of July 20, 2022, had more than 2,214,492 hits and 144,982 calls were made to the hot line. *Id. at* ¶¶ 27-28 The Notice adequately set out the Settlement's essential terms and informed the potential Settlement Class Members of, among other things, their right to request exclusion from the Settlement Class or object to the Settlement, as well as the procedure for submitting a Claim Form. *Id.* at ¶ 35.

The Notice Plan, as well as the mailed notice and publication notice, satisfy due process. *See, e.g., In re Mexican Gov't Bonds Antitrust Litig.*, No. 18-cv-02830-JPO, 2021 WL 5709215, at *2 (S.D.N.Y. Oct. 28, 2021) (holding similar notice plan satisfied "due process"). The Supreme

Court has consistently found that mailed notice satisfies the requirements of due process. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 319 (1950). The mailed notice and publication notice are written in clear and concise language, and reasonably conveyed the necessary information to the average class member. *See Wal-Mart*, 396 F.3d at 114. Class Members have been afforded a full and fair opportunity to consider the proposed Settlement, exclude themselves from the Settlement, and respond and/or appear in Court. Further, the Class Notice fully advised Class Members of the binding effect of the judgment on them. *Id.*, Ex. A.

The content disseminated through this Notice campaign was more than adequate. *See Hall v. ProSource Techs., LLC*, No. 14-cv-2502-SIL, 2016 WL 1555128, at *5 (E.D.N.Y. Apr. 11, 2016) (finding notice sufficient where it "described essential and relevant information in plain terms, including . . . the terms of the Settlement Agreement . . . and the various rights of potential class members, such as the right to opt out of the Settlement Class or object to the instant Final Approval Motion").

In sum, this combination of individual first-class mail and email to Class Members who could be identified with reasonable effort, supplemented by notice in two national publications, and publication on an internet website, was "the best notice that is practicable under the circumstances." Rule 23(c)(2)(B). Comparable notice programs are routinely approved by Courts in this Circuit. *See, e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262 and 12-cv-5822-NRB, 2020 WL 6290596, at *3 (S.D.N.Y. Oct. 27, 2020).

VII. Conclusion

Considering the factors outlined in Rule 23(e) and *Grinnell* in their totality, and for the reasons set forth herein and in the Nussbaum Declarations 4/20/2022 and 7/22/2022, the Welsh Declarations 12/2/2021 and 6/21/2022, the Fitzpatrick Declaration, the Thompson Affidavit and the Azari Declarations submitted in support of the motions for preliminary and final approval and

for attorney fees and costs and service awards for the class representatives, Plaintiffs respectfully request that the Court find that this Settlement is fair, reasonable and adequate; grant final approval of the Settlement; grant certification of the Settlement Class for settlement purposes; and enter the proposed Final Judgment dismissing with prejudice the claims against Morgan Stanley.

Dated: July 22, 2022

Respectfully submitted,

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Settlement Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2022, I caused a true and correct copy of the foregoing document to be filed and served via the Court's Electronic Filing System.

/s/ Jean S. Martin
Jean S. Martin

APPENDIX A

Plaintiffs' Responses to Objections from Settlement Class Members

The Court-ordered Notice Plan instructed Class Members to object by filing a written objection with the Clerk of the Court and mailing a copy of that objection to Class Counsel and Counsel for Morgan Stanley. Class Members were further instructed that to be valid, an objection must include: (i) their full name, address, telephone number, and e-mail address (if any); (ii) information identifying them as a Settlement Class Member; (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection that they believe applicable; (iv) the identity of all counsel representing them; (v) a statement whether they or their counsel will appear at the Final Approval Hearing; and (vi) their signature and the signature of their duly authorized attorney or other duly authorized representative, if applicable. An objection needed to be postmarked no later than July 12, 2022. Many of the objections to the Settlement did not follow the Court-ordered procedures and are therefore facially invalid, as noted below.

As discussed in Plaintiffs' Motion for Final Approval, the majority of objections received fall into two categories—those objecting generally to the adequacy of the Settlement and those objecting to Class Counsel's request for attorneys' fees. The objections do not warrant or justify denial of final approval of the Settlement. The objections concerning the sufficiency of the monetary relief fail to acknowledge the $10,000 reimbursement available to all Settlement Class Members for out-of-pocket losses, attested to and documented compensation for lost time and other specifics of the monetary relief. Furthermore, the 24 months of monitoring, identity theft protection and insurance services, including a $1 million policy written by AIG, through Aura's Financial Shield were specifically negotiated to provide Settlement Class Members with additional coverage for any fraud suffered by them, including but not limited to fraud connected to the

Morgan Stanley Data Security Incidents. Moreover, Settlement Class Members had the opportunity to exclude themselves from the Settlement and retain their rights to bring independent actions against Morgan Stanley.

Objections to the amount of a settlement are not grounds to deny final approval. *See, e.g.*, *Snyder v. Ocwen Loan Servicing*, LLC, No. 14 C 8461, 2019 WL 2103379, at *9 (N.D. Ill. May 14, 2019) (overruling various objectors because "objectors' reservations about the amount of the settlement could have been resolved by simply opting out of the class and filing separate suit"); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 321 (N.D. Cal. 2018) (overruling 28 objections that claimed "the Settlement is too low or otherwise insufficient;" because "the positive response from the Class favors approval of the Settlement."); *Browne* v. *Am. Honda Motor Co.*, No. 09-CV-06750-MMM, 2010 WL 9499072, at *15 (C.D. Cal. July 29, 2010) (overruling 117 objectors in a class of 740,000 because "[t]he fact that there is opposition does not necessitate disapproval of the settlement. Instead, the court must independently evaluate whether the objections being raised suggest serious reasons why the proposal might be unfair."). "Contrary to objectors' expectations, the settlement is not a wish-list of class members that the Defendant must fulfill." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 65 (S.D.N.Y. 2003) (internal quotations omitted).

As to attorneys' fees, the percentage requested by Class Counsel is both reasonable and well within the range of fees typically awarded by courts. *See In re Zinc Antitrust Litig.*, Case No. 14-cv-3728-PAE (S.D.N.Y. Feb. 16, 2022) (ECF No. 327 at 1) (awarding 33.3% of settlement fund); *In re JPMorgan Treasury Futures Spoofing Litig.*, Case No. 1:20-cv-03515-PAE (S.D.N.Y. Jun. 3, 2022) (ECF No. 96 at ¶ 3) (awarding 33.3% of settlement fund); *Spicer v. Pier Sixty LLC*, Case No. 08-cv-10240-PAE, 2012 WL 4364503, at *4 (S.D.N.Y. Sep. 14, 2012) (approving award

of 33.3% of settlement fund as "consistent with the trend in this Circuit"); *Montalvo v. Flywheel Sports, Inc.*, Case No. 16-cv-6269-PAE, 2018 WL 7825362 (S.D.N.Y. Jul. 27, 2018) (approving award of 33% of the settlement fund in a case that settled rather quickly and did not involve onerous discovery); *In re Giant Interactive Group, Inc. Securities Litig.*, 279 F.R.D. 151, 166 (S.D.N.Y. 2011) (awarding 33% of the settlement fund)). The requested fees are fully supported by the work Class Counsel performed.[1]

For this Court's convenience, this Appendix organizes the objections alphabetically, summarizes the substance of the objection, and sets forth Plaintiffs' response.[2] To avoid repetition, where the substance of an objection is substantially similar to an objection previously addressed, Plaintiffs incorporate responses by reference. Plaintiffs respectfully submit that the Court should overrule the objections and grant final approval and the requested attorneys' fees.

1. Barbee, John (Glenwood Springs, CO)

Summary of Objection:

Mr. Barbee's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Barbee raises two objections. Mr. Barbee claims that he has not been provided with the information necessary to "calculate the amount of compensation" to determine whether the Settlement is "worth [Class Members'] time required to participate" and "the number and nature of the participation of Class Representatives to determine if their compensation of $5,000 per Representative seems fair and reasonable as well." Mr. Barbee further requested that information regarding Class Counsel's time and expenses be made available. Mr. Barbee's second objection is

[1] *See* Nussbaum Decl. 4/20/2022 at ¶¶ 11-70; Welsh Decl. 6/21/2022 at ¶ 12; Fitzpatrick Decl. 4/20/2022 at ¶¶ 8-25.

[2] On July 16, 2022, Plaintiffs requested permission from the Court to file a separate response to the objection of Robina Frank, given that Ms. Frank is the only objector represented by counsel, Hamilton Lincoln Law Institute Center for Class Action Fairness. This Court granted Plaintiffs' request on July 18, 2022. (ECF No. 129). As such, this Appendix does not address the objection of Ms. Frank.

that 24 months of Aura's Financial Shield is not enough and that he would like 5 years of protection, with an option to continue at a discounted rate.

Response:

Mr. Barbee's objection was filed on March 15, 2022, before Class Counsel filed their Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs ("Fee Motion"), accompanying memorandum of law, and supporting declarations and affidavit. The Fee Motion and accompanying documents which were posted to the Settlement website, detail the substantial time and effort that went into litigating this Action and provide legal support for the request. Although these documents were available on the Settlement website, Class Counsel also emailed them to Mr. Barbee for his convenience. Mr. Barbee's questions regarding Class Counsel's fee request are answered within those documents.

With regard to Mr. Barbee's second point, Class Counsel seek less than the 33.33% of the Settlement Fund because the value of the total proposed Settlement package is at least $68.2 million. This request is consistent with awarded requests in the Second Circuit and reflects payment for Class Counsel's efforts which included: (i) conducting extensive research and investigation of the challenging and complex data security breach claims against Defendant; (ii) retaining data security, dark web and forensic experts and investigators; (iii) engaging a damages expert; (iv) drafting two voluminous, annotated and detailed consolidated amended complaints; (v) opposing letter briefs and a formal motion to dismiss; (vi) conducting substantial fact discovery, including the analysis of hundreds of thousands of pages of documents produced by Defendant and by over a dozen third parties; (vii) preparing and negotiating subpoenas and privilege issues for numerous third parties; (viii) taking party and third party depositions; (ix) engaging in extensive witness interviews; (x) engaging over a six month period in three full day-long mediation sessions before the Hon. Diane M. Welsh (Ret.) with substantial additional negotiations and exchange of legal and factual memoranda following each session; and (ix) engaging in months of hard-fought, arm's-length settlement negotiations.

Additionally, the Class Representatives served the Settlement Class well. As detailed in the Fee Motion, Class Representatives initiated these proceedings, lent their names to this Action and thereby subjected themselves to public attention, including being forever linked to the litigation in any internet searches using their names. In addition, each of them participated in numerous conferences with their attorneys, produced documents and information, and evaluated and support the proposed settlement. The $5,000 request per Class Representative is modest and reasonable.

Mr. Barbee's objection that he would prefer 5 years of Aura's Financial Shield rather than the minimum of 24 months provided, and would like an option to continue the service at a discounted rate for life should be similarly overruled. The negotiated services through Aura's Financial Shield are an excellent benefit for Class Members—a benefit that but-for the Settlement, Class Members would not have.

As noted above, objections to the amount of a settlement are not grounds to deny final approval. Similarly, complaining that the settlement should be "better" is not a valid objection. *Henderson v. Volvo Cars of N. Am.*, LLC, 2013 WL 1192479, at *9 (D.N.J. Mar. 22, 2013). *See also In re*

Merrill Lynch & Co., Inc., 246 F.R.D. at 168 (rejecting objection that settlement is "unreasonably low" and "not in the investors class" interests as conclusory). "The Settlement is not, and cannot be, all things to all people." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 184–85 (S.D.N.Y. 2012*), aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013). While the Settlement may not "get the class everything it wants; however, it gets the class a good deal that it does not presently have." *Id.* It is certainly possible that, through trial, Class Members may have obtained greater recovery, but that is not the standard this Court should review, especially given the risks involved to get to that point. *See Cagan v. Anchor Sav. Bank FSB*, 1990 WL 73423, at *12,13 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million"); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 621 (S.D.N.Y. 2012) ("[E]ven if, as Objector Morris claims, the best possible recovery was $125 million, it would not bar approval of the settlement, given the risk."); *Dupler v. Costco Wholesale Corp*., 705 F. Supp. 2d 231, 246-47 (E.D.N.Y. 2010) ("[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); *Joel A. v. Giuliani*, 218 F.3d 132, 144 (2d Cir. 2000) ("a settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate and fair").

2. Borucki, William Joseph (Sunnyvale, CA)

Summary of Objection:

Mr. Borucki's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Borucki objects to the Settlement claiming that "none of the settlement funds will go to injured parties" and that "the proposed insurance policy is of little value" because it "will commence at some future date many years after the injury" and "individual customers will [not] be able to prove that any fraud they suffer can be uniquely associated with the data loss from the Morgan Stanley incident in 2016." Mr. Borucki also objects to the request of 33.33% of the $60 million fund to lawyers "who have suffered no injury while providing no funds to the injured parties."

Response:

Mr. Borucki erroneously argues that the Settlement will not benefit injured parties. A review of the Settlement Agreement and related filings demonstrate otherwise. The Settlement provides robust relief for Class Members. The $60 million non-reversionary Settlement Fund will provide several types of monetary and non-monetary relief to Class Members including: access to Aura's Financial Shield services for a period of at least 24 months without the need to even file a claim; and payments to people who submit valid claims for "Out-of-Pocket Expenses" and/or claims for attested to and/or documented "Lost-Time" incurred as a result of the Data Security Incidents. Settlement Class Members may submit a claim for all relief if applicable. In addition, the Settlement provides for non-monetary benefits including Morgan Stanley's retention of Kroll and commitment to maintain certain business practice changes.

The services through Aura's Financial Shield are an excellent benefit for Class Members. The service being offered to Class Members is far more than just credit monitoring for fraud associated with the Data Security Incidents. It focuses on protecting financial assets, freezing identity at 10 different credit bureaus including the three main credit bureaus, home and property title monitoring, dark web monitoring, credit freeze assistance, lost wallet protection, income tax protection and other services. This service is integrated with Early Warning Services to provide real-time monitoring of financial accounts. It also carries a $1,000,000 policy protecting the subscriber. This service will notify consumers in near real-time if there is any change in a registered financial account (such as a credit card account, checking or savings account, or investment account), new signatory request, new account opening, wire transfer requests, and other events targeted by hackers and online thieves. The services provided by Aura's Financial Shield retail for approximately $135 per year per enrollee. *See* Affidavit of Jerry Thompson at ¶¶ 10, 11, 16. Further, any fraud experienced while enrolled in Aura's Financial Shield need not be uniquely associated with the data loss from the Data Security Incidents, and, thus, provides greater protection for Class Members than they would achieve at trial. The service is of significant value to Class Members.

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request.

3. Conway, Katherine (Plandome, NY)

Summary of Objection:

Ms. Conway's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Ms. Conway objects that the terms of the Settlement "offer very little [] to account holders whose privacy was breached and do not compensate victims in any way for the ongoing risk of cybercrime, identity theft, and related harm arising from this breach. Further, the nature of the compensation is not only de minimis and capped at $100, it bases compensation on expenses incurred rather than potential damage suffered." Ms. Conway argues that the Settlement does not hold Morgan Stanley sufficiently accountable for its behavior.

Response:

Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement to Class Members. Notably, Ms. Conway misunderstands the terms of the Settlement as the Settlement does not cap recovery at $100, but rather compensation for out-of-pocket expenses is capped at $10,000, plus Class Members may also file claims for both Attested and Lost Time.

Plaintiffs certainly appreciate Ms. Conway's concern for holding companies like Morgan Stanley accountable for their actions. Plaintiffs deposed Morgan Stanley's corporate representative about their data security business practices and measures that had already been implemented after the Incidents. Morgan Stanley, as a result of this Settlement, has agreed to continue certain business practice changes and to hire Kroll Investigation for a period of twelve months to continue efforts to locate and retrieve any additional IT assets. Kroll has teams of dedicated cyber risk experts with extensive experience retracing and recovering data. These retrieval efforts will follow a detailed protocol that has been the subject of discussion with Class Counsel. Kroll will report its progress to Class Counsel and defendant's counsel quarterly and at the conclusion of the 12-month period.

4. Corey, Tim (Westlake Village, CA)

Summary of Objection:

Mr. Corey's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Corey objects to Class Counsel's request for attorneys' fees and reasons that "if all members of the settlement class file, [] each one will get $2.67, while the attorneys will get $20 million."

Response:

First, it is important to note that the Settlement is not a per-Class Member, *pro rata* distribution. As detailed in Response No. 2 (William Joseph Borucki), the $60 million Settlement Amount will be used to make payments of different values to Class Members, depending on the injuries alleged and the claims filed.

Nevertheless, the Settlement Agreement provides for one of the most substantial relief packages ever achieved on a per-Class Member basis in a data security class action. For this Court's reference, Plaintiffs have summarized major data security settlements in chart form for comparison purposes in the Declaration of Linda P. Nussbaum in Support of Plaintiffs' Motion for Final Approval.

Plaintiffs incorporate by reference Response No. 1 (John Barbee**)** as it relates to Class Counsel's fee request.

5. Epling, Richard (St. Pete Beach, FL)

Summary of Objection:

Mr. Epling's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Epling's objection is three-fold. First, he objects based on his review of the Court's docket, which he states suggests that "no or very little fact discovery has taken place" and that the case was filed "for the principal if not sole purpose of settlement." His second objection attacks the Court's Rule 23(b)(3) predominance finding. Mr. Epling questions the connection between the 2016 and 2019 Data Security Incidents and suggests that the "facts" of the two Incidents are not in common. His final objection relates to the benefits of Aura's Financial Shield.

Response:

Mr. Epling's objection was filed on March 30, 2022, prior to the filing of Plaintiffs' Fee Motion. As detailed in the Fee Motion, this case was very actively litigated. Plaintiffs incorporate by reference Response No. 1 (John Barbee) as evidence of the extensive work done by Class Counsel since the inception of this litigation. Indeed, the substantial investigation and analysis provided Class Counsel with a thorough understanding of the strengths and weaknesses of the case's claims and defenses and enabled Class Counsel to negotiate the excellent Settlement before the Court.

Regarding Mr. Epling's second objection, Judge Analise Torres found that the predominance requirement of Rule 23(b)(3) has been met sufficiently to warrant preliminary approval, and all necessary factors for certification of settlement class have been amply satisfied. *See* ECF No. 82, ¶¶ 1, 3. Predominance exists where the questions that are capable of common proof are "more substantial than the issues subject only to individualized proof." *Roach v. T.L. Cannon Corp*., 778 F.3d 401, 405 (2d Cir. 2015). Judge Torres based her determination on Plaintiffs' assertion that for settlement purposes, central common questions include whether Morgan Stanley had a duty to the Class to prevent exposure of their private data and whether Morgan Stanley took reasonable actions to prevent the Data Security Incidents. *See* ECF No. 81-1 at 29. There have been no changes that would undermine this Court's initial determination that certification of the Settlement Class is appropriate pursuant to Rule 23(a) and 23(b)(3).

Finally, Mr. Epling appears to misunderstand the benefits of Aura's Financial Shield. Aura's Financial Shield is available for a period of at least 24 months, whether or not a person has suffered fraud as a result of Morgan Stanley's conduct. In fact, a purpose of the product is for precisely the kinds of instances Mr. Epling references, where harm from the Data Security Incidents has not yet manifested. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the full benefits of Aura's Financial Shield.

6. Fahy, James P. (Mansfield, MA) ECF No. 94

Summary of Objection:

Mr. Fahy objects to receiving 24 months of Aura's Financial Shield and instead requests that he be given the option to receive coverage from an alternative identity theft service. Mr. Fahy is hesitant to provide his personal information since he believes that Aura's Financial Shield is "linked to Morgan Stanley."

Response:

Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of Aura's Financial Shield. Plaintiffs further note that Aura's Financial Shield is not "linked" to Morgan Stanley. As explained in the Affidavit of Jerry Thompson, filed herewith, Aura is an independent company with no "link" to Morgan Stanley.

7. Frankenberg, Robert J. (Napa, CA) ECF No. 87

Summary of Objection:

Mr. Frankenberg objects to Class Counsel's request for attorneys' fees.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request.

8. Goetz, Marguerite C.

Summary of Objection:

Ms. Goetz's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class counsel provided the objection to the Court for reference on July 21, 2022. See ECF No. 131.

Ms. Goetz objects on the grounds that two years of Aura's Financial Shield service is insufficient for the harm that has been caused as a result of the Data Security Incidents, and she expects that the services be provided for the rest of her lifetime and that the service be provided to her beneficiaries for the length of their respective lifetimes. Ms. Goetz further objects on the grounds that the $10,000 cap on out-of-pocket losses is not sufficient to cover reimbursement of past, present, and future losses. Ms. Goetz argues that both she and her beneficiaries should be compensated for the effects of the Data Security Incidents on their health and happiness.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the ability of Class Members to exclude themselves from the Settlement. This response is especially relevant here. Although Ms. Goetz has not provided any support for her contention that her out-of-pocket past, present, and future losses exceed the out-of-pocket cap in the Settlement, Ms. Goetz, like all Class Members, had the option to exclude herself from the Settlement and bring and independent action against Morgan Stanley.

Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement.

With respect to Ms. Goetz's objection that her children, who are the beneficiaries on her Morgan Stanley account, should receive benefits from the Settlement, Plaintiffs note that the Class preliminarily certified by Judge Torres does not include beneficiaries. The Class includes: "All Individuals with existing or closed Morgan Stanley accounts established in the United States who received the Notice Letters regarding the Data Security Incidents." *See* ECF No. 82, Preliminary Approval Order. This Settlement does not release potential claims of beneficiaries related to the Data Security Incidents.

9. Hapeman, James (Kohler, WI)

Summary of Objection:

Mr. Hapeman's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Hapeman objects on behalf of himself and his children. Mr. Hapeman objects in so far as he does "not agree with the settlement" because "the only parties that come out [a]head on this lawsuit are the Class Counsel." Mr. Hapeman contends that the "vast majority of the plaintiffs will receive no money" and that Aura's Financial Shield Services will not benefit anyone.

Response:

In addition to not being filed with the Clerk of Courts, Mr. Hapeman's objection is also facially invalid as it fails to comply with the Court's written objection requirements, specifically, Mr. Hapeman improperly objects on behalf of himself and his children. Objecting is an individual right that must be exercised individually. *See, e.g., In re TikTok, Inc., Consumer Privacy Litigation,* 565 F. Supp. 3d 1076, 1092 (N.D. Ill. 2021) (recognizing that the requirements of notice and opting out of a settlement are designed to protect the due process rights of individual class members, thus courts require class members to individually sign and return a paper opt-out form to ensure the class member is individually consenting to opting out)). Mr. Hapeman's children have not signed the objection form as required, nor has Mr. Hapeman provided any other evidence that his children consent to the objection being filed on their behalf.[3]

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request and Response No. 2 (William Joseph Borucki) as it relates to the benefits of Aura's Financial Shield and other benefits of the Settlement. In addition to Aura's Financial Shield, which that all Class Members are eligible to receive without the need to file a claim, Class Members are also entitled to file claims for cash benefits – specifically out-of-pocket damages and lost time.

[3] Mr. Hapeman notes that his children were minors at the time they had Morgan Stanley accounts but does not contend they are presently minors.

10. Harris, Jeffrey (Oneonta, NY)

Summary of Objection:

Mr. Harris's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Harris objects on the following grounds: (1) the settlement is insufficient to provide meaningful relief; (2) the proposed allocation of some of the settlement is wasteful; (3) the proposed allocation of any residual amounts is wasteful; and (4) the proposed plaintiff attorneys' fees are unreasonable. Mr. Harris notes that given the size of the Class and the $60 million Settlement Amount, if divided equally, Class Members would each only receive approximately $4, which he claims is unfair.

Response:

Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement and Aura's Financial Shield. Plaintiffs incorporate by reference Response No. 4 (Tim Corey) as it relates to the per Class Member recovery analysis. While it is unclear what Mr. Harris is referring to when he states that the proposed allocation of any residual amounts is wasteful, Plaintiffs presume Mr. Harris is referencing the fact that any residual funds will be used toward extending Aura's Financial Shield coverage for Class Members. Mr. Harris may have misunderstood what happens with residual funds, which under the Settlement Agreement are used to extend the period of coverage for Aura's Financial Shield. Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's Fee Request. No residual funds revert to Morgan Stanley.

11. Hartley, Joan L. (Beaverton, OR) ECF No. 88

Summary of Objection:

Ms. Hartley's objection is that she cannot remember the steps she took in 2016 to secure her personal information, the time she spent doing so, and cannot provide documentation. She objects on the basis that such requirements are unreasonable.

Response:

As explained in the Notice, Ms. Hartley does not need to provide documentation or remember the exact steps she took to secure her personal information to benefit from the Settlement. To make a claim for lost time, all Class Members need to do is attest to a general description of what they did once learning of the Data Security Incidents. There is no need to submit documentation for this kind of claim. Plaintiffs negotiated the Settlement with this lenient attestation requirement to ease the burden on Class Members given the time that has passed. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the detailed benefits of the Settlement.

12. Helfand, Steven Franklyn (Fort Lauderdale, FL) ECF No. 98

Summary of Objection:

Mr. Helfand filed two separate objections to the Settlement. In his first objection, Mr. Helfand objects on the following grounds: (i) the Notice he received was insufficient given the short deadline to submit an objection; (ii) there should have been plaintiffs to represent subclasses of individuals who have already experienced fraud and individuals who have not yet experienced fraud; (iv) the terms and conditions of Aura's Financial Shield are unfair to Class Members; (v) the Settlement release is overbroad; and (vi) Mr. Helfand has had no meaningful opportunity to review Class Counsel's request for attorneys' fees because it was not posted on the Settlement Website.

Response:

As an initial note, Mr. Helfand is no stranger to objecting to class action lawsuits. As Judge Michael K. Moore stated, Mr. Helfand, "is a well-known serial objector who has represented himself and third parties in objecting to multiple class action settlements." *Gay v. Tom's of Maine, Inc.*, No. 0:14-cv-60604-KMM, ECF No. 43, at 4 n.1 (S.D. Fla. Mar. 11, 2016) (Moore, C.J.) (citing cases); *see also Spann v. J.C. Penney Corp.*, No. SA CV 12-0215 FMO (KESx), 2016 U.S. Dist. LEXIS 137184, at *32 n.11 (C.D. Cal. Sep. 30, 2016) (recognizing that Steven Helfand is a "known serial objector"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *42 (N.D. Ga. Mar. 17, 2020), *aff'd in part, rev'd in part and remanded*, 999 F.3d 1247 (11th Cir. 2021), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431, 211 L. Ed. 2d 254 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765, 211 L. Ed. 2d 479 (2022) (same).[4] Plaintiffs ask the Court to take this background information into account when considering the weight of his arguments. *See Equifax*, 2020 WL 256132, at *41 ("The fact that the objections are asserted by a serial or 'professional' objector, however, may be relevant in determining the weight to accord the objection.").

First, Mr. Helfand objects to the Settlement on the basis that he received Notice in the mail on April 19, 2022, which did not give him enough time to object by May 3, 2022, or file a claim by June 2, 2022. Records of the Settlement Administrator indicate that Notice was originally mailed to Mr. Helfand at an old New York address. The Notice was returned to Epiq which then initiated steps to determine an updated address for Mr. Helfand. This accounts for his Notice being delayed. Additionally, the Parties filed a joint stipulation (ECF No. 108) to seek an extension to the Notice Plan deadlines and the Court so-ordered the stipulation on the same day. (ECF No. 110). As such, the deadline for Class Members to submit objections and requests for exclusion was extended to

[4] In *Equifax*, Chief Judge Thomas Thrash, in characterizing Mr. Helfand as a serial objector, noted that he is a disbarred California lawyer having mislead a court about his objections to a settlement and "and other acts of moral turpitude." *Equifax*, 2020 WL 256132, at *42. In *Collins v. Quincy Bioscience, LLC*, Magistrate Judge Jonathan Goodman said of Helfand that "he is one of the most uncooperative, evasive, confrontational, difficult, inconsistent, rude, threatening, and problematic deponents I have ever encountered in more than 37 years of practicing law. No. 19-22864-CIV-COOKE/GOODMAN, 2020 WL 7135528, at *6 (S.D. Fla. Nov. 16, 2020).

July 12, 2022, meaning that Mr. Helfand had approximately three months to file his objection, and the deadline to file a claim was extended to August 12, 2022. Class Counsel explained this situation to Mr. Helfand and he seemed satisfied with the answer.

Mr. Helfand objects that he had no meaningful opportunity to review Class Counsel's motion for attorneys' fees. Class Counsel's motion was available on the public CM/ECF docket on April 12, 2022, the same day it was filed. *See* ECF No. 93. A copy of the motion was posted to the Settlement Website on April 19, 2022 for Class Members to review. As discussed above, the Notice deadlines were extended by the Court, thus allowing Class Members ample time to review Class Counsel's motion. Mr. Helfand seemed satisfied with this issue when Class Counsel discussed it with him.

Mr. Helfand's second argument, that the Settlement is inadequate because it does not account for a subclass of individuals who have already experienced damages resulting from the Data Security Incidents and a subclass of individuals who face future exposure to damages is without merit and has been overruled in factually similar cases. *See, e.g., In re:* The *Home Depot, Inc., Customer Data Security Breach Litigation*, No. 1:14-md-02583, 2016 WL 6902351 (N.D. Ga. 2016) (rejecting all objections, including objection that separate counsel was necessary to represent allegedly conflicting subclasses) (No. 14-md-2583-TWT, Doc. 237 at 39-40 (objection); Doc. 245 at 21-23 (reply in support of final approval)).

Mr. Helfand argues that those who incur future harm will be unfairly time-barred by expiration of the claims period but fails to acknowledge that the Settlement does appropriately provides benefits for these individuals in the form of Aura's Financial Shield. Indeed, as explained in the Affidavit of Gerald Thompson, Financial Shield has a one-million-dollar insurance policy written by AIG to protect Class Members from any future harm they may experience. Further, Class Members have the option to opt out of the Settlement in order not to release any claims against Morgan Stanley related to the Data Security Incidents.

Mr. Helfand's reliance *on Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Oritz v. Fibreboard* Corp., 527 U.S. 815 (1999) in support of his argument is misplaced. Unlike in this case, *Amchem* and *Ortiz* were massive personal-injury "class action[s] prompted by the elephantine mass of asbestos cases" that "defie[d] customary judicial administration." *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 646-48 (8th Cir. 2012). In those cases, adequacy was not sufficiently protected within a single class because claimants who suffered diverse medical conditions as a result of asbestos exposure wanted to maximize the immediate payout, whereas healthy claimants had a strong countervailing interest in preserving funds in case they became ill in the future. These vast differences between groups of claimants in *Amchem* required "caution [because] individual stakes are high and disparities among class members great." 521 U.S. at 625. Those concerns are simply not present in this consumer case where all Class Members, through the compromise of their personal information, suffered the same injury in terms of an increased risk of present and future harm. *McMorris v. Carlos Lopez & Associates, LLC*, 995 F.3d 295, 301 (2d Cir. 2021) (holding that "the increased risk of identity theft or fraud following the unauthorized disclosure of [ ] data" establishes injury-in-fact for those whose information was compromised); *In re Blackbaud, Inc., Customer Data Breach Litigation*, WL 2718439, *1 (D.S.C. July 1, 2021) (recognizing that "all named Plaintiffs allege that they suffered an increased risk of future harm"). Indeed, courts in this District and across the country have held that by virtue of a data breach or

disclosure alone, all class members suffer the same injury-in-fact on the basis of the substantial and present risk of future harm. *See, e.g.*, *In re GE/CBPS Data Breach Litig.*, 2021 WL 3406374, at *4 (S.D.N.Y., 2021); *McFarlane v. Altice USA, Inc.*, 2021 WL 860584, at *4 (S.D.N.Y. Mar. 8, 2021); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967 (7th Cir. 2016); *Remijas v. Neiman Marcus Group*, LLC, 794 F.3d 688, 693 (7th Cir. 2015); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1216 (N.D. Cal. 2014); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x. 384, 389 (6th Cir. 2016); *In re Zappos.com, Inc.*, 888 F.3d 1020, 1027 (9th Cir. 2018); *Am. Fed'n of Gov't Emps. v. Office of Pers. Mgmt.* (*In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*), 928 F.3d 42, 55-61 (D.C. Cir. 2019) (per curiam); *Attias v. Carefirst, Inc.*, 865 F.3d 620, 628-29 (D.C. Cir. 2017); *Fero v. Excellus Health Plan, Inc.*, 304 F. Supp. 3d 333, 338-41 (W.D.N.Y. 2018).

Moreover, there is no conflict between the two groups, as in *Amchem*, because of the nature of the harm caused by the breach. Those who have already suffered losses stand just as likely to continue to suffer future losses by the misuse of their information as those who have not suffered any losses to date. Thus, unlike in *Amchem*, everyone has an incentive to protect against future harms. As the Eighth Circuit explained when confronted with identical objections in another data breach settlement: "Accordingly, the interests of the two subclasses here are more congruent than disparate, and there is no fundamental conflict requiring separate representation." *In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 976 (8th Cir. 2018); *see also In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 309-10 (N.D. Cal. 2018). The settlement provides both compensation for current losses, future losses, and protection against future losses—all of which benefit all class members. Mr. Helfand's objection—that this fact pattern is akin to *Amchem* and *Ortiz* because some class members have presently incurred out-of-pocket costs while others have not—was thoroughly analyzed and rejected in *Target*:

> The *Amchem* and *Ortiz* global classes failed the adequacy test because the settlements in those cases disadvantaged one group of plaintiffs to the benefit of another. There is no evidence that the settlement here is similarly weighted in favor of one group to the detriment of another. Rather, the settlement accounts for all injuries suffered. Plaintiffs who can demonstrate damages, whether through unreimbursed charges on their payment cards, time spent resolving issues with their payment cards, or the purchase of credit-monitoring or identity-theft protection, are reimbursed for their actual losses, up to $10,000. Plaintiffs who have no demonstrable injury receive the benefit of Target's institutional reforms that will better protect consumers' information in the future, and will also receive a pro-rata share of any remaining settlement fund. It is a red herring to insist, as [Objector] does, that the no-injury Plaintiffs' interests are contrary to those of the demonstrable-injury Plaintiffs. All Plaintiffs are fully compensated for their injuries.

In re Target Corp. Customer Data Sec. Breach Litig., 2017 WL 2178306, at *5 (D. Minn. May 17, 2017), *aff'd*, 892 F.3d at 973-76; *see generally id.* at *2-9. Further, "the interests of the various plaintiffs do not have to be identical to the interests of every class member; it is enough that they share common objectives and legal or factual positions." *Id.* at *6 (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999). As in *Target*, the Class Representatives are adequate

here because they seek essentially the same things as all Class Members: compensation for whatever monetary damages they suffered and reassurance that their information will be safer in Morgan Stanley's hands in the future.

Third, Mr. Helfand argues that the Settlement is unfair because enrollment in Financial Shield requires class members to agree to Aura's License and Terms of Service. Class Members receive this benefit free of charge and, thus, by operation there would be no "automatic renewal" as Mr. Helfand suggests. The "perpetual license" of which Mr. Helfand takes issue does not apply to Aura's data privacy settlement services. In any event, the proper course for Mr. Helfand in response to his concerns would be for him not to enroll in Financial Shield or to opt out of the Settlement.

In his fourth objection, Mr. Helfand erroneously suggests that the release of Unknown Claims and waiver of California Civil Code § 1542 ("Section 1542") (or any law or principle that is similar, comparable, or equivalent) on behalf of absent class members is overbroad and not allowed in class action settlements. Morgan Stanley has expressed its intention to file a response with the Court regarding this objection point. As such, Plaintiffs incorporate by reference Morgan Stanley's argument. Preliminarily, because Mr. Helfand is a Florida resident and Section 1542 applies only to California residents, this Section does not apply to him. Further, waivers of Section 1542 and similar laws are widely accepted by courts, including courts in the Second Circuit. *See, e.g.*, *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2020 WL 4212811, at *1 (N.D. Cal. July 22, 2020) (approving class action settlement agreement—Dkt. 369-2—featuring identical Section 1542 waiver as that in the present settlement agreement); *see also Anwar* v. *Fairfield Greenwich Ltd.*, 2013 WL 12354248, at *3 (S.D.N.Y. Mar. 25, 2013); *In re Platinum and Palladium Commodities Litig.*, 2015 WL 10853179, at *3 (S.D.N.Y. Feb. 27, 2015); *Cunningham* v. *Cornell Univ.*, 2020 WL 8212936, at *3 (S.D.N.Y. Dec. 22, 2020); *Swetz* v. *GSK Consumer Health, Inc.*, 2021 WL 5449932, at *5 (S.D.N.Y. Nov. 22, 2021). If Mr. Helfand desired to preserve his ability to assert any claims that would be released by the Settlement Agreement, he had the option to opt out of the Settlement.

13. Helfand, Steven Franklyn (Fort Lauderdale, FL) (2) ECF No. 99

Summary of Objection:

Mr. Helfand's second filed objection argues that no attorneys' fees should be awarded because of the "indisputable intra-class conflict and inadequate representation" discussed in his first filed objection. Mr. Helfand's second argument is that Class Counsel's fee "should be calculated based on the amount recovered by the class or value to the class, rather than the total amount recoverable." Mr. Helfand argues that Class Counsel failed to adequately assess the value of the Settlement to the Class by factoring in costs to the total Settlement value.

Mr. Helfand also makes reference to a "cryptic" "early pay provision" in the Settlement Agreement and argues that Rule 23 and due process require full disclosure of all fee agreements. Mr. Helfand argues that under the "early pay provision," if attorneys' fees are reduced or struck, Class Counsel

owe repayment not to the Defendant, but to the Class. Mr. Helfand contends that Class Counsel shields themselves from appellate review under the early pay provision.

Response:

Plaintiffs incorporate by reference Response No. 12 (Steven Franklyn Helfand) as it relates to Mr. Helfand's intra-class conflict argument. As discussed above, no such conflict exists.

As to Mr. Helfand's contention that the fee award should be based upon the value to the class, Plaintiffs agree. It appears that Mr. Helfand fails to appreciate that the Settlement establishes a non-reversionary $60 million cash Fund which will all be spent for the Class. Any residual monies after payment of claims will be used to extend the period of coverage of Financial Shield for all Class Members who enroll; thus, the number of Class Members who file a claim or chose to enroll in Financial Shield will not alter the "actual value" of the Settlement.

Mr. Helfand is also mistaken in his position that the costs of notice and administration should not be included in calculating the total settlement value. Indeed, Settlement notice and administration costs, however, which are substantial, presently $8.2 million, and being paid by Morgan Stanley in addition to the non-reversionary $60 million Settlement Fund, are appropriately included in the total settlement value. *See In re Warner Comm'ns. Secs. Litig*, 798 F.2d 35, 37 (2d Cir. 1986) (including costs of notice and administration as part of the total value of the settlement to the class); see also *In Re Marine Midland Motor Vehicle Leasing Litigation*, 155 F.R.D. 416, 419 (W.D.N.Y. 1994) (recognizing notice and claims administration costs as contributing to the total value of the settlement when determining attorneys' fees under a percentage of the fund method).

As explained in detail in the Fee Motion, the total value to the class is $68.2 million. Class Counsel's request for $20 million represents 29.3% of the total value of the Settlement, which Plaintiffs submit is a reasonable percentage of the fund, as supported by case law.

Regarding Mr. Helfand's objection to an "early pay provision" in the Settlement Agreement, as stated in Plaintiffs' Memorandum in Support of their Motion for Final Approval, outside of the Settlement Agreement provided to the Court, no other agreement was made in connection with the proposed Settlement. *See* Memo. at 25. Paragraph 12.2 of the Settlement Agreement allows for the parties to execute an agreement for the payment of fees after "entry of the Final Approval Order and Judgment and before the Effective Date" but, as previously stated, no such agreement exists. In no way does Paragraph 12.2 of the Settlement Agreement shield Class Counsel from appellate review. In terms of any repayment of fees, Paragraph 12.2 requires Class Counsel to repay any fees paid prior to the Effective Date if Defendant terminates the Settlement Agreement if the Effective Date does not occur. Mr. Helfand is incorrect that these fees would be owed to the Class. If Defendant terminates the Settlement Agreement under these circumstances, there would be no settlement and the entirety of the Settlement Fund would revert to Defendant.

The provision to which Mr. Helfand cites only arises after an award of attorneys' fees by the Court. There is no provision that allows for Class Counsel to pay itself the requested fees in the hopes that the Court will award such an amount which would give rise to a need to "repay the Class" as Mr. Helfand suggests. Paragraph 12.2 expressly provides that the payment of attorneys' fees

cannot be made until after an award by the Court and after entry of the Final Approval Order and Judgement.

14. Hess, Cameron L. (Rancho Cordova, CA) ECF No. 89

Summary of Objection:

Mr. Hess objects to the Settlement on the grounds that "[a] shorted limitations on claims to June 2, 2022, reporting deadline less than 1-year from the data breach means that most potential claimants will not be eligible to recover out-of-pocket damages. Most claims will in fact arise after that deadline, and will be time-barred by this settlement." Mr. Hess contends that the providing of 24 months of Aura's Financial Shield Services will not replace actual out-of-pocket costs and that "credit monitoring companies cannot do very much."

Response:

Mr. Hess's objections indicate several misunderstandings of both the litigation and the Settlement. First, the Data Security Incidents occurred in 2016 and 2019, not one year ago. Plaintiffs negotiated Aura's Financial Shield to address Mr. Hess's concerns regarding identity theft occurring after the Claims Deadline. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of Aura's Financial Shield.

15. Jett, Patricia L. (Kansas City, MO) ECF No. 113

Summary of Objection:

Ms. Jett's objection is to the adequacy of the Settlement. Ms. Jett states that she is not able to work and has suffered loss of time, money, and health deterioration as a direct result of the situation brought on by Morgan Stanley. Ms. Jett claims as a result of the Data Security Incidents, that she has suffered serious adverse consequences.

Response:

Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement. Further, Plaintiffs note that like all potential Class Members, Ms. Jett received Notice of the option to exclude herself from the Settlement. The Notice explained that in doing so, she would retain the right to bring her own action against Morgan Stanley related to the Data Security Incidents for the unique alleged medical or psychiatric damages that she claims.

16. Katcher, Israel (Lagrangeville, NY)

Summary of Objection:

Mr. Katcher's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Katcher objects to the request for attorneys' fees as well as the adequacy of the Settlement. Mr. Katcher states that he currently has credit monitoring services and does not understand the benefits of Aura's Financial Shield. He would "rather have the cash." Mr. Katcher contends that Class Counsel "could not possibly have involved enough efforts to justify a 20-million-dollar windfall."

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request and the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement including Aura's Financial Shield. Further, as explained in the Affidavit of Jerry Thompson filed herewith, Aura's Financial Shield service is different and more robust than traditional credit monitoring services.

17. Kelly, Susan (Portland, OR)

Summary of Objection:

Ms. Kelly's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 21, 2022. See ECF No. 131.

Ms. Kelly does "not like the Settlement because Aura's Financial Shield does not work on [Google] Chrome" and does not offer virus protection for MacBook computers. Ms. Kelly does not own a computer, but she relies on a family member who does and that family member prefers to use Google Chrome. As such, Ms. Kelly requests compensation for Class Members who "don't have access to the software required by Aura."

Response:

Ms. Kelly fundamentally misunderstands how Aura's Financial Shield works. As explained in the Affidavit of Jerry Thompson, filed herewith, Aura's Financial Shield is not a software, it is a service. Software requires a download onto your device. Aura's Financial Shield is a cloud-based security service that is accessed via an internet browser. The service works with all browsers for both PCs and MacBooks, to include Google Chrome. The service also works on the iPhone and Android operating systems. As to Ms. Kelly's comment that the service does not offer virus protection services, Ms. Kelly is correct. Antivirus software, however, is not a hedge against financial threats and would not be effective for remedying a data security incident like those in this case. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement including Aura's Financial Shield.

18. Kritner, Richard Anthony (Mequon, WI) ECF No. 91

Summary of Objection:

Mr. Kritner objects to the Settlement on the grounds that: "[w]ith a $60 million settlement and 15 million current and former Morgan Stanley clients, the settlement would generally be less than $4 per client ($60 million/15 million= $4)"; Class Counsel's request for attorneys' fees is excessive; and the administrative cost to distribute the Settlement funds would be excessive. Mr. Kritner proposes that legal fees be limited to a "nominal amount not to exceed the lesser of 1% of total settlement or $600K" and the Court approve a *cy pres* award to have remaining funds go directly to charity.

Response:

Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement. Plaintiffs incorporate by reference Response No. 4 (Tim Corey) as it relates to the per Class Member recovery analysis. Further, as detailed in the Settlement Agreement, the costs of notice and administration are to be paid by Morgan Stanley in addition to the Settlement Fund, meaning that those costs do not impact the Settlement Fund relief available to Class Members.

Plaintiffs' response to the objection with regard attorneys' fees and the work that was performed is addressed in Response No. 1 (John Barbee). As for Mr. Kritner's request that the Court approve a *cy pres* award in lieu of attorneys' fees, Plaintiffs highlight the fact that public policy strongly supports the requested fee award. *See* Declaration of Brian T. Fitzpatrick at ¶¶ 15-18 (ECF No. 106). Without private counsel taking on the risk of this lawsuit and having the skill, time, and resources to pursue the claims vigorously, the millions of individuals making up the Settlement Class would have recovered nothing.

19. Levy, Lester L. (White Plains, NY) ECF No. 112

Summary of Objection:

Mr. Levy, the Chairman Emeritus of Wolf Popper LLP, objects to the Settlement Notice, adequacy of the Settlement, attorneys' fee request, attorney expense request, and the requested service awards for the plaintiffs. Mr. Levy states that his objections are "guided, in large part, by the reasoning of the U.S. Court of Appeals in *Briseno v. Henderson*, 998 F.3d 1014 (9th Cir. 2021)."

Response:

By citing *Briseno*, Mr. Levy errs in characterizing this as a claims-made settlement. This Settlement requires Morgan Stanley to create a non-reversionary common fund of $60 million. In addition, Morgan Stanley is paying the costs of notice and administration estimated to be at least $8.2 million. Morgan Stanley is also separately paying to engage Kroll to search for and retrieve additional devices. *Briseno* was a claims-made settlement with an agreement for defendant to pay

attorney fees that far exceeded the settlement paid to the class. *Briseno* is inapposite for many reasons.

In *Briseno,* also known as the *ConAgra* case, plaintiffs alleged that the representation that oil is 100% natural was false and misleading because the oil contained GMOs. The settlement did not require direct notice. AS Mr. Levy notes, there was a clear sailing provision providing that *ConAgra* would not object to a request for fees up to a certain amount for the reverter fund settlement. In *Morgan Stanley,* while the defendant agreed not to object to a request for fees up to third of the settlement fund, this is not a clear sailing provision, as the Settlement establishes a non-reversionary common fund. The Ninth Circuit in *ConAgra* reversed, finding that the defendant was going to pay far more in attorneys' fees than it would to the class. That scenario does not exist here. Morgan Stanley is creating a Settlement Amount of $60 million, also paying approximately $8.2 million in notice and administration costs, and paying for the retention of Kroll. No monies revert to Morgan Stanley. Any remaining monies in the Settlement Fund go to fund additional coverage of Aura's Financial Shield. This means that more than 70% of the monies being paid by Morgan Stanley are going directly to benefit the Class.

Mr. Levy also objects because the Notice "fails to disclose that class members has (sic) a separate right to object to class counsel's expense request" and also a "separate right" to object to service awards. Mr. Levy does not provide any support for his position and Class Counsel have been unable to find any. First, the Notices here were presented to and approved by Judge Torres. The Notice expressly provides that Class Members can object to "all or part of the settlement." Mr. Levy's position is also curious given that in the *TJX Data Breach* settlement, in which he was Class Counsel, the Court-approved notices contained similar language: "You may object to any aspect of the Settlement." Those notices did not contain the language that Mr. Levy proposes dooms this settlement.

Mr. Levy also objects, opining that "counsel would receive a disproportionate distribution of the cash settlement payout." First, we note that in the *TJX* case, the court criticized Mr. Levy and his fellow Class Counsel for making a request for attorneys' fees that was disproportionate to the amount going to the class in that claims-made settlement. Mr. Levy and Class Counsel argued that the "value" of that claims-made settlement was more than $200 million by incorporating the full retail value of the 3 years of credit monitoring offered and then asked the court to award fees based upon that value. The "fiction" of benefits Mr. Levy argues the Ninth Circuit rejected in *ConAgra* was the same fiction rejected by the court in his *TJX* settlement. There is no "fiction" here. The Class is getting the full benefit of the $60 million fund[5], plus the cost of notice and administration, plus the retention, at Defendant's additional expense, of Kroll. This is not a claims-made settlement, and no funds revert to Morgan Stanley.

[5] While Mr. Levy mistakenly contends that the proposed Settlement is claims-made rather than a common fund, he raises a question as to what happens to money left over in the fund. This conflation aside, the Settlement Agreement clearly provides that any residual monies will not revert to Morgan Stanley, but instead will be used to fund additional periods of coverage of Aura's Financial Shield.

Mr. Levy also objects to a supposed "quick pay" provision, but such a provision is not present in the Settlement Agreement. Morgan Stanley has already paid into an interest-bearing QSF account the full $60 million fund upon the order on preliminary approval. Mr. Levy's statement that class counsel will be paid "even before the judge learns how much will actually be paid to the class" is incorrect and most likely arises due to Mr. Levy's mischaracterization of the proposed Settlement as a claims-made settlement. Plaintiffs further incorporate by reference Response No. 12 (Steve Hefland No. 1) as it relates to the a purported quick pay provision in the Settlement Agreement.

Mr. Levy also objects to the statement in the Settlement Agreement that Morgan Stanley has implemented remedial measures. Settlement Class Counsel reviewed and analyzed the measures Morgan Stanley implemented after the Data Security Incidents and took 30(b)(6) testimony as to them. As part of the proposed Settlement, Morgan Stanley has agreed to maintain those business practice changes. Here, Settlement Class Counsel has not asked for those remedial measures to be considered in the value of the settlement for purposes of the attorneys' fee request. The Settlement Agreement is clear that the hiring of Kroll to locate and retrieve devices is a measure that was expressly negotiated by Class Counsel and is a significant benefit to the Class in terms of mitigating potential future harm. Again, that benefit has not been valued by Settlement Class Counsel for purposes of the fee application.

Mr. Levy objects to the requested attorneys' fees, arguing that this was not a "particularly hard-fought" litigation based upon a review of the docket. Because discovery is not filed, the court docket is not always an appropriate measure for the work that has gone into a case. Mr. Levy ignores the detailed allegations in the Consolidated Amended Complaint that were developed by Class Counsel and all of the work detailed in the Motion for Preliminary Approval and the Motion for Attorneys' Fees. Class Counsel diligently and creatively litigated for over a year and a half; conducted extensive research and investigation; engaged in plaintiff vetting, retained data breach, dark web, and forensic experts and investigators; drafted two voluminous and detailed consolidated amended complaints; defended against a motion to dismiss; reviewed over 163,300 pages of party and third party documents; analyzed and negotiated several privilege logs; deposed party and third party witnesses; and prepared and served subpoenas for over a dozen third parties.

Mr. Levy claims that "data breach security class actions are not particularly risky." The mountain of case law says otherwise. Only three (b)(3) damages classes have been certified in data security cases and one of those decisions is currently on appeal and another occurred only within the last couple of months. Data breach cases generally present novel questions of fact and law. *See, e.g., In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019) ("Data breach litigation is complex and risky. This unsettled area of law often presents novel questions for courts. And of course, juries are always unpredictable."); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018) (noting that "many of the legal issues presented in this data-breach case are novel, and Defendants have the resources to strongly contest an individual plaintiff's contentions."). Historically data breach cases have faced substantial hurdles even in making it past the pleading stage, and to date, no data breach action has gone to trial.

Mr. Levy also questions the hourly rates listed in the fee application for Settlement Class Counsel Jean Martin. Mr. Levy incorrectly quotes a "$637" rate pulled from a three-year old settlement, *Gordon, et al. v. Chipotle Mexican Grill, Inc.*, No. 17-cv-01415 (D. Colo.). Mr. Levy calculated

the "$637" rate by taking lodestar fee amount and dividing by the total number of hours billed by Ms. Martin's firm. The calculated $637 rate was, in fact, a blended rate. As set forth in Ms. Martin's declaration in that matter, Ms. Martin presented, and had approved, hourly rates of $850 and $894. ECF No. 118. Ms. Martin's current rate of $919 was approved in this District last year. *Culbertson v. Deloitte Consulting*, 20cv3962-LJL (S.D.N.Y.) (ECF No. 146-16, 163). It is curious that Mr. Levy questions the rates listed by counsel in the present matter when his hourly rate in 2020 was $990. *Belfiore v. The Procter & Gamble Company*, 2:14-cv-04090 (E.D.N.Y.) (ECF No. 358-4).

Mr. Levy contests Class Counsel's lodestar. First, Plaintiffs note that the vast majority of work throughout this litigation was performed by only two law firms, both of which were appointed as Lead Class Counsel by Judge Torres. *See* ECF No. 26. Judge Torres appointed Jean Martin of Morgan & Morgan and Linda Nussbaum of Nussbaum Law Group as interim Co-Lead Counsel and granted them the authority to, among other things: promote the efficient conduct of the litigation and avoid unnecessary duplication and unproductive efforts by making and supervising all work assignments. As detailed in the Declaration of Linda P. Nussbaum in Support of Plaintiffs' Fee Motion, (ECF No. 102), of the 9,952.55 hours billed, Ms. Nussbaum's law firm billed 5,299.5 hours and Ms. Martin's law firm billed 2,987 hours through February 28, 2022. The remaining 1,736.05 hours were split between 10 law firms, most of which served as counsel to the representative plaintiffs.

20. Lewis, Mark Francis (Sai Kung, Hong Kong) ECF No. 111

Summary of Objection:

Mr. Lewis objects to the Settlement on the grounds of adequacy. Mr. Lewis believes that it is unfair to split the $60 million Settlement Amount between 15 million Class Members, as the result would be approximately $4 per Class Member, without accounting for attorneys' fees. Mr. Lewis further comments that if 15 million Class Members attest to spending four hours researching or remedying issues related to the Data Security Incidents, the Settlement Amount will be insufficient. Mr. Lewis also objects to the 24-month period of Aura's Financial Shield and argues that identity thieves will wait longer than 24 months to commit crimes with PII. Mr. Lewis proposes that "30,000,000 YEARS" would be the appropriate length of time for Morgan Stanley to pay for Aura's service. In relation to compensation for Class Member time spent researching and remedying issues, Mr. Lewis argues that Class Members should be paid at a rate of 1.5 to 2 times their normal working hour wages even if they did not miss work to do so. Mr. Lewis reasons that the time spent will most likely be done during leisure time and that it is equivalent to having to "work" on a holiday. Mr. Lewis also argues that the $10,000 cap on out-of-pocket losses is insufficient. Finally, Mr. Lewis objects to Class Counsel's request for attorney's fees, arguing that it is unfair for Settlement Class Members "to be paid on a pro-rata basis if there is insufficient money in the Proposed Settlement Fund while it appears that Class Counsel is to be paid in full."

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's request for attorney's fees and the adequacy of the Settlement despite a Class Member's request

for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement. Plaintiffs incorporate by reference Response No. 4 (Tim Corey) as it relates to the per Class Member recovery analysis. Plaintiffs incorporate by reference Response No. 16 (Richard Anthony Kritner) as it relates to Mr. Lewis's argument that Class Counsel should not be paid for their services.

Mr. Lewis is correct that if all Settlement Class Members were to make claims for out-of-pocket expenses at the capped $10,000 amount, the Settlement Fund would be insufficient. As explained in the Declaration of Cameron Azari, the Settlement Administrator has received 118,808 Claim Forms to date, which in Mr. Azari's experience is within the expected range of claims in this type of settlement. Further, Class Counsel are experienced class action litigators and are also acutely familiar with claims rates. Class Counsel took the claims rates into consideration when negotiating the Settlement Amount. Preliminary analysis by the Claims Administration indicates that the Fund, even after deduction of the requested Attorney Fees, is sufficient to cover the claims of Class Members.

21. Logan, Mary B. (Toms River, NJ)

Summary of Objection:

Mr. Logan's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Ms. Logan objects to Class Counsel's request for attorneys' fees. Ms. Logan further objects to the inclusion of Aura's Financial Shield as a Settlement benefit, as she would prefer cash. Ms. Logan "feel[s] it is an empty gesture to provide access to Aura's Financial Shield as the only form of compensation."

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request and the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including Aura's Financial Shield. Plaintiffs note that Ms. Logan misunderstands the terms of the Settlement, as Aura's Financial Shield is not the only form of compensation for Class Members. Class Members may submit claims for out-of-pocket expenses and lost time.

22. Linden, Melissa A. (Connecticut) ECF No. 122

Summary of Objection:

Ms. Linden has filed an Objection (ECF No. 122), a "Motion Required Joiner of Parties" (ECF No. 123), and a Motion to Stay (ECF No. 130). Ms. Linden objects that the individual cap on out-of-pocket expenses of $10,000 is inadequate based upon her individual losses. Ms. Linden also seeks an award of punitive damages and a return of assets relating to Richard F. Linden to "his

Estate's beneficiary." Ms. Linden further objects claiming that employees of Defendant "participate in malicious and deceitful practices" and argues that there has been a breach of her information and that of Richard F. Linden with regard to the Notice provided in this matter.

Response:
Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement.

In various ways, Ms. Linden seems to plead her individual case and complain that the compensation is not enough for her individual circumstances. She does not contend that the monetary relief provided in the Settlement is inadequate to compensate class members as a whole for their harm caused by Morgan Stanley's alleged wrongs. As such, the proper action for this objector would have been to opt-out of the Settlement, and not object.

Ms. Linden's objection is factually vague and legally deficient, and does not set forth grounds to disapprove the settlement.

23. Luxenberg, Diana Lee (Three Rivers, CA) ECF No. 114

Summary of Objection:

Ms. Luxenberg objects on the grounds that Morgan Stanley has already provided her with 2 years of fraud monitoring. Instead, Ms. Luxenberg requests that Morgan Stanley be required to pay those who "actually had a data breach" and lost money. Ms. Luxenberg also objects to Class Counsel's request for attorneys' fees and suggests that Class Counsel provide pro bono service for their time litigating this matter.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request and the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including the benefits of Aura's Financial Shield. The Settlement Agreement provides compensation to Class Members who lost money, despite Ms. Luxenberg's assertion to the contrary. Further, as explained in the Affidavit of Jerry Thompson filed herewith, Aura's Financial Shield is different and more robust than the credit monitoring service Morgan Stanley previously offered Class Members after the Data Security Incidents. Plaintiffs incorporate by reference Response No. 16 (Richard Anthony Kritner) as it relates to the public policy reasons Class Counsel should be paid for their contingent fee work.

24. Mahler, Seth (West Hartford, CT)

Summary of Objection:

Mr. Mahler's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Mahler objects to the request for attorneys' fees. Mr. Mahler further objects to the adequacy of the Settlement and the inclusion of Aura's Financial Shield as a Settlement benefit as he does not want to give his personal data to another company. Mr. Mahler takes issue with the idea that Morgan Stanley is a $3.7 billion company and that the Settlement Amount is only 0.162% of that number.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request and the adequacy of the Settlement. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including the benefits of Aura's Financial Shield. As explained in Plaintiffs' Motion for Final Approval, as this Court found in *Meredith* and *Giant Interactive Group* "'[a] defendant is not required to 'empty its coffers' before a settlement can be found adequate.'" *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) and *In re Giant Interactive Group, Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011), quoting *In re Sony SCRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008).

25. McCarthy, Adrian C. (Hayward, CA) ECF No. 90

Summary of Objection:

Mr. McCarthy objects because he never had a Morgan Stanley account.

Response:

If Mr. McCarthy never had a Morgan Stanley account, he would not be a Class Member and would not have standing to object to the Settlement. However, Morgan Stanley's records indicate that Mr. McCarthy is an account holder as a result of certain former employment and his participation in an employer stock plan. Class Counsel advised Mr. McCarthy of this account information provided by Morgan Stanley which established that he is a Class Member. Mr. McCarthy responded with an intent to proceed with his objection because he believes that his employer established the account without his knowledge and that Morgan Stanley never advised him of the account.

Mr. McCarthy's objection should be overruled because Morgan Stanley's records indicate that he is a former account holder. Mr. McCarthy, like all Class Members, had the option to exclude

himself from the Settlement and was reminded of this option by Class Counsel in their communications with him.

26. Oliveto, Anthony F. (Saratoga Springs, NY)

Summary of Objection:

Mr. Oliveto's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Oliveto objects on behalf of himself and his family: Margaret M. Oliveto, Scott E. Vollmer, and Anthony J. Oliveto. Mr. Oliveto argues that the Settlement, especially Aura's Financial Shield service, is not adequate given the gross conduct of Morgan Stanley and the stress, lost time, annoyance, interference, suffering and inconvenience the Data Security Incidents have caused his family. Mr. Oliveto states that his family has spent significant time dealing with the consequences of the Data Security Incidents, including fielding phishing telephone calls and checking their financial account statements. He contends that his family will continue to stuffer other forms of injury, to include physical bodily harm and alienation of affection, in the future as a result of the Data Security Incidents.

Response:

In addition to not being filed with the Clerk of Courts, Mr. Oliveto's objection is also facially invalid as it fails to comply with the Court's written objection requirements, specifically, Mr. Oliveto improperly objects on behalf of himself and his family members. Plaintiffs incorporate by reference Response No. 9 (James Hapeman) as it relates to objections being an individual right. Mr. Oliveto's family members do not sign the objection[6], nor does Mr. Oliveto provide any documentation sufficient to show that they consent to the filing of the objection on their behalf.

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including the benefits of Aura's Financial Shield. Plaintiffs incorporate by reference Response No. 22 (Seth Mahler) as it relates to the Mr. Oliveto's desire to further "punish" Morgan Stanley for its actions and inactions that led to this litigation.

[6] Mr. Oliveto has also not signed the objection, as required by the Court.

27. Onorato, John D. (Mundelein, IL)

Summary of Objection:

Mr. Onorato's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Onorato objects on the grounds that Morgan Stanley's original notice of the Data Security Incidents, which he received in the summer of 2020, only informed him that his personal data had been "possibly" breached. Mr. Oranato takes issue with the Settlement insofar as it does not require Morgan Stanley to accept responsibility for the Data Security Incidents. Mr. Onorato also objects to the adequacy of the Settlement, arguing that Morgan Stanley is capable of expending more money given its profitability, and that it should do so, given the egregiousness of its conduct. Mr. Oranato argues that Aura's Financial Shield services should be given to all Class Members for their lifetimes.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement. Plaintiffs incorporate by reference Response No. 3 (Katherine Conway) as it relates to the business practice changes and retention of Kroll Morgan Stanley has agreed to. Plaintiffs incorporate by reference Response No. 22 (Seth Mahler) as it relates to Mr. Onorato's desire to further "punish" Morgan Stanley for its actions and inactions that led to this litigation.

28. Reily, Michael D. (Grass Lake, MI)

Summary of Objection:

Mr. Reily's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Reily objects on the following grounds: Aura's Financial Shield is not a significant enough benefit; the data breach occurred several years ago, "so any damages may have already been done[;]" and Class Counsel's request for attorneys' fees. Mr. Reily also objects on the grounds that he cannot both object and exclude himself from the Settlement at the same time.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request and the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including the benefits of Aura's Financial Shield and

the ability of Class Members to submit a claim for out-of-pocket expenses for damages resulting from the Data Security Incidents.

In terms of Mr. Reily's seeking to both object and exclude himself from the Settlement at the same time, by excluding himself from the Settlement Class, the Settlement would no longer affect Mr. Reily's rights; accordingly, he would lack standing to object. *See Senegal v. JPMorgan Chase Bank, N.A.*, 939 F.3d 878, 881 (7th Cir. 2019) (objectors to class settlement "can't complain about this or any other element of the (b)(3) aspect of this class, because they have opted out.") (Easterbrook, J.); *Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922, 930 (E.D. Mich. 2007) ("opting out of a settlement and choosing to object logically are mutually exclusive options: if one actually opts out, she has no standing to object to the settlement as she will not be bound by it.")

29. Rogers, Karen Ilene (Anchorage, AK)

Summary of Objection:

Ms. Roger's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Ms. Rogers objects on the grounds that the Settlement is inadequate given the egregious nature of Morgan Stanley's conduct. Ms. Rogers further objects on the grounds that the relief being offered is insufficient given that the consequences of the Data Security Incidents will remain with her for the rest of her life and the lives of her children and grandchildren.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request and the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including the benefits of Aura's Financial Shield and how it will help Protect Mrs. Rogers from identity theft. Plaintiffs incorporate by reference Response No. 22 (Seth Mahler) as it relates to Ms. Roger's desire to further "punish" Morgan Stanley for its actions and inactions that led to this litigation.

30. Rose, Jimi

Mr. Rose filed a Motion to Proceed Individually (ECF No. 92) to which Morgan Stanley responded (ECF No. 96). The Parties do not categorize Mr. Rose's filing as an objection. Therefore, there is no further response.

31. Rosenbaum, Richard

Summary of Objection:

Mr. Rosenbaum's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Rosenbaum objects on the grounds that Class Members should be given the choice of which form of compensation, monetary compensation vs. identity protection services, best suits their particular circumstances.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of Aura's Financial Shield.

32. Rund, Dana M. (Crown Point, IN)

Summary of Objection:

Ms. Rund's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Ms. Rund objects on the grounds that the Settlement is inadequate given the egregious nature of Morgan Stanley's conduct. Ms. Rund argues that two years of credit monitoring is insufficient given the risks she will face for the remainder of her life.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including the benefits of Aura's Financial Shield. Plaintiffs incorporate by reference Response No. 22 (Seth Mahler) as it relates to Ms. Rund's desire to further "punish" Morgan Stanley for its actions and inactions that led to this litigation.

33. Sack, David (New York, NY) ECF No. 117

Summary of Objection:

Mr. Sack objects on behalf of himself and his wife, Laura A. Sack to both the adequacy of the Settlement and to Class Counsel's request for attorneys' fees. Mr. Sack argues that the "vast

majority of settlement class members, the "automatic benefit" members, will receive no monetary compensation as part of the settlement" and that instead, Class Members are being offered 24 months of credit monitoring services that were neither sought nor desired. Mr. Sack cites to the Consolidated Amended Complaint to note that Plaintiffs sought, in addition to equitable relief, actual, nominal, punitive, and consequential damages and takes issue with the Settlement not providing for these damages. Mr. Sack contends that the "automatic benefit" class members should not be in the same class as the class members seeking out-of-pocket reimbursement, because "it would not be equitable to place both classes of plaintiffs in the same settlement class for the purpose of calculating the settlement fund merely to support a request for attorneys' fees based on the size of the fund." Mr. Sack proposes that the Settlement be renegotiated so that the "automatic benefit" class members receive at least nominal cash compensation. Mr. Sack further objects to Class Counsel's fee request on the grounds that it is "fundamentally unfair for attorneys to be paid in cash, whereas the "automatic benefit" class members are paid in kind." According to Mr. Sack, Class Counsel has failed to provide sufficient information for the loadstar cross-check and that it is "impossible for the Court, or for class members, to assess the reasonableness of the number of hours spent working on this matter ..."

Response:

Mr. Sack's objection is facially invalid as it fails to comply with the Court's written objection requirements, specifically, Mr. Sack improperly objects on behalf of himself and his wife. Plaintiffs incorporate by reference Response No. 9 (James William Hapeman) as it relates to objections being an individual right. Mr. Sack's wife did not sign the objection, nor does Mr. Sack provide any documentation sufficient to show that she consents to the filing of the objection on her behalf.

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's request for attorney's fees and the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including the benefits of Aura's Financial Shield.

Mr. Sack misunderstands the terms of the Settlement. His characterization of "automatic benefit class members" vs. class members who will receive monetary compensation is confusing. Every Class Member has the opportunity to make a claim for monetary compensation if they have incurred out-of-pocket expenses or spent time dealing with the consequences of the Data Security Incidents. Mr. Sack objects to the fact that Plaintiffs sought various forms of damages in their Consolidated Amended Complaint, but did not successfully obtain each and every form as part of the Settlement. A Settlement results from both Parties appreciating the risks of litigation and making compromises to come to an agreement.

Regarding attorney's fees, Plaintiffs note that Mr. Sack mischaracterize the work that has been performed by Class Counsel, as detailed in Response No. 1 (John Barbee). As to his contention that "no fewer than 12 law firms billed nearly 10,000 hours on this matter," Plaintiffs note that the vast majority of work throughout this litigation was performed by only two law firms, both of which were appointed as Class Counsel by Judge Torres. Indeed, as detailed in the Declaration of

Linda P. Nussbaum in support of Plaintiffs' Fee Motion (ECF No. 102), of the 9,952.55 hours billed, Ms. Nussbaum's law firm billed 5,299.5 hours and Ms. Martin's law firm billed 2,987 hours through February 28, 2022. The remaining 1,736.05 hours were split between 10 law firms.

34. Stipes, Denise (Chicago, IL)

Summary of Objection:

Ms. Stipes's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Ms. Stipes objects on the grounds that the Settlement is inadequate given the nature of Morgan Stanley's conduct. Ms. Stipes expresses frustration that she did not receive Notice of the Settlement because Morgan Stanley had a former email address for her contact information.

Response:

Epiq, the claims administrator, has informed Class Counsel that when Ms. Stipes' email Notice bounced back, Ms. Stipes was mailed Notice at her home in Chicago and that Ms. Stipes promptly filed a claim. In negotiating the Notice Plan that was implemented, the Parties considered the likelihood that there would be some Class Members for whom Morgan Stanley did not have updated contact information. For that reason, Plaintiffs ensured that the Notice Plan included Publication Notice. Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement. Plaintiffs incorporate by reference Response No. 22 (Seth Mahler) as it relates to Ms. Stipe's desire to further "punish" Morgan Stanley for its actions and inactions that led to this litigation.

35. Swartz, Richard Wayne (Quakertown, PA)

Summary of Objection:

Mr. Swartz's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Swartz objects on the grounds that the Settlement is inadequate given the nature of Morgan Stanley's conduct. Mr. Swartz claims that his private information is for sale on the dark web and does not believe that the Settlement adequately punishes Morgan Stanley for their negligence in allowing this to happen.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement. Plaintiffs incorporate by reference Response No. 22 (Seth Mahler) as it relates to Mr. Swartz's desire to further "punish" Morgan Stanley for its actions and inactions that led to this litigation.

36. Taylor, Thomas John (Lackawanna, NY)

Summary of Objection:

Mr. Taylor's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Taylor objects specifically to Aura's Financial Shield service on the grounds that the company is owned by AIG Insurance, and AIG is a trading partner with Morgan Stanley. Mr. Taylor believes this is a conflict of interest and would therefore prefer to be offered a different identity theft protection service.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Further, as explained in the Affidavit of Jerry Thompson, filed herewith, Aura is an independent company. AIG does not own Aura. AIG is the provider of Identity Theft insurance for Aura's Identity members. AIG also underwrites the insurance for the Financial Shield service that covers any losses of funds, equities and other areas of possible fraud.

37. Wershba, Randi (New York, NY)

Summary of Objection:

Ms. Wershba's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Ms. Wershba does not assert her own opinion; rather, she states that she has consulted with her deceased husband's friends who are attorneys, and they were "of the opinion that it [is] not a good settlement[.]"

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement. Plaintiffs note that her deceased husband was a partner at Wolf Partner LLP. *See* objection of Lester L. Levy, Chairman Emeritus of Wolf Popper LLP, above at Objection No. 17.

38. Zektzer, Jack (Seattle, WA) ECF No. 86

Summary of Objection:

Mr. Zektzer's sole objection is that he "strongly prefer[s] a cash settlement in lieu of the provision of Aura's Financial Shield being offered" as he is "not aware of any loss due to the Morgan Stanley data breach."

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to the adequacy of the Settlement despite a Class Member's request for an additional or different benefit.

39. Zeisel, Evan Bass

Summary of Objection:

Ms. Zeisel's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Mr. Zeisel sent an email to Class Counsel and counsel for Morgan Stanley asking to be excluded from the Settlement but voicing displeasure because Class Members were not allowed to exclude themselves online through the Settlement Website.

Response:

Class Counsel attempted to communicate with Mr. Zeisel for a determination as to whether he was excluding himself or objecting to the Settlement but did not receive a response. Mr. Zeisel's communication is being treated as an exclusion rather than an objection.

40. Zuccarelli, Carl (Crown Point, IN)

41. Zuccarelli, Daniel (Orland Park, IL)

42. Zuccarelli, Doris J. (Crown Point, IN)

43. Zuccarelli, Michael (Schererville, IN)

Summary of Objection:

These four objections filed by various members of the Zuccarelli family are identical to the objection filed by Dana M. Rund. *See* Dana M. Rund, Objection No. 30. As with the Rund objection, none of the Zuccarelli objections appeared on this Court's CM/ECF docket, and they have been filed by Class Counsel with ECF on July 18, 2022. *See* ECF No. 128.

Response:

Plaintiffs incorporate by reference Response No. 30 (Dana M. Rund).

44. Zweber, Amy (Shelburne, VT)

Summary of Objection:

Ms. Zweber's objection was not received by the Clerk of Courts, did not appear on ECF, and therefore appears to be facially invalid. Class Counsel provided the objection to the Court for reference on July 18, 2022. *See* ECF No. 128.

Ms. Zweber objects to Class Counsel's request for attorneys' fees. Ms. Zweber states that this Settlement "should only be approved if the Class Coun[sel] can show that this litigation had any chance of providing a net benefit for the class members." Ms. Zweber is further concerned that the Settlement will raise the cost Class Members will pay to conduct business with Morgan Stanley moving forward.

Response:

Plaintiffs incorporate by reference Response No. 1 (John Barbee) as it relates to Class Counsel's fee request and the adequacy of the Settlement despite a Class Member's request for an additional or different benefit. Plaintiffs incorporate by reference Response No. 2 (William Joseph Borucki) as it relates to the benefits of the Settlement, including the benefits of Aura's Financial Shield. Class Counsel are not aware of any relationship between this Settlement and the costs that Class Members will pay to conduct business with Morgan Stanley moving forward.

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

IN RE JPMORGAN TREASURY SPOOFING LITIGATION, 20 Civ. 3515 (PAE)

----------x

New York, N.Y.
May 31, 2022
05:00 p.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

LOWEY DANNENBERG
Attorneys for Plaintiffs
BY: RAYMOND GIRNYS
-and-
KIRBY MCINERNEY
Attorneys for Plaintiffs
BY: KAREN M. LERNER

SULLIVAN & CROMWELL LLP
Attorneys for Defendants
BY: ROBERT A. SACKS

(Case called)

THE COURT: Good afternoon, everyone. I'm calling the case of In Re JPMorgan Treasury Futures Spoofing Litigation, 20 CV 3515.

Who do I have for the plaintiff?

MR. GIRNYS: Good afternoon, your Honor. Raymond Girnys from Lowey Dannenberg.

THE COURT: Good afternoon.

MS. LERNER: Karen Lerner from Kirby McInerney.

THE COURT: Good afternoon. For the defense?

MR. SACKS: Robert Sacks from Sullivan Cromwell, your Honor.

THE COURT: Very good.

Mr. Girnys, will you be taking the lead for the plaintiff today?

MR. GIRNYS: Yes, your Honor.

THE COURT: I note there are a number of apparent lawyers in the back. Are some of these affiliated with the plaintiffs' side?

MR. GIRNYS: Yes, your Honor.

THE COURT: Welcome to all of you as well. You may all be seated.

We're here for a fairness hearing in the case. I had originally scheduled this for four o'clock and needed to push it to five o'clock on account of a jury trial that is ongoing.

Nevertheless, my staff was here at all times to record the appearance, had it happened, of any objector. I'm now reflecting, making a record of the fact that the door was open, and no one came. There were no objectors who came.

Counsel, I want to thank you for the very thoughtful submissions you have made. This is not, from my perspective, a controversial process of approving a settlement or the fee application. That should give you an idea where we're headed here. I have a few questions which deal more with mechanics.

If there something you want to say by way of introduction, I'll all ears, but there is no need to belabor the point.

MR. GIRNYS: Yes, your Honor. Thank you, your Honor, again.

THE COURT: Sorry. You may take off the mask provided you're speaking at the time and fully vaccinated.

MR. GIRNYS: Yes, sir. Thank you, your Honor.

Again, for the record, Raymond Girnys of Lowey Dannenberg.

Your Honor, I am prepared to answer any questions the court may have.

THE COURT: Sure. Look, the main question I have is just the interrelationship between the settlement here and the regulatory settlements just in practice. How do they fit together?

MR. GIRNYS: Sure, the Department of Justice --

THE COURT: Little closer to the mic. Thanks.

MR. GIRNYS: There is the regulatory settlement that provides for what is called the victim compensation fund. The DOJ established that fund and is administering that fund to proposed individuals and entities that traded in the relevant markets, treasury futures, during the defined time period, and they are administering that settlement. We have no insight into how that actually is being administered. We do not know the methodology that was used there.

THE COURT: I guess the question is, to begin with, is the pool of people whether defined by time period or trading metrics, is it the same, different, is there an overlap in one direction or the other from those covered by this case?

MR. GIRNYS: So I can't answer that with any definitive certainty given just we don't know how they are doing it or who they are accepting. What I can tell you is that the time periods are consistent, 2008 to 2016. It does include treasury futures and options traders. And that, I think, is as far on the limb as I think we are able to go to answer your Honor's question at this point.

THE COURT: Here is the question. Let's suppose you've got $15.8 million here, less fees and costs and the like. Call it ballpark 10 plus.

If a member of an absent class member puts in and gets

compensated here, which would be to the tune of a high but not 100 percent, high percentage but not 100 percent, what stops that person from going to the government and then seeking recompense for the identical injury?

MR. GIRNYS: So the notice clearly defined any individuals or entities able to submit both a claim in connection with the DOJ settlement as well as a claim in this case. They are allowed to provide relevant transaction, trading history, and under our plan of distribution, obtain a recovery from this settlement fund.

THE COURT: But let's flip it the other way. Let's suppose my hypothetical class member has already gotten compensated by DOJ -- just making this up -- to the tune of 60 percent of their outside injury.

Will that be something that will be known in this case before a payout decision is made, or is there a risk that the person will get over-compensated, 60 percent by the government and 80 percent here?

MR. GIRNYS: So there is no information change as to whether that individual or entity, how much they would recover from the DOJ and then how much they would recover here.

As to your Honor's question as to over-compensation, going back to our initial point, we simply do not know how the DOJ is administering it or calculating it.

THE COURT: I guess in the end it is arguably a

decision that needs to be made by the second entity to pay out, and whoever goes first is presumably unconstrained by the other. If somebody comes to your claims administrator here and is otherwise qualified, they get their money. You would hope then that DOJ is tracking that and saying, Hey, you've already gotten 80 percent payout, the most you could seek from us DOJ is 20 percent.

All I can ask you is: Are you asking that question to the people who come to the claims administrator here? Have you already been compensated by some other source?

MR. GIRNYS: The short answer to that question is no, we are not asking that question of claimant. We are asking them to provide their proof of claim form which asks for basic background information, as well along with their transaction records that we are then going to have a claims administrator apply the plan of distribution to compensate class members and claimants and receive payment from the settlement fund.

THE COURT: What happens, I mean, it may be that it is too late to tweak those mechanics. It may be that your claims administrator has the authority to ask that question. But had I spotted this issue earlier, I would have asked counsel to add just the mechanics earlier, just to make sure there isn't an unwarranted double recovery.

MR. GIRNYS: So I appreciate your Honor's question. I think the question really is we simply do not know what the

DOJ, how they are quantifying it. All we're saying is, under our plan of distribution, they are entitled to some recovery. They traded the relevant product market during the product distribution that deals with the specific contracts and certain multipliers that we developed in connection with our experts, so that they would be compensated as a result of their trading during the time JPMorgan allegedly --

THE COURT: Let's collectively problem solve. I'm all in favor of the settlement here, but this is an unaddressed glitch that somebody could get over-compensated, perhaps to the detriment of a later claimant if the money ran out.

So I would like to figure out what the right order is that I can issue that just makes sure that from the perspective of this litigation which I supervise, the question is being asked have you already received money from the government in this case and contrary, and symmetrically I would submit that the government ought to be asking that question.

What's the right way to solve this problem?

I appreciate you told me many times you don't know what the government is doing, but that's not fully responsive to the question of what authority I have to just guard against double recovery. It's not in the interest of other members of your class, and it's not in anybody's reputational interest for anybody to be associated with a process that needlessly over-rewards.

MR. GIRNYS: What I would say, your Honor, is perhaps we can take back your Honor's questions and we can propose a solution. I don't -- sitting here today, I don't believe it has impact on the approval of the settlement. It sounds like this is just a potential workable tweak where I would like to think through some issues and speak --

THE COURT: Let me ask you: Is there any principle of law that prevents me from directing the claim administrator to ask any applicant to certify that they haven't already gotten a recovery from the same injury from the government.

I mean, it seems that that hardly disturbs the structure of the settlement here, right?

MR. GIRNYS: Correct, and I'm unaware of a principle of law that would foreclose your Honor from doing so. But that's just, this is a relatively novel issue in these types of proceedings where you have two pots of funds. And so we just attempted to do what was most efficient and try and get class members to get us their claims data and records so that we can begin -- the claims administrator can begin the work of processing claims.

THE COURT: But the claims data should also include whether the claim has already been paid out. I think you're not fighting in the proposition, you're just reserving on the mechanics.

Let me ask you, Mr. Sacks -- I'm just in

problem-solving mode -- what's the best way to solve this problem?

Is there a risk of double recovery if I don't do so?

MR. SACKS: Your Honor, what I might suggest is that they add to the claim form a question that asks: Have you received or are you entitled to receive any amount from the DOJ? If so, how much is it?

And then they can take that into account in determining the allocable shares of the settlement pot in this case.

THE COURT: May I suggest this. The premise of the question works well. The problem is "have you received" is the easy question. Are you entitled to receive is a different problem, because there are likely loads of people who are entitled, given the substantive overlap here.

Yet the person shouldn't presumably be disqualified from getting a payout from the first payor because they are in theory qualified to get it from the second. What's important really is the second, before paying, know that the first paid out.

May I suggest this. I don't want to spent a whole lot of time with this. I would like counsel to come together and by the end of the day Thursday propose a question that can be added to the claim form in this case that is suitable to the task of guarding against double recovery, and an admonition or

suggestion that the court can give to the government that alerts them to this risk and helps inspire them to put in place a parallel corrective.

Mr. Girnys, any reason why that is a problem?

MR. GIRNYS: So I would just to take a step back, your Honor. Our estimate, our classwide estimate of damages was between 50 and $60 million. The DCA is roughly $33 million. When you combine that with the $15.7 million we achieved here, that is still below the 50 to 60.

THE COURT: Right, which makes it all the worse if one person basically comes back for seconds when nobody has been there for firsts. We don't have enough to feed everybody first.

MR. GIRNYS: So the one issue is, and respectfully, an assumption with the question is that same transactions are being compensated in connection with the DOJ as well as with us. That just simply goes back to the point that I belabor. So I will not do so again in connection with the methodology used there.

So there is a hypothetical, it is a real world issue where claimant A, in the DOJ funds, can have traded 100 contracts, have been paid on 50 of those contracts but not the other 50, but in our settlement would then be entitled to be compensated on that 100 given that it is a separate pool of funds.

THE COURT: Look, to the extent that that would suggest there is no improper double compensation, you can come up with hypotheticals where there is no problem with each fund paying the same person. But I can come up with hypotheticals in which there is a double recovery. I don't think anybody supports a double recovery that exceeds 100 percent of the face value of the claim, if you will.

So all I'm trying to do is be about process here. I'm trying to make sure that both of our systems here, which I can control, and DOJ, which I can advise them, are up to the challenge of guarding against that.

So come together, get me a proposed order by the end of the day Thursday. I have every expectation I will approve today the order in this case. I'm serving notice on everyone that that is the one glitch, need not hold anything up here, but I absolutely am putting on the record now, the approval that I expect to give today will be subject to the issuance of an order that is aimed at just guarding against double recovery.

Counsel, will you work together and solve this problem?

MR. GIRNYS: Yes, your Honor. Thank you.

MR. SACKS: Yes, your Honor.

THE COURT: With that, I don't I think I have any other questions for plaintiffs or defendants. I come here with

a bench ruling to read, but if there is something you wanted to put on the record that has not been fully set out in your prior papers, I'm all ears.

MR. GIRNYS: Nothing further from plaintiffs, your Honor.

MR. SACKS: Nothing, your Honor. Thank you.

THE COURT: All right. Plaintiffs here are Charles Herbert Proctor, III, Synova Asset Management, LLC, Robert Charles Class A, L.P., Thomas Gramatis, Budo Trading LLC, Kohl Trading LLC, M&N Trading LLC., Port 22 LLC, and Rock Capital Markets LLC. They filed this action in 2020 as representatives of a putative class against numerous corporate entities related to JPMorgan Chase & Company, which I will refer to collectively for short as "JPMorgan." Plaintiffs brought claims under the Commodity Exchange Act, which I will refer to as the CEA. They alleged deceptive practices and manipulation by JPMorgan in the market for U.S. Treasury Futures contracts and options on those contracts occurring over a period of nearly eight years -- between April 1, 2008, and January 31, 2016. Specifically, they claim that defendants "spoofed" the market by purposefully placing U.S. Treasury Futures orders that they intended to cancel prior to execution, with the goal of disrupting an otherwise efficient market.

This decision resolves two pending motions by plaintiffs: First, to approve a proposed class settlement,

docket 79, and second, for an award of fees and costs to class counsel and service fees for the class representatives, docket 80. The court will first rule on the proposed settlement, and then turn to the motion for fees and costs.

I will not be issuing a written decision. Instead, I will simply issue a bottom-line order reflecting the fact that the motions were resolved for the reasons set forth on the record today. And, of course, I will also issue the orders substantive providing for the relief at issue. As I mentioned as well, I will also expect in the days to come to issue an order that is aimed at avoiding double recovery. So if the content of what I say here is important to you, you will need to order the transcript of this conference.

I will begin with a brief overview of the settlement. The proposed settlement would resolve all claims on behalf of the class. No class members have opted out. I would note that no objectors appeared today. The gross settlement amount is $15.7 million.

The amount to which a settlement class member is entitled is based on the distribution plan. That plan allocates each settlement class member's entitlement by making pro rata distributions based on the estimated impact of the alleged spoofing on the member's transactions. The plan is structured such that claimants with a higher trading volume will receive a proportionally larger allocation. The volume is

not the sole measure of a class member's entitlement. The plan also incorporates a multiplier that accounts for the frequency and impact of the alleged spoofing. The minimum payment to any class member is $15.

On December 9, 2021, the court granted preliminary approval of the proposed settlement of the case. That triggered the process of notice to the class.

As of April 25, 2022, some five weeks ago, the settlement administrator had mailed copies of the notice postcard to 28,014 potential settlement class members. In addition, as to less individualized means of notice, on January 10, 2022, the administrator published notice of the settlement as a press release via *PR Newswire*, and in print editions of *The Wall Street Journal* and *Investor's Business Daily*. The administrator also ran a 30-day digital media campaign publicizing the proposed settlement on targeted websites. These included *foxbusiness*.com, *NASDAQ.com*, *reuteres.com*, *and wsj.com*. Thereafter, the administrator ran a "microtargeting" campaign that solved advertising on Twitter and LinkedIn. The notices directed potential class members to the settlement website. Among other information, it set out pertinent details about the proposed settlement, the exclusion deadline, this fairness hearing and how to file a claim. The settlement administrator also established a toll-free hotline and e-mail devoted to answering potential class member's

questions.

I'm now going to turn to the motion to approval of the settlement.

A court may approve a proposed class action settlement, provided it determines that the settlement is "fair, adequate, and reasonable, and not a product of collusion." *Meredith Corp v. SESAC LLC*, 87 F. Supp. 3d 650, 661 (SDNY 2015). Such approval is subject to the court's broad discretion, which should "be exercised in light of the general judicial policy favoring settlement." *Hart v. RCI Hospital Holdings, Inc.*, 2015 WL 5577713, at page 6 (SDNY September 22, 2015). A court must review the settlement for both procedural and substantive fairness to ensure that both the negotiating process and the terms of the settlement are fair. See *Wal-Mart Stores, Inc. v. VISA USA, Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

As to procedural fairness, as this court has reviewed in other cases involving class settlements, "a presumption of fairness may attache to a proposed settlement when the terms of that settlement were reached by experienced counsel during arm's-length negotiations undertaken after meaningful discovery." I would cite *Hart* at page seven and *Meredith* at page 662. That presumption is appropriate here. I will briefly explain why, but for the record, I adopt the lengthier discussion on this point contained in plaintiff's memorandum in

support of settlement approval.

The parties in this case were vigorously and admirably represented by able counsel with extensive experience in litigating complex class actions, including securities class actions. Before reaching settlement, plaintiff's counsel conducted an investigation and litigated extensively. Among other things, class counsel's expertise and experience allowed it to capably investigate following JPMorgan's February 2020 disclosure that it was under investigation for unspecified trading practices in the U.S. Treasuries markets. That effort resulted in counsel filing the first class action complaint, in May 2020, and defeating competing motions to serve as lead counsel in this consolidated action, in October 2020.

Just before that consolidation, on September 29, 2020, JPMorgan entered into a deferred prosecution agreement, or "DPA," with the Department of Justice and the United States Attorney's office for the District of Connecticut. These resolved potential criminal charges related to a scheme to defraud market participants in the U.S. Treasury Futures market. In the same time period, the Commodity Futures Trading Commission (CFTC) filed and settled charges against JPMorgan for manipulative and deceptive conduct, arising from the same conduct. Under the DPA, JPMorgan paid a total criminal monetary amount of nearly $1 billion, roughly $33.5 million of which has been earmarked to compensate victims of the alleged

manipulation of U.S. Treasury Futures and Options markets.

I want to confirm this with defense counsel, but my understanding is that, as part of these settlements, JPMorgan did not admit liability, is that correct?

MR. SACKS: Correct, your Honor.

THE COURT: I take it, however, that the DPA may impose some limits on JPMorgan's ability to affirmatively deny liability?

MR. SACKS: Correct.

THE COURT: Thank you. Per customary practice.

All right. In October 2020, plaintiff's settlement negotiations with JPMorgan began in earnest. These included a formal mediation before a neutral who assisted the parties over the course of several months to resolve this dispute. The negotiations involved the parties' examination, among other things, of publicly available documents (including public filings by the DOJ and CFTC) JPMorgan's SEC filings, consultations with experts and market participants, more than 300 gigabytes of JPMorgan's transaction data and nearly six million pages of document discovery JPMorgan had provided to regulators. Class counsel negotiated the production of this discovery in the course of the mediation process.

As a result, by the time the parties had reached a proposed settlement, counsel, in the words of the memorandum plaintiffs have submitted in support of settlement approval,

were "fully informed about the facts, risks, and challenges of this action." So informed, and after initially reaching an impasse, the parties accepted the mediator's settlement proposal. The fact that the proposed settlement reflects a successful mediation further supports the court's finding of procedural fairness. See *Kelen v. World Financial Network National Bank*, 302 F.R.D. 56, 68 (SDNY 2014).

I'm now going to turn to substantive fairness.

Courts in this circuit use the nine-factor test set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), to evaluate whether a settlement is substantively fair, reasonable, and adequate. The Second Circuit has listed these "*Grinnell* factors" as follows:

(1) the complexity expense and likely determination of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risk of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell* at page 463.

These factors also overwhelmingly favor settlement

approval. Again, I incorporate by reference the memorandum in support of the motion in favor of approval. Briefly, here is the heart of the analysis.

The first factor strongly favors approving the settlement. As this court has previously put the point, "the greater the complexity, expense and likely duration of the litigation, the stronger the basis for approving a settlement." Citing *Hart* at page seven. The proposed settlement here brings an end to some two years, more than two years of litigation. Settling at this stage prevents the parties from having to bear the considerable cost of litigating dispositive motions. These would have been particularly complex and time-consuming to brief, given the challenges inherent in any CEA spoofing case, which were amplified in this case by the complex nature of the financial instruments -- futures and options contracts -- targeted by the alleged spoofing. I would cite *CFTC v. R.J. Fitzgerald & Company*, 310 F.3d 1321, 1334 (11th Cir. 2002); and *In Re London Silver Fixing, Ltd., Antitrust Litigation*, 332 F. Supp. 3d 885, 910 (SDNY 2018). The settlement also eliminates the formidable costs of pretrial motions practice, pretrial preparation, trial, post-trial motions, and the cost of an appeal. Had the case lasted through the end of a Second Circuit appeal, it is reasonable to forecast that it would have lasted several years longer, at the very least.

The second factor, the reaction of the class to the

settlement, also strongly favors approving the settlement. A positive reaction to the settlement was in favor of approval. Importantly, there was substantial and multi-dimensional outreach to the putative class by the settlement administrator. By multiple means, the putative class was informed of the settlement terms and critical information about how to object, opt out, or file a claim. The settlement website as of last month had more than 27,770 hits. And 105 individuals called the hotline. Yet, to date, no settlement class member has opted out and none has objected to the settlement.

The third factor, the stage of discovery and amount of discovery completed, is intended to capture whether the parties had adequate information to meaningfully assess their claims at the time of settlement. Citing *Hart* at page ten. The court finds that such is so here. To be sure, the case pivoted into settlement mode early on, without the need for certain conventional means of civil discovery, such as comprehensive depositions. That, no doubt, was because with the federal government's enforcement machinery publicly trained on JPMorgan, which catalyzed plaintiffs to bring this out, and with the DOJ and regulatory actions evidently headed towards settlement, JPMorgan had limited to some degree its realistic means of defense. Some potential defenses that JPMorgan might have interposed here, for example, might have been viewed by the Department of Justice as in tension with the requirements

of the DPA. As noted, discovery consisted largely of JPMorgan's furnishing plaintiffs with regulatory discovery. Nonetheless, this discovery was substantial and put both sides in an excellent position to assess settlement alternatives. So, too, did the fact that class counsel had worked with experts and consultants to assess the case and the extent of JPMorgan's exposure and the putative class' potential damages. This fact thus favors approving the settlement.

The fourth, fifth, and six factors address the risks of establishing liability, establishing damages, and maintaining the class action through trial. These facts also favor the settlement. Although, as I said, JPMorgan's regulatory settlements left it wounded, the regulatory settlements here did not establish the bank's liability. Plaintiffs have identified various hurdles they would have had to clear to do that, had this case proceeded through the usual phases of federal civil litigation and had the rigorous standards of certification and summary judgment been applied to plaintiff's case. To prevail, plaintiffs would have had to establish ultimately that JPMorgan manipulated the markets for U.S. Treasury Futures and options on those futures in violation of the CEA, and in a manner that caused damages to the settlement class that were both calculable and unrecompensed. I will note a few areas of potential risk to which these hurdles exposed the class. First, the parties have not engaged

in class certification motions practice. There is a nontrivial risk that plaintiffs might not have been able to achieve certification, let alone maintain the class through trial absent a settlement not approved. As counsel acknowledges, "CEA cases are among the most complicated and risky class actions to pursue." Citing *In Re Sumitomo Copper Litigation*, 74 F.Supp.2d 393, 395 (SDNY 1999); as well as other cases cited in this settlement memo at ten. The parties have also not engaged in summary judgment practice. It is possible that summary judgment motions, at a minimum, would have pruned the size of the certifiable class significantly. Indeed, courts have recognized that it is "exceedingly difficult" to establish damages in CEA spoofing cases, and that options on future contracts are "highly complex and inherently risky financial instruments." Citing *R.J. Fitzgerald & Co*, 310 F.3d at 1334, among other authority. Thus, notwithstanding JPMorgan's relatively early capitulation to federal prosecutors and regulators, there is a plausible risk that plaintiffs would not have been able to establish or sustain judgments as to liability and/or damages.

In this vein, it is pertinent that, notwithstanding the DPA and CFTC settlement, JPMorgan has not conceded liability to plaintiffs and, subject to running afoul of the DPA, was at liberty to put plaintiffs to their proof. As counsel has recognized, courts have dismissed private cases

even where defendants have already been fined by the government for the same or much the same alleged conduct. Citing the cases at Settlement Memo at 11. And a civil jury potentially could have declined to award substantial damages in this complex case, where it is reasonable to forecast that had the case gone to summary judgment or trial, damages at a minimum would have been hotly disputed in a "battle of experts." For example, in the case of *In Re TFT-LCD (Flat Panel) Antitrust Litigation*, 7 M.D. 1827, from the Northern District of California, September 3, 2013, that was a case in which, notwithstanding a guilty plea to criminal charges, civil demands became a battleground at the follow-on civil trial. Had the case moved forward rather than settling, this, too, was a risk the settlement class would have faced.

Look, in the end, the court cannot assess the likelihood that liability would have durably been found or that damages would have attached to such a finding had plaintiffs successfully run this gauntlet. The case was clearly made much easier for plaintiffs given the successful regulatory actions brought against JPMorgan, but plaintiffs still faced real, nontrivial challenges in crossing the goal line. The settlement here fairly reflects the possibility that plaintiffs might have failed either in certifying a class or in establishing liability or damages as consequential as they sought to pursue. It also properly differentiates among

claims, recognizing that certain claims were by nature harder to probe and establish than others. The awards that it envisions are key to the differential strengths and weaknesses of settlement class members' claims, based on facts such as trading volume and impact of the alleged spoofing. For all members of the settlement class, the settlement thus provides a welcome certainty of recovery, in contrast to the uncertain path and potentially lengthy path to an uncertain damages award that plaintiffs otherwise have had to travel on behalf of the class.

The seventh factor, the ability of the defendants to withstand a greater judgment does not affirmatively favor the settlement in the way that the other factors do. As plaintiffs rightly note, "there is little reason to doubt that JPMorgan could withstand a greater judgment" than the $15.7 million settlement here. But, as a matter of law, the ability to withstand a greater judgment does not "standing alone...suggest that settlement is unfair." Citing *In Re Austrian & German Bank Holocaust Litigation*, 80 F.Supp.2d 164, 178, n.9 (SDNY 2000)(citations omitted). Moreover, the settlement cannot be viewed in a vacuum. It is not the only source of recompense to which injured class members may receive. As I earlier noted, the government has allocated more than $33 million of a victim compensation fund to those harmed by the alleged market manipulation here. That fund in tandem with the $15.7 million

the class will obtain by JPMorgan is estimated to cover between 82 percent and 98 percent of the damages of plaintiff claim. With the important proviso that I intend to put in place an order that it is intended to guard against double recovery thereby protecting the other members of the class. I accordingly treat this factor, the ability of the defendant to pay more money, as neutral, insofar as the defendant has, in the parallel regulatory actions, agreed to do just that -- pay more money. The eighth and ninth factors, the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation also favor approving the settlement. The advocacy of the settlement should be judged in light of the strength of the plaintiff's case, not against the "possible recovery in the best of all possible worlds." *Hart* at page 11 (citations omitted). The court need only find that the settlement falls within the "range of reasonableness." *Newman v. Stein*, 46 F.2d 689, 693 (2d Cir. 1972). That is clearly so here. If plaintiffs were to pursue litigation, it would surely will have been costly. And it might have borne little incremental fruit on top of the regulatory actions. In light of the attendant risks of litigation, as well as the contentious settlement negotiations, the proposed settlement is reasonable and will provide adequate relief to the class.

A word finally on the plan of allocation. "To warrant

approval, the plan of allocation must also meet the standards by which the settlement was scrutinized -- namely it must be fair and adequate." *In Re WorldCom, Inc. Securities Litigation*, 388 F.Supp.2d 319, 344 (SDNY 2005). Here, as I have noted, the plan takes into account class members' trading volume and the alleged spoofing frequency and impact. After all claims are submitted, the settlement administrator will review and process the claims forms, determine each claim's pro rata share (with a minimum payout of $15 per class member) and eventually apply to this court for an order to distribute the net settlement fund. Again, subject to the caveat of assuring there is no double recovery, I find that plan nuanced and reasonable.

So, for all these reasons, the court finds that the proposed settlement is fair, adequate, and reasonable. I approve the settlement.

Now, when I preliminarily approved the settlement, I found that it was likely that I would certify the settlement class under Rules 23(a) and 23(b)(3). Plaintiffs now seek final certification. I adopt by reference the good arguments made in support of certification, best outlined in plaintiff's memorandum in support of preliminary approval, which is at docket 68 at pages 19 to 23. There have been no changes in the case that would warrant deviating from my initial view that there is a valid certifiable class here. That nearly 30,000

notices have been sent to potential class members certainly bolsters the numerosity requirement. That no putative class member has come forward in any way to protest the construct and size of the class is also evidence that it was properly drawn. I find the proposed settlement class appropriate and I approve the motion to certify that class substantially for the reasons set out by plaintiffs on pages 20 to 21 of their memo.

Having approved the settlement, I'm now going to turn to the motion to approve attorneys' fees and costs and the service award. The plaintiff class has been represented in this litigation by Lowey Dannenberg, P.C. and Kirby McInerney LLP -- whom I will together call class counsel. Class counsel have applied for an award of attorney's fees of one third of the fund, net of litigation costs and expenses and service awards -- or $5,117,163.68. Counsel also seek costs of $303,508.96. Class counsel represent that their "lodestar" - the product of their reported hours worked times the regular hourly rates that they claim to charge paying clients -- is $3,408,509.

As the Supreme Court long ago recognized, a lawyer who "recovers a common fund for the benefit of a persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co v. Van Gemert*, 444 U.S. 472, 478 (1980). In the Second Circuit, district courts may employ a percentage-of-the-fund method when awarding

fees in common fund cases. See *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). However, the Circuit also cautions district courts to cross-check a percentage fee against class counsel's "lodestar." *Id.* at 50. Regardless of the method used, attorneys fees may not exceed what is reasonable under the circumstances. *Id.* at 47. In assessing whether an award is reasonable, the court must consider what the Circuit calls the *Goldberger* factors. These are:

(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Id. at 50.

I will consider each of those *Goldberger* factors in turn. At the outset, I note that my view, which I have stated in my previous cases, is an award to class generally should not exceed one third of the net settlement -- that is, one third of the sum yielded by subtracting costs from the gross settlement. That approach assures that the class receives fully two-thirds of the gross settlement, and it incents class counsel to be disciplined about the costs that they expend. Counsel has moved for an award here consistent with that approach. For the record, if counsel's requested fee was being awarded off of the

gross settlement fund, it would be represent an approximately 32.6 percent fee.

As to the time and labor expended by counsel, class counsel represent they have put significant time and effort, more than 4,780 hours into developing and litigating this action. Class counsel undertook the investigation and development of the case, navigated a lengthy settlement process, and has orchestrated fulsome settlement administration.

Regarding the lodestar cross-check, district courts in this Circuit award fees frequently that amount to multiples of the lodestar. That is for a variety of reasons, including in recognition of the investment of time and capital that contingency cases inherently present, the risk that these will never be recouped, and the practical reality that other such cases on the docket of a lawyer paid by contingency fees may yield no recovery at all. In this case, class counsel's request is for the amount I mentioned, a little over $5 million in fees, which constitutes one third of the net settlement award, and has calculated a lodestar of, as I mentioned, of $3,408,509. The requested fee represents a modest multiplier of counsel's lodestar of about 1.5. "Given that courts in this district will often approve lodestar multipliers" far above that number, counsel's requested fee appears reasonable. See *Montalvo v. Flywheel Sports, Inc.*, 2018 WL 7825362 at page six

(S.D.N.Y. July 27, 2018).

As to the magnitude and complexity of this litigation, this CEA class action involved an unusually complex theory of alleged market manipulation. Both liability and damages for such claims are difficult to establish. And class counsel did not have the benefit of settled case law, as is the case, for example, with respect to open-market securities class actions brought under the 1934 Securities Exchange Act. Indeed, class counsel credibly represents that relatively few private class actions brought under the CEA alleging a spoofing theory have resulted in settlements. The same may be said of the number of such cases that have resulted, outside the settlement context, in the certification of Rule 23 class. The court appreciates class counsel's taking on these challenges and class counsel's able navigation of these hard problems, in developing the case on behalf of the putative class, and in bringing contentious settlement negotiations to a successful outcome. I might add too that the settlement was not only successful. Compared with many analogous cases, it was also prompt, a fact that brings obvious advantages to the class. That factor too supports an award of one third of the net settlement.

As to the risk of the litigation, as discussed in the context of approving the settlement and with regard to the complexity of the litigation, this factor sufficiently favors approving an award of one third of the settlement net costs.

Although the regulatory actions gave plaintiff's counsel a big head start and prevent counsel from claiming here to have independently developed this action based on their initiative investigation. For the reasons I have stated, the government affects did not estop JPMorgan from defending its conduct on the merits of or resisting plaintiff's bid for class certification or incremental damages above those obtained in the regulatory arena. And although plaintiffs' counsel did not initiate this matter until JPMorgan had announced the fact at least generally of regulatory investigations, counsel had invested serious time in the case before the point at which JPMorgan's settlements with the regulators were announced. Plaintiffs' counsel thus invested resources in the case at a time when JPMorgan's settlement with the government was not a certainty. And plaintiffs faced an uncertain path to recovery for many members of the class, possibly all. Given the challenges they faced, counsel ran the risk of stumbling at various junctures, leaving the putative class uncertified, or, if certified, without a sure recovery atop that obtained by the governmental action. These risks are sufficient to be called consequential. This factor also supports the proposed fee, which is consistent with norms in this District for cases of comparable size and complexity.

As to the quality of the representation, this factor also supports an award of one third of the net settlement class

counsel has ably litigated in this case. While no doubt the beneficiary of such exogenous events as regulatory actions and adverse corporate disclosures, class counsel nonetheless faced numerous changes in ensuring that the victims of the alleged manipulation here would be fulsomely recompensed. The settlement award, representing roughly a quarter of recoverable classwide damages, serves to top up, and in my view should only be used to top up the funds available through the government's victim compensation fund. By which I mean there shouldn't be double recoveries. Together, these pots comprise of the 98 percent of the estimated damages defendants allegedly caused. Plaintiffs' counsel have made these funds readily available for victims to apply for and access. Class counsel's hard work to secure these benefits merits compensation.

When employing the percentage-of-fund method, courts should be mindful of the size of the fee award in relation to the overall size of the settlement, which is the next factor, and that is "to ensure that the percentage awarded does not constitute a windfall." Citing *Hart* at page 16. As noted, the award under consideration here represents one third of the net settlement and 32.6 percent of the gross settlement. Awards representing such shares of the gross or net settlement are often awarded in this district in cases approximately this scale. Of course, as stands to reason, where large larger settlements are involved, fee awards representing lesser

percentages of the gross and net settlements tend to be more appropriate.

The court finds a percentage-of-fund calculation, awarding one third of the net settlement fund to class counsel, similarly appropriate.

May I just ask counsel, just as an aside, what will happen to one claim fund? Will they reverse to the defense?

MR. GIRNYS: No, your Honor.

THE COURT: That is further support for the reasonableness of the settlement.

The settlement class' positive reaction to the proposed settlement is further confirmation no class member has objected, for example, to the proposed fee award. Courts have approved percentage-of-the-fund recoveries in such circumstances, including those cited in *Hart* at page 17. This factor accordingly supports an award of one third of the net settlement.

Turning to public policy.

Public policy supports an award of one third of the net settlement. Such an award will incent counsel in the future to investigate, develop, and litigate other viable such cases. Courts have acknowledged that private lawsuits provide a critical role in deterring violations of the CEA. See, for example, *Leist v. Simplot*, 638 F.2d 283, 311 (2d Cir. 1980).

So, for all of those reasons, I grant class counsel

attorneys' fees in the amount of $5,117,163.68.

Turning to costs.

Class counsel also requests reimbursement of costs in the amount of $303,508.96. About 83 percent of that is attributable to expert expenses. The costs also include expenses for initial investigations and research, discovery, mediation fees, process servers, filing fees, travel, postage, and copying. In light of the substantial period class counsel spent litigating the case and in light of the fact that the expert work was so obviously critical in establishing liability and class cert worthiness in this case, I find these expenses and the expert dimension of them particularly reasonable. I find all such expenses to have been validly incurred. I will approve class counsel's request for the expenses for an expense award as identified.

As to service awards.

Class counsel requests a total of $45,000 in service awards to be shared equally among the nine class plaintiffs. Such awards are common in class action cases to compensate class representatives for their time and effort in representing the class. Here, I appreciate that the nine lead plaintiffs were, as represented, integral to the suit and that their participation was relatively demanding, including participation in discovery and providing access to data and knowledge of the market and market conditions when their transactions occurred,

all of which assisted class counsel's investigation and formulation of the complaint. The service award of $45,000 split among them is appropriate for these purposes. It will also encourage similar service by future named plaintiffs.

Therein ends the ruling.

I expect tomorrow that orders consistent with what I've ruled from the bench today will issue.

With that, is there anything further from plaintiffs?

MR. GIRNYS: No, your Honor. Thank you.

THE COURT: Anything from the defense?

MR. SACKS: Yes, your Honor.

I just want to be sure I didn't miss-answer your question about liability. We did in the DPA admit certain facts that we cannot contest.

THE COURT: I understood that.

MR. SACKS: But I was addressing liability, I thought, as it related to this case. We didn't admit liability that would have imposed liability.

THE COURT: That's what I meant. In other words, there was no way to treat JPMorgan as collaterally estopped by the regulatory settlements here. Plaintiffs couldn't have moved for summary judgment based on the regulatory settlements.

MR. SACKS: There are certain facts in the regulatory settlements that could have been found here, but they would not have been a basis for a liability in this case, given the

breadth of what the claims were in this case.

THE COURT: That's what I understood.

In other words, your range of motion was constrained by the regulatory settlements both as to facts and because typically the government, in a deferred prosecution context, will be distressed if counsel, entrance into a DPA enters into it, and then on the courthouse steps denounces the whole prosecutive venture as ridiculous.

MR. SACKS: Correct. An SEC settlement oftentimes neither admit nor deny. This was not such a settlement. We admitted certain facts set out.

THE COURT: And I understood that, and I understood that gave ammunition to the plaintiffs here. They needed to do some more work to get across the goal line is my point.

Is that correct?

MR. SACKS: Yes. I just didn't want to leave a misimpression. I apologize if I did.

THE COURT: None left at all.

Before we adjourn, I'm mindful I've got just a few people here. There was a substantial cast on the plaintiffs' side worked on the case. Really, for both of you, please bring back to your teams my gratitude for a job well done and for really frustrate briefing. Particularly in the COVID era, I'm mindful that a lot of the junior lawyer involves a lot of hard work without the significant benefits of in-person contact with

the leaders of the team. To the extent that is any wind in people's sails, just for the court to say a job well done, I'm saying it here. I hope you bring it back to the junior members of the team. Thank you.

MR. SACKS: Thank you, your Honor.

MS. LERNER: Thank you, your Honor.

MR. GIRNYS: Thank you, your Honor.

THE COURT: We stand adjourned.

(Adjourned)

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Morgan Stanley Data Security Litigation

Case No. 20-cv-05914

DECLARATION OF BRIAN T. FITZPATRICK

I. BACKGROUND AND QUALIFICATIONS

1. 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 the University of Notre Dame in 1997 and 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 Exhibit 1. I speak only for myself and not for Vanderbilt.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. 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, the Fordham Law Review, 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 Institutes on Class Actions in 2011, 2015, 2016, 2017, and 2019; the Annual Conference of the ABA's

Litigation Section in 2021; 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. In 2015, I was elected to the membership of the American Law Institute.

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*"). This article is still what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to one subject matter 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 attempted 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 an unbiased sample of settlements, but the number of settlements included in my study is also several times greater than 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 109 from the Second Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. Since then, this study has been relied upon regularly by courts, scholars, and testifying experts.[1] I have attached this study as Exhibit 2 and will draw upon it in this declaration.

[1] *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *Kuhr v. Mayo Clinic Jacksonville*, No. 3:19-cv-453-MMH-MCR, 2021 WL 1207878, at *12-13 (M.D. Fla. Mar. 30, 2021) (same); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2020 WL 6891417, at *3 (S.D.N.Y. Nov. 24, 2020)

(same); *Shah v. Zimmer Biomet Holdings, Inc.*, No. 3:16-cv-815-PPS-MGG, 2020 WL 5627171, at *10 (N.D. Ind. Sept. 18, 2020) (same); *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *In re Wells Fargo & Co. S'holder Derivative Litig.*, No. 16-cv-05541-JST, 2020 WL 1786159, at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, No. CV 11-10230-MLW, 2020 WL 949885, 2020 WL 949885, at *52 (D. Mass. Feb. 27, 2020), *appeal dismissed sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp*., No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CRB, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, No. 18 Civ. 455 (LGS), 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, No. 15–3509, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 3:07-cv-5944 JST, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, No. MDL 2328, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 58 F.Supp.3d 167, 172 (D. Mass. 2014) (same); *Tennille v. W. Union Co.*, No. 09–cv–00938–JLK–KMT, 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 & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod.*

4. In addition to my empirical works, I have also published many law-and-economics papers on the incentives of attorneys and others in class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151 (2021) (hereinafter "*A Fiduciary Judge*"); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "*Class Action Lawyers*"); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Much of this work was discussed in a book published recently by the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019). The thesis of the book is that the so-called "private attorney general" is superior to the public attorney general in the enforcement of the rules that free markets need in order to operate effectively and that courts should provide proper incentives to encourage such private attorney general behavior. I will also draw upon this work in this declaration.

5. I have been asked by class counsel to opine on whether their fee request of 29.3% of the cash portion of the settlement is reasonable in light of the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel, and I have attached a list of these

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Liab. Litig., No. 11–1546, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, No. 2:07–CV 208, 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*, No. 10 C 816, 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).

documents in Exhibit 3. As I explain, based on the empirical studies and research on economic incentives, I believe their fee request is reasonable.

II. CASE BACKGROUND

6. This settlement arises out of litigation against Morgan Stanley for negligence, fraud, unjust enrichment and other state law violations for failing to protect its customers' personally identifiable information. The first private complaint was filed in July 2020, shortly after Morgan Stanley notified its customers of these data security incidents. A number of other private lawsuits were thereafter filed and subsequently consolidated before this court. Unbeknownst to the private plaintiffs, the Office of Comptroller of the Currency ("OCC") was investigating Morgan Stanley during this time for conduct related to the data security incidents, and, in October 2020, Morgan Stanley agreed to pay a $60 million fine to OCC. The private litigation was ongoing during this time and continued thereafter, including motion practice and significant, expedited discovery. After almost a year of party and third-party discovery as well as three full-day, in-person mediation sessions over a period of months, Morgan Stanley and the private litigants agreed to accept a mediator's proposal which led to a class-wide settlement in late 2021. On January 18 of this year, Judge Torres preliminarily approved the settlement and certified a settlement class. The parties are now asking the Court to grant final approval of the settlement and class counsel is seeking an award of fees and expenses.

7. The settlement class includes, with minor exceptions, "all Individuals with existing or closed Morgan Stanley accounts established in the United States who received the Notice Letters regarding Data Security Incidents." *See* Settlement Agreement ¶ 1.31. The class will release the defendant from any claim "that was or could have been asserted in any of the Actions," including claims "related to or arising from any of the facts alleged in any of the Actions." *See id*.

at ¶ 1.27. In exchange, the defendant will pay $60,000,000 into a fund that will: 1) buy all class members who choose to enroll two years of financial fraud insurance; 2) pay all class members who file a claim up to $100 for up to 4 hours of time lost to dealing with the data security incidents; 3) pay all class members who file documentation to receive up to $10,000 for out-of-pocket losses caused by or additional time spent on the data security incidents; 4) and pay for attorneys' fees, expenses, and service awards. *See id.* at ¶¶ 1.34, 2.2. No amount of this money can revert back to the defendant. *See id*. at ¶ 6.1. If any money remains in the fund after these distributions, the remaining funds will be used to extend the period of coverage of financial fraud insurance for class members who choose to enroll. *See id.* at ¶ 3.6. In addition, the defendant will pay all of the costs to notify the class and administer the settlements, *see id.* at ¶ 9.1, which I am told are now estimated to total over $8.2 million. On top of all of this, the defendant has agreed to maintain certain improvements to its protocols for protecting its customers' information and to hire a third party, Kroll, to try to locate and retrieve any of the missing server machines that could still fall into the wrong hands. *See id.* at ¶¶ 7.1, 7.2. Although protocol improvements were also promised to the OCC, the obligation for the defendant to hire Kroll to attempt to locate and to retrieve additional decommissioned assets is unique to the private settlement and was negotiated by class counsel after they discovered the existence of one of the decommissioned assets recently purchased on the internet.

8. Class counsel are seeking a fee award of $20 million. This request is 29.3% of the $68.2 million cash portion of the settlement. As I explain below, it is my opinion that a fee award of this amount would be reasonable in light of the empirical studies of class action fees and research on economic incentives in class action litigation.

III. ASSESSMENT OF THE REASONABLENESS OF THE REQUEST FOR ATTORNEYS' FEES

9. When a class action reaches settlement or judgment and no fee shifting statute is triggered and the defendant has not agreed to pay class counsel's fees, class counsel is paid by the class members themselves pursuant to the common law of unjust enrichment. This is sometimes called the "common fund" or "common benefit" doctrine. It requires the court to decide how much of their class action proceeds it is fair to ask class members to pay to class counsel.

10. In the Second Circuit, courts have discretion to use either the lodestar method or the percentage method in awarding attorneys' fees in common fund class actions. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 45 (2d Cir. 2000) ("We hold that either the lodestar or percentage of the recovery methods may properly be used to calculate fees in common fund cases."). But "[t]he trend in this Circuit is toward the percentage method . . . ." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). 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 the percentage method should be used whenever the value of the settlement or judgment can be reliably calculated; the lodestar method should be used only where the value cannot be reliably calculated and the percentage method is therefore not feasible or when the method is required by law, such as by a fee-shifting statute. This is not just my view, but the view of leading class action scholars. *See* Principles of the Law of Aggregate Litigation § 3.13 (2010) (cmt. b) ("Although many courts in common-fund cases permit use of either a percentage-of-the-fund approach or a lodestar . . . most courts and commentators now believe that the percentage method is superior."). Because this settlement consists of enough cash to use the percentage method, in my opinion that is the method that should be used here. I will therefore proceed under that method.

11. Under the percentage method, courts must 1) calculate the value of the benefits to the class in the settlement and then 2) select a percentage of that value to award to class counsel. When calculating the value of the benefits, in my opinion, courts should and usually do include any cash benefits to class members, cash the defendant must pay to third parties, non-cash benefits that can be reliably valued, attorneys' fees and expenses, and administrative costs paid by the defendant. *See, e.g.*, *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015); *Moukengeshcaie v. Eltman, Eltman & Cooper, P.C.*, 2020 WL 5995978, at *2 (E.D.N.Y. Apr. 21, 2020), *report and recommendation adopted sub nom.*, 2020 WL 5995650 (E.D.N.Y. Oct. 8, 2020). Although some of these things do not go directly to the class as compensation, they facilitate compensation to the class, savings to the class, or serve to deter defendants from future misconduct by making defendants pay more when they cause harm. As I explain in more detail below, class counsel should be rewarded for generating both compensation and deterrence. Again, this is not only my opinion, but the opinion of the leading class action scholars. *See* Principles of the Law of Aggregate Litigation § 3.13(b) (2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement.").

12. When selecting the percentage, courts usually examine a number of factors. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832. In the Second Circuit, courts consider the following factors: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. In my opinion, the fee requested here is reasonable because it is supported by all six of these factors.

13. Let me begin with the valuation of the settlement. The cash portion of the settlement is easily valued. The defendant has agreed to pay $60 million into a fund as well as to pay for settlement notice and administration costs estimated to be more than $8.2 million. Typically, costs of notice and administration are paid from the settlement fund, but here they are being borne by defendant separately from the non-reversionary fund; that accounting maneuver obviously should not affect the total value of the cash portion of the settlement: either way, it is $68.2 million. The remainder of the settlement benefits have not been quantified—in particular, the payments defendant will make to Kroll to attempt to locate and retrieve additional missing decommissioned servers—but I have been told they will come at significant cost the defendant. In my opinion, it is not necessary to quantify these benefits: as I explain below, class counsel's fee request is reasonable based on the cash portion of the settlement alone.

14. Let me turn now to the percentage. Class counsel's fee request of $20 million would comprise 29.3% of only the cash portion of the settlement. This percentage is above average according to most studies, but that is only because some of the settlement benefits have not been quantified and are therefore excluded from the denominator of the fee percentage calculation. For this and other reasons, it is my opinion that all the Second Circuit's factors support the fee request.

15. Consider first factor "(6) public policy considerations." As I explain in my book THE CONSERVATIVE CASE FOR CLASS ACTIONS, class action lawyers perform a critical law enforcement role in our country—which is why they are often referred to as "private" attorneys general. In Europe, countries rely much more on the government to police the marketplace. In America, by contrast, we believe more strongly in self-help and the private sector, including to police the marketplace. That is, we need private class action lawyers because it is not desirable for "public" attorneys general to police all wrongdoing. Even if it were desirable, it is simply not

possible: "public" attorneys general have very limited resources. It is also impossible for individual litigants to police all wrongdoing: sometimes individual claims are too small to be viable on their own, and, even when they are viable, individuals do not have the incentive to invest in one claim the same way a defendant facing many similar claims does; as a result, the playing field between individual plaintiffs and defendants is often not level. *See* Fitzpatrick, *Class Action Lawyers*, *supra*, at 2059. Class action lawyers level the playing field and overcome the enforcement gap that would otherwise exist in our country by aggregating non-viable and underinvested claims into effective litigation vehicles. *See id*.

16. There is no doubt that individuals could not have pursued Morgan Stanley here on their own; the claims are simply too small. Although it was not impossible for the government to do so—indeed, the OCC has—it is also true that the OCC's efforts will not generate any compensation to class members; the OCC's $60 million civil penalty will go solely to the U.S. Treasury. Class counsel's settlement, by contrast, will distribute the lion's share of its $60 million non-reversionary fund to class members to compensate them for their individual losses and time wasted as well as to buy financial fraud insurance coverage. Thus, without class counsel's efforts, there would have been no compensation at all to Morgan Stanley's victims. Moreover, even with regard to deterrence, class counsel's efforts will do more than the OCC's. To begin with, the total amount Morgan Stanley will pay in class counsel's settlement is greater than the OCC's civil penalty. Moreover, class counsel's settlement requires Morgan Stanley to take steps that the OCC did not, most notably to retain a third party to try to locate and recover missing decommissioned IT assets. In other words, this is an example of our private enforcement system adding value to government enforcement; that is, it is an example of our private enforcement system working.

17. But lawyers are rational economic actors like anyone else. They will only bring lawsuits and optimally invest in them if they are compensated adequately. The fee decisions courts make at the end of successful class actions are, so to speak, the "fuel" in the engine of the private-attorney-general "automobile"; these decisions tell lawyers in future cases what they can expect to receive if they invest in a new case and ultimately win it. Accordingly, in my opinion, courts should set fee awards such that future lawyers will make the best decisions about what cases to file and how to resolve them. In my view, this means courts should set fees such that lawyers will have incentives 1) to bring as many meritorious cases as possible and 2) to litigate those cases in a way that maximizes the resulting compensation for the class and the deterrence of future wrongdoing. There is little doubt that this case has merit: although Morgan Stanley had serious standing and other defenses, it is hard to see why it did not have a duty to protect the data it collected from its customers; this is confirmed by the fact that the OCC pursued Morgan Stanley for its data security practices. Moreover, there is no doubt class counsel's settlement will generate both compensation and deterrence: class members will receive millions of dollars of compensation and financial fraud insurance coverage, and the defendant will pay millions more under the other provisions of the settlement for notice and administration costs and for retaining a third party to locate and retrieve additional decommissioned servers. Every one of these dollars increases the defendant's cost of engaging in misconduct. It is important to incentivize class counsel to generate compensation and deterrence like this. The fee requested here will do that.

18. In particular, the fee requested here will incentivize class counsel to pursue relief even if when it is difficult to quantify. As I noted above, some of the benefits here cannot be quantified yet. As such, class counsel cannot be awarded a percentage of them. But it is important to find some other way to reward class counsel for pursuing such relief. One way to do so is to

bump up class counsel's fee percentage from the portion of the settlement that can be valued. As I explain below, this percentage is above average according to most studies. But, given the unquantified relief recovered here, such a percentage is necessary to foster the proper incentives: if class counsel received the same fee no matter whether they recovered extra relief or not, they would have no incentive to pursue the extra relief, even if it was important to the class. Awarding the fee requested here avoids poor incentives.

19. Consider next factor "(5) the requested fee in relation to the settlement." A fee award of 29.3% would be above average according to most studies. Even so, as I noted above, given that some of the settlement benefits cannot be quantified and therefore have been excluded from the denominator, this is to be expected. For example, according to my empirical study, the most common percentages awarded by federal courts nationwide using the percentage method were 25%, 30%, and 33%, with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study*, *supra*, at 833-34, 838. The other large-scale academic studies of class action fees, which were authored by Geoff Miller and the late Ted Eisenberg, are in agreement, *see* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 260 (2010) ("*Eisenberg-Miller 2010*") (finding mean and median of 24% and 25%, respectively), if not trending even higher: their most recent study reported a mean of 27% and a median of 29%, *see* Theodore Eisenberg et al., *Attorneys' Fees in Class Action Settlements: 2009-2013*, 92 N.Y.U. L. Rev. 937, 951 (2017) ("*Eisenberg-Miller 2017*"). This means that, even with the unquantified relief excluded from the denominator, the fee requested here is no more than the most recent nationwide median.

20. The same is true when looking at fee awards in the Second Circuit alone. In the 72 settlements in my study from the Second Circuit where the percentage method was used, the mean

and median were 23.8% and 24.5%, respectively. *See* Fitzpatrick, *Empirical Study*, *supra*, at 836. Again, the Eisenberg-Miller studies found much the same thing, but, again, with percentages trending higher. *See Eisenberg-Miller 2010*, *supra*, at 260 (finding mean and median in the Second Circuit of 23% and 24%, respectively); *Eisenberg-Miller 2017*, *supra*, at 951 (finding mean and median in the Second Circuit of 28% and 30%, respectively). Indeed, even with the unquantified relief excluded from the denominator, the fee requested here is actually below the most recent Second Circuit median. For all these reasons, this factor therefore supports the fee request.

21. Consider next the factors that speak to the results obtained by class counsel in light of the risks presented by the litigation: "(2) the magnitude and complexities of the litigation; (3) the risk of the litigation[, and] (4) the quality of representation." In my opinion, these are the strongest factors in favor of class counsel's fee request. To put it frankly, it is hard for me to see how a jury could have awarded anywhere near the value of this settlement had this case gone to trial. Although I think the class's case on liability was strong, there is great risk that a jury would find little to no damages here. Indeed, it is not even clear that the class would have survived the defendant's standing arguments in the motion to dismiss. Although I personally think the anxiety and loss of time that stems from data security breaches constitute injuries in fact under Article III of the U.S. Constitution, that is a hotly contested question. But even if the class could survive the challenge to standing and prevail at trial, how much would the jury have awarded for anxiety and loss of time? Perhaps very modest statutory damages would have been available for a portion of the class, but perhaps not. In my opinion, recovering millions of dollars in these circumstances is nothing short of miraculous.

22. Consider finally the factor "(1) the time and labor expended by counsel." There are two ways that courts might consider this factor: qualitatively or quantitatively. The qualitative

approach assesses what class counsel did during the years of litigation; i.e., whether class counsel have dug deeply enough into a case to know what it is worth as opposed to selling out the class for a quick fee award. *See, e.g.*, *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988) ("[I]n awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using the lodestar formulation . . . ."). The quantitative approach is to calculate class counsel's lodestar and to "crosscheck" the fee percentage requested against the lodestar to ensure that the ensuing multiplier is not in some sense "too much." *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001).

23. In light of the deleterious effect the quantitative approach can have on class counsel's incentives—i.e., the lodestar crosscheck interrupts the percentage method's alignment of the interests of the class and class counsel—the better approach, in my opinion, is to assess this factor qualitatively. Here, there is little doubt that class counsel dug into this case deeply enough to know what it is worth. Although this litigation has not yet transpired as long as the typical class action does before it reaches settlement, *see* Fitzpatrick, *Empirical Study*, *supra*, at 820 (finding the average and median times for class actions to reach final settlement approval were around three years), class counsel's thorough investigation into damages has enabled the court to easily conclude that the value of this settlement is more than the class would net at trial.

24. On the other hand, it is true that the Second Circuit "encourage[s]" the lodestar crosscheck. *See, e.g.*, *Goldberger*, 209 F.3d at 50. Of course, "encourage" does not mean require and there are plenty of courts in this Circuit that do not do the crosscheck. *See, e.g.*, *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 71 (S.D.N.Y. 2003); *Teachers' Ret. Sys. of Louisiana v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *7 (S.D.N.Y. May 14, 2004); *Dorn v. Eddington Sec., Inc.*, 2011 WL 9380874, at *6-7 (S.D.N.Y. Sept. 21, 2011); *Palacio v. E*TRADE Fin. Corp.*, 2012 WL

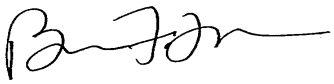
2384419, at *6-7 (S.D.N.Y. June 22, 2012); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 466 (S.D.N.Y. 2013); *Macedonia Church v. Lancaster Hotel, LP*, 2011 WL 2360138, at *13-14 (D. Conn. June 9, 2011). But even if the crosscheck is done here, there is no indication that class counsel's lodestar multiplier would be outside the bounds of previous cases. Class counsel has reported a multiplier of 2.75. According to my empirical study, courts that did the crosscheck awarded percentages that resulted in multipliers ranging from .07 to 10.3 with a mean of 1.65 and a median of 1.34. *See* Fitzpatrick, *Empirical Study, supra*, at 834. The Eisenberg-Miller studies found much the same. *See Eisenberg-Miller 2010, supra*, at 272 (finding mean multiplier of 1.81 before 2009); *Eisenberg-Miller 2017, supra*, at 965 (finding mean multiplier of 1.48 since 2009). But Eisenberg-Miller also found that multipliers tend to be higher in settlements with values as large as this one. (I did not examine that question in my study.) Thus, for example, their latest study found a mean multiplier of 2.72 for settlements above $67.5 million, *see Eisenberg-Miller 2017, supra*, at 967, and their older study found a mean of 2.70 for settlements between $69.6 million and $175.5 million, *see Eisenberg-Miller 2010*, *supra*, at 274. The multiplier here is therefore quite typical in cases of this size.

25. For all these reasons, it is my opinion that the fee request here is reasonable in light of the empirical studies and research on economic incentives in class action litigation.

26. My compensation for this declaration was a flat fee in no way dependent on the outcome of class counsel's fee petition.

Nashville, TN

April 12, 2022



Brian T. Fitzpatrick

EXHIBIT 3

Documents reviewed:

- Consent Order *In the Matter of: Morgan Stanley Bank, N.A.* (Oct. 8, 2020) (Office of the Comptroller of the Currency)
- Consolidated Class Action Complaint (filed 7/5/21, document 60)
- Memorandum of Law in Support of Morgan Stanley Smith Barney LLC's Motion to Dismiss (filed 8/9/21, document 64)
- Plaintiffs' Memorandum of Law in Opposition to Morgan Stanley Smith Barney LLC's Motion to Dismiss (filed 9/15/21, document 68)
- Reply Memorandum of Law in Further Support of Morgan Stanley Smith Barney LLC's Motion to Dismiss (filed 9/29/21, document 70)
- Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (filed 12/31/21, document 81-1)
- Declaration of Linda P. Nussbaum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (filed 12/31/21, document 81-2), including the Settlement Agreement and Release attached thereto ("Settlement Agreement")
- Order Granting Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (filed 1/18/22, document 82)
- Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Service Awards to the Named Plaintiffs (filed herewith)

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Milton R. Underwood Chair in Free Enterprise*, 2020 to present
- *FedEx Research Professor*, 2014-2015
- *Professor of Law*, 2012 to present
- *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018
- Classes: Civil Procedure, Litigation Finance

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010
- Classes: Civil Procedure

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

BOOKS

THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (Cambridge University Press 2021) (ed., with Randall Thomas)

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press 2019) (winner of the Pound Institute's 2022 Civil Justice Scholarship Award)

ACADEMIC ARTICLES

Distributing Attorney Fees in Multidistrict Litigation, 13 J. Leg. Anal. 558 (2021) (with Ed Cheng & Paul Edelman)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, 89 FORD. L. REV. 1151 (2021)

Many Minds, Many MDL Judges, 84 L. & Contemp. Problems 107 (2021)

Objector Blackmail Update: What Have the 2018 Amendments Done?, 89 FORD. L. REV. 437 (2020)

Why Class Actions are Something both *Liberals* and *Conservatives Can Love*, 73 VAND. L. REV. 1147 (2020)

Deregulation and Private Enforcement, 24 LEWIS & CLARK L. REV. 685 (2020)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, 40 NW. J. INT'L L. & BUS. 203 (2020) (with Randall Thomas)

Can the Class Action be Made Business Friendly?, 24 N.Z. BUS. L. & Q. 169 (2018)

Can and Should the New Third-Party Litigation Financing Come to Class Actions?, 19 THEORETICAL INQUIRIES IN LAW 109 (2018)

Scalia in the Casebooks, 84 U. CHI. L. REV. 2231 (2017)

The Ideological Consequences of Judicial Selection, 70 VAND. L. REV. 1729 (2017)

Judicial Selection and Ideology, 42 OKLAHOMA CITY UNIV. L. REV. 53 (2017)

Justice Scalia and Class Actions: A Loving Critique, 92 NOTRE DAME L. REV. 1977 (2017)

A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology, 69 VAND. L. REV. 991 (2016)

The Hidden Question in Fisher, 10 NYU J. L. & LIBERTY 168 (2016)

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

How Many Class Actions are Meritless?, in THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (ed., with Randall Thomas, Cambridge University Press 2021)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, in THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (ed., with Randall Thomas, Cambridge University Press 2021) (with Randall Thomas)

Do Class Actions Deter Wrongdoing? in THE CLASS ACTION EFFECT (Catherine Piché, ed., Éditions Yvon Blais, Montreal, 2018)

Judicial Selection in Illinois in AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY (Joseph E. Tabor, ed., Illinois Policy Institute, 2017)

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

Developments in Discovery Reform, George Mason Law & Economics Center Fifteenth Annual Judicial Symposium on Civil Justice Issues, Charleston, SC (Nov. 16, 2021) (panelist)

Locality Litigation and Public Entity Incentives to File Lawsuits: Public Interest, Politics, Public Finance or Financial Gain?, George Mason Law & Economics Center Symposium on Novel Liability Theories and the Incentives Driving Them, Nashville, TN (Oct. 25, 2021) (panelist)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, University of California Hastings College of the Law, San Francisco, CA (Nov. 3, 2020)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, The Judicial Role in Professional Regulation, Stein Colloquium, Fordham Law School, New York, NY (Oct. 9, 2020)

Objector Blackmail Update: What Have the 2018 Amendments Done?, Institute for Law and Economic Policy, Fordham Law School, New York, NY (Feb. 28, 2020)

Keynote Debate: The Conservative Case for Class Actions, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Jan. 24, 2020)

The Future of Class Actions, National Consumer Law Center Class Action Symposium, Boston, MA (Nov. 16, 2019) (panelist)

The Conservative Case for Class Actions, Center for Civil Justice, NYU Law School, New York, NY (Nov.11, 2019)

Deregulation and Private Enforcement, Class Actions, Mass Torts, and MDLs: The Next 50 Years, Pound Institute Academic Symposium, Lewis & Clark Law School, Portland, OR (Nov. 2, 2019)

Class Actions and Accountability in Finance, Investors and the Rule of Law Conference, Institute for Investor Protection, Loyola University Chicago Law School, Chicago, IL (Oct. 25, 2019) (panelist)

Incentivizing Lawyers as Teams, University of Texas at Austin Law School, Austin, TX (Oct. 22, 2019)

"Dueling Pianos": A Debate on the Continuing Need for Class Actions, Twenty Third Annual National Institute on Class Actions, American Bar Association, Nashville, TN (Oct. 18, 2019) (panelist)

A Debate on the Utility of Class Actions, Contemporary Issues in Complex Litigation Conference, Northwestern Law School, Chicago, IL (Oct.16, 2019) (panelist)

Litigation Funding, Forty Seventh Annual Meeting, Intellectual Property Owners Association, Washington, DC (Sep. 26, 2019) (panelist)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, International Class Actions Conference, Vanderbilt Law School, Nashville, TN (Aug. 24, 2019)

A New Source of Class Action Data, Corporate Accountability Conference, Institute for Law and Economic Policy, San Juan, Puerto Rico (April 12, 2019)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, Ninth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 14, 2018)

MDL: Uniform Rules v. Best Practices, Miami Law Class Action & Complex Litigation Forum, University of Miami Law School, Miami, FL (Dec. 7, 2018) (panelist)

Third Party Finance of Attorneys in Traditional and Complex Litigation, George Washington Law School, Washington, D.C. (Nov. 2, 2018) (panelist)

MDL at 50 - The 50th Anniversary of Multidistrict Litigation, New York University Law School, New York, New York (Oct. 10, 2018) (panelist)

The Discovery Tax, Law & Economics Seminar, Harvard Law School, Cambridge, Massachusetts (Sep. 11, 2018)

Empirical Research on Class Actions, Civil Justice Research Initiative, University of California at Berkeley, Berkeley, California (Apr. 9, 2018)

A Political Future for Class Actions in the United States?, The Future of Class Actions Symposium, University of Auckland Law School, Auckland, New Zealand (Mar. 15, 2018)

The Indian Class Actions: How Effective Will They Be?, Eighth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 19, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 8, 2017) (panelist)

Critical Issues in Complex Litigation, Contemporary Issues in Complex Litigation, Northwestern Law School (Nov. 29, 2017) (panelist)

The Conservative Case for Class Actions, Consumer Class Action Symposium, National Consumer Law Center, Washington, DC (Nov. 19, 2017)

The Conservative Case for Class Actions—A Monumental Debate, ABA National Institute on Class Actions, Washington, DC (Oct. 26, 2017) (panelist)

One-Way Fee Shifting after Summary Judgment, 2017 Meeting of the Midwestern Law and Economics Association, Marquette Law School, Milwaukee, WI (Oct. 20, 2017)

The Conservative Case for Class Actions, Pepperdine Law School Malibu, CA (Oct. 17, 2017)

One-Way Fee Shifting after Summary Judgment, Vanderbilt Law Review Symposium on The Future of Discovery, Vanderbilt Law School, Nashville, TN (Oct. 13, 2017)

The Constitution Revision Commission and Florida's Judiciary, 2017 Annual Florida Bar Convention, Boca Raton, FL (June 22, 2017)

Class Actions After Spokeo v. Robins*: Supreme Court Jurisprudence, Article III Standing, and Practical Implications for the Bench and Practitioners*, Northern District of California Judicial Conference, Napa, CA (Apr. 29, 2017) (panelist)

The Ironic History of Rule 23, Conference on Secrecy, Institute for Law & Economic Policy, Naples, FL (Apr. 21, 2017)

Justice Scalia and Class Actions: A Loving Critique, University of Notre Dame Law School, South Bend, Indiana (Feb. 3, 2017)

Should Third-Party Litigation Financing Be Permitted in Class Actions?, Fifty Years of Class Actions—A Global Perspective, Tel Aviv University, Tel Aviv, Israel (Jan. 4, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 2, 2016) (panelist)

The Ideological Consequences of Judicial Selection, William J. Brennan Lecture, Oklahoma City University School of Law, Oklahoma, City, Oklahoma (Nov. 10, 2016)

After Fifty Years, What's Class Action's Future, ABA National Institute on Class Actions, Las Vegas, Nevada (Oct. 20, 2016) (panelist)

Where Will Justice Scalia Rank Among the Most Influential Justices, State University of New York at Stony Brook, Long Island, New York (Sep. 17, 2016)

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

A Respected Judiciary—Balancing Independence and Accountability, 2016 Annual Florida Bar Convention, Orlando, FL (June 16, 2016) (panelist)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

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, FL (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, NY (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, CA (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, FL (Apr. 4, 2014)

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

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

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (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, Ann Arbor, MI (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, Nashville, TN (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, FL (Apr. 12, 2013) (panelist)

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

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

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

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

The End of Class Actions?, Washington University Law School, St. Louis, MO (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, Chicago, IL (Sep. 15-16, 2011) (participant)

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

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

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

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

Twombly *and* Iqbal *Reconsidered,* Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (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, Washington, DC (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (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, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (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, South Bend, IN (Oct. 10, 2009)

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

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

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

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

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

OTHER PUBLICATIONS

Memo to Mitch: Repeal the Republican Tax Increase, THE HILL (July 17, 2020)

The Right Way to End Qualified Immunity, THE HILL (June 25, 2020)

I Still Remember, 133 HARV. L. REV. 2458 (2020)

Proposed Reforms to Texas Judicial Selection, 24 TEX. R. L. & POL. 307 (2020)

The Conservative Case for Class Actions?, NATIONAL REVIEW (Nov. 13, 2019)

9th Circuit Split: What's the math say?, DAILY JOURNAL (Mar. 21, 2017)

Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

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

Does the Way We Choose our Judges Affect Case Outcomes?, American Legislative Exchange Council 2018 Annual Meeting, New Orleans, Louisiana (August 10, 2018) (panelist)

Oversight of the Structure of the Federal Courts, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate, Washington, D.C. (July 31, 2018)

Where Will Justice Scalia Rank Among the Most Influential Justices, The Leo Bearman, Sr. American Inn of Court, Memphis, TN (Mar. 21, 2017)

Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Washington, D.C. (Mar. 16, 2017)

Supreme Court Review 2016: Current Issues and Cases Update, Nashville Bar Association, Nashville, TN (Sep. 15, 2016) (panelist)

A Respected Judiciary—Balancing Independence and Accountability, Florida Bar Annual Convention, Orlando, FL (June 16, 2016) (panelist)

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

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, Nashville, TN (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

Member, American Law Institute
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies
Reviewer, Oxford University Press
Reviewer, Supreme Court Economic Review
Member, American Bar Association
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 & California (inactive)

COMMUNITY ACTIVITIES

Board of Directors, Nashville Ballet, 2011-2017 & 2019-present; Board of Directors, Beacon Center, 2018-present; Nashville Talking Library for the Blind, 2008-2009

JOURNAL OF EMPIRICAL LEGAL STUDIES

Journal of Empirical Legal Studies
Volume 7, Issue 4, 811–846, December 2010

An Empirical Study of Class Action Settlements and Their Fee Awards

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This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. Introduction

Class actions have been the source of great controversy in the United States. Corporations fear them.[1] Policymakers have tried to corral them.[2] Commentators and scholars have

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[1]See, e.g., Robert W. Wood, Defining Employees and Independent Contractors, Bus. L. Today 45, 48 (May–June 2008).

[2]See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

suggested countless ways to reform them.[3] Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.[4]

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.[5] I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;[6] these future studies are important because there may be more class action settlements in state courts than there are in federal court.[7]

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

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[3]See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1080–81 (2005).

[4]See, e.g., Samuel Issacharoff & Geoffrey Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009).

[5]See, e.g., Emery Lee & Thomas E. Willing, Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions 11 (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, How the Merits Matter: D&O Insurance and Securities Settlements, 157 U. Pa. L. Rev. 755 (2009).

[6]Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Suits, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133 (2004); Findings of the Study of California Class Action Litigation (Administrative Office of the Courts) (First Interim Report, 2009).

[7]See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 56 (2000).

any given year.[8] As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over $33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

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[8]Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly $5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. Prior Empirical Studies of Class Action Settlements

There are many existing empirical studies of federal securities class action settlements.[9] Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.[10] Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between $7 billion and $17 billion per year.[11] Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

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[9]See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <http://ssrn.com/abstract=870577> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

[10]See, e.g., RiskMetrics Group, available at <http://www.riskmetrics.com/scas>.

[11]See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

the settlements that courts have awarded to class action lawyers.[12] These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.[13] These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.[14] None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,[15] which was recently updated to include data through 2008,[16] and a 2003 study by Class Action Reports.[17] The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.[18] Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, $116 million and $12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.[19] Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

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[12]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–24, 28–36; Perino, Markets and Monitors, supra note 9, at 12–28, 39–44; Perino, Milberg Weiss, supra note 9, at 32–33, 39–60.

[13]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–18, 22, 28, 33; Perino, Markets and Monitors, supra note 9, at 20–21, 40; Perino, Milberg Weiss, supra note 9, at 32–33, 51–53.

[14]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 14–24, 29–30, 33–34; Perino, Markets and Monitors, supra note 9, at 20–28, 41; Perino, Milberg Weiss, supra note 9, at 39–58.

[15]See Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27 (2004).

[16]See Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II].

[17]See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (Mar.–Apr. 2003).

[18]See Eisenberg & Miller II, supra note 16, at 251.

[19]Id. at 258–59.

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.[20] For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.[21] Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.[22] Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of $35.4 and $7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.[23] Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.[24]

III. Federal Class Action Settlements, 2006 and 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,[25] (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website[26]—and (3) a list from the Administrative Office of Courts of all district court cases

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[20]See Eisenberg & Miller, supra note 15, at 61–62.

[21]See Eisenberg & Miller II, supra note 16, at 278.

[22]See Eisenberg & Miller, supra note 15, at 34.

[23]Id. at 47, 51.

[24]Id. at 61–62.

[25]The searches consisted of the following terms: ("class action" & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & "class action"); ("class action" /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); ("class action" /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

[26]See <http://classactionworld.com/>.

coded as class actions that terminated by settlement between 2005 and 2008.[27] I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.[28] For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a *16*-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.[29]

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.[30] My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

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[27]I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

[28]See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

[29]A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

[30]See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation: Cases and Materials 1061 (2d ed. 2006).

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.[31]

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.[32] At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

	Number of Settlements	
Subject Matter	*2006*	*2007*
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

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[31]See Halliburton Co. v. Graves, No. 04-00280 (S.D. Tex., Sept. 28, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Aug. 29, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Sept. 17, 2007).

[32]See, e.g., John C. Coffee, Jr., Reforming the Security Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1539–40 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

expected in light of Supreme Court precedent over the last two decades,[33] there were almost no mass tort class actions (included in the "Other" category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court[34]) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.[35] However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.[36] This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.[37] When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.[38] So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.[39] Prior to the Supreme Court's 1997 opinion in *Amchem Products, Inc. v. Windsor*,[40] it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

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[33]See, e.g., Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

[34]See Eisenberg & Miller II, supra note 16, at 257.

[35]Id. at 262.

[36]Id.

[37]See Martin H. Redish, Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545, 553 (2006).

[38]See Amchem Prods., Inc v Windsor, 521 U.S. 591, 620 (1997).

[39]See Redish, supra note 368, at 557–59.

[40]521 U.S. 591 (1997).

state and federal court between 2003 and 2008 were settlement classes.[41] It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.[42] As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

Subject Matter	*Average*	*Median*	*Minimum*	*Maximum*
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

[41]See Eisenberg & Miller II, supra note 16, at 266.

[42]The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.[43] Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.[44] The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.[45] The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.[46]

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

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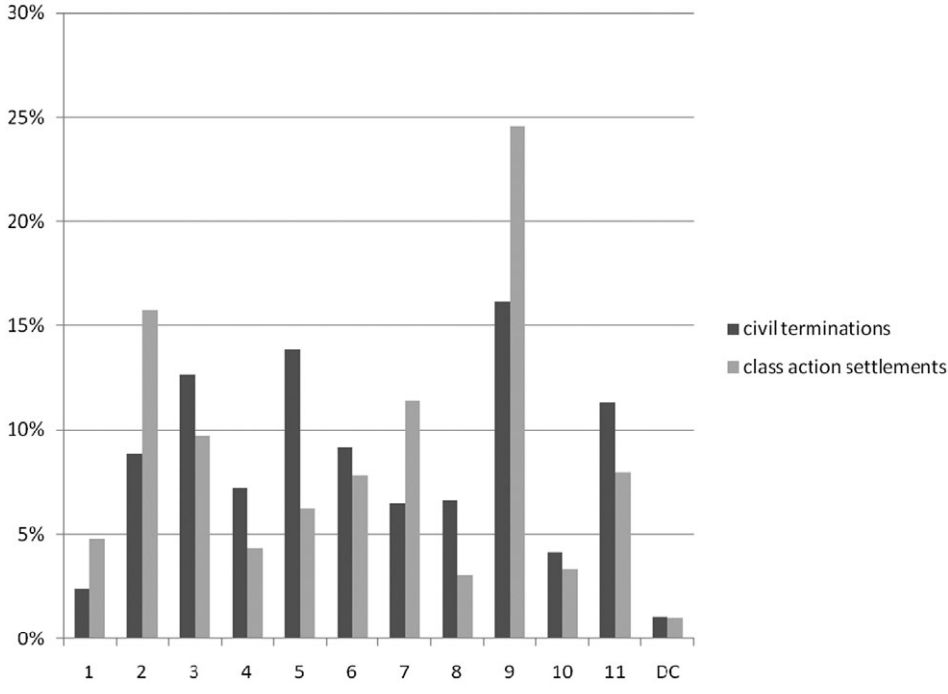
[43]See Eisenberg & Miller, supra note 15, at 59–60.

[44]See Clemmons v. Rent-a-Center W., Inc., No. 05-6307 (D. Or. Jan. 20, 2006).

[45]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006).

[46]See Eisenberg & Miller II, supra note 16, at 260.

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



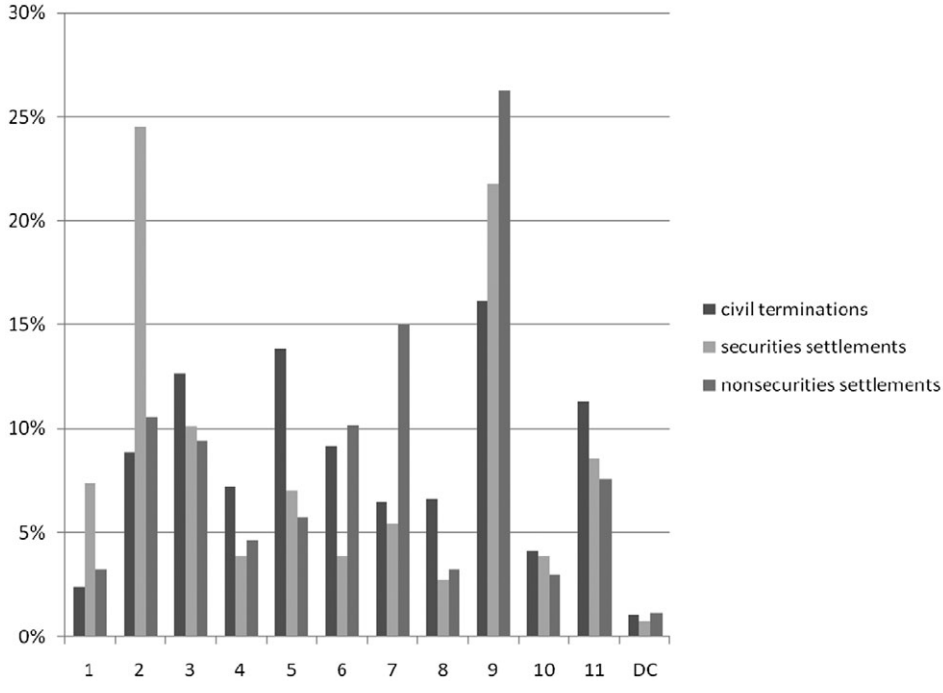
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.[47] One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

[47]See Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

tions in which defendants have their corporate headquarters or other operations.[48] This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit's overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

[48]See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant's corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.[49] In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.[50]

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

Subject Matter	*Cash*	*In-Kind Relief*	*Injunctive or Declaratory Relief*
Securities ($n = 257$)	100%	0%	2%
Labor and employment ($n = 94$)	95%	6%	29%
Consumer ($n = 87$)	74%	30%	37%
Employee benefits ($n = 61$)	90%	0%	34%
Civil rights ($n = 61$)	49%	2%	75%
Debt collection ($n = 42$)	98%	0%	12%
Antitrust ($n = 30$)	97%	13%	7%
Commercial ($n = 13$)	92%	0%	62%
Other ($n = 43$)	77%	7%	33%
All ($n = 688$)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

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[49]See Fed. R. Civ. P. 23(b).

[50]These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,[51] consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

	Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)			
Subject Matter	*2006* (n = *304*)		*2007* (n = *384*)	
Securities	$16,728	76%	$8,038	73%
Labor and employment	$266.5	1%	$547.7	5%
Consumer	$517.3	2%	$732.8	7%
Employee benefits	$443.8	2%	$280.8	3%
Civil rights	$265.4	1%	$81.7	1%
Debt collection	$8.9	<1%	$5.7	<1%
Antitrust	$1,079	5%	$660.5	6%
Commercial	$1,217	6%	$124.0	1%
Other	$1,568	7%	$592.5	5%
Total	$22,093	100%	$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks' offices.

[51]See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are "seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong").

includes all determinate[52] payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.[53] I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only $1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.[54]

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over $33 billion was approved in the 2006–2007 settlements. Over $22 billion was approved in 2006 and over $11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled $6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than $1 billion were approved in 2006.[55] Indeed, it is worth noting that the eight settlements for more than $1

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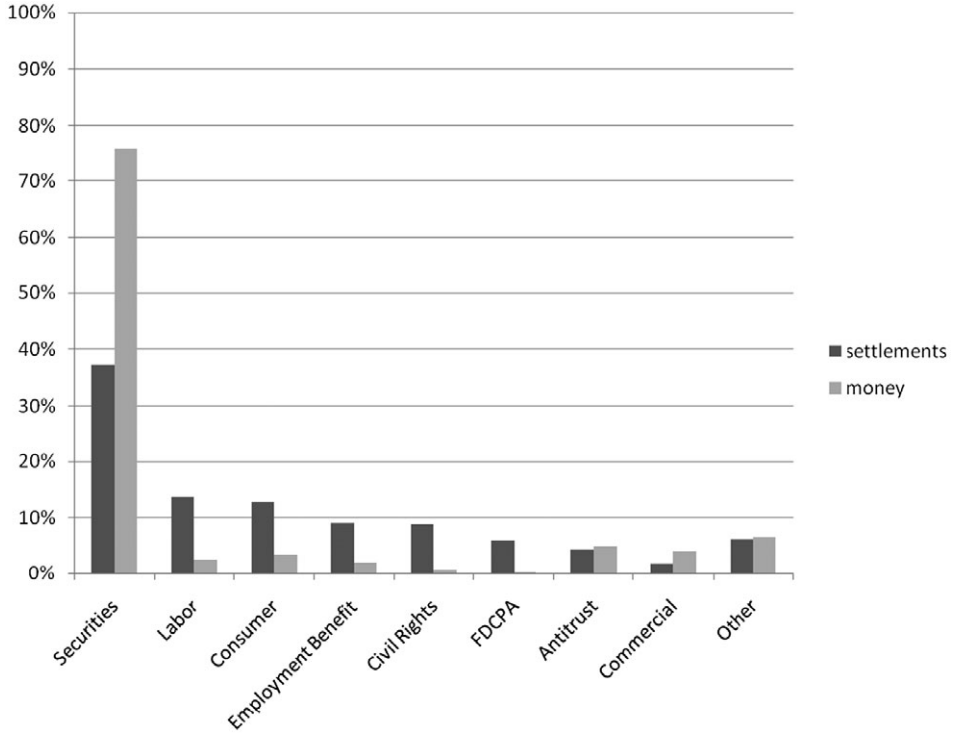
[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

[53]In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

[54]See Hensler et al., supra note 7, at 427–30.

[55]See In re Enron Corp. Secs. Litig., MDL 1446 (S.D. Tex. May 24, 2006) ($6,600,000,000); In re Tyco Int'l Ltd. Multidistrict Litig., MDL 02-1335 (D.N.H. Dec. 19, 2007) ($3,200,000,000); In re AOL Time Warner, Inc. Secs. & "ERISA" Litig., MDL 1500 (S.D.N.Y. Apr. 6, 2006) ($2,500,000,000); In re: Diet Drugs Prods. Liab. Litig., MDL 1203 (E.D. Pa. May 24, 2006) ($1,275,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel I), No. 01-1855 (S.D.N.Y. Dec. 26, 2006) ($1,142,780,000); In re Royal Ahold N.V. Secs. & ERISA Litig., 03-1539 (D. Md. Jun. 16, 2006)

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks' offices.

billion accounted for almost $18 billion of the $33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below $10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

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($1,100,000,000); Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) ($1,075,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) ($1,074,270,000).

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

Settlement Size (in Millions)	*Number of Settlements*
[$0 to $1]	131 (21.7%)
($1 to $10]	261 (43.1%)
($10 to $50]	139 (23.0%)
($50 to $100]	33 (5.45%)
($100 to $500]	31 (5.12%)
($500 to $6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

Subject Matter	*Average*	*Median*
Securities ($n = 257$)	$96.4	$8.0
Labor and employment ($n = 88$)	$9.2	$1.8
Consumer ($n = 65$)	$18.8	$2.9
Employee benefits ($n = 52$)	$13.9	$5.3
Civil rights ($n = 34$)	$9.7	$2.5
Debt collection ($n = 40$)	$0.37	$0.088
Antitrust ($n = 29$)	$60.0	$22.0
Commercial ($n = 12$)	$111.7	$7.1
Other ($n = 28$)	$76.6	$6.2
All ($N = 605$)	$54.7	$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost $55 million, but the median was only $5.1 million. (With the $6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to $43.8 million and, for securities cases, dropped to $71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around $100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above $1 billion;[56] when that settlement is removed, the average for commercial cases was only $24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was $112 million and the median was $12.9 million, both in 2006 dollars,[57] more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of $115 million and $11.7 million (both again in 2006 dollars),[58] respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did ($39.5 million in 2006 dollars), but a larger median ($8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more "mega" class actions today than there were before 2003, explaining its smaller mean.[59]

It is interesting to ask how significant the $16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. "tort" system every year by a financial services consulting firm, Tillinghast-Towers Perrin.[60] These studies are not directly

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[56]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving $1,075,000,000 settlement).

[57]See Eisenberg & Miller, supra note 15, at 47.

[58]See Eisenberg & Miller II, supra note 16, at 262.

[59]There were eight class action settlements during 2006 and 2007 of more than $1 billion. See note 55 supra.

[60]Some commentators have been critical of Tillinghast's reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders, 14 Conn. Ins. L.J. 75, 84 (2007); John Fabian Witt, Form and Substance in the Law of

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred $160 billion and $164 billion, respectively, to claimants and their lawyers.[61] The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. Attorney Fees in Federal Class Action Settlements, 2006 and 2007

A. Total Amount of Fees and Expenses

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some $16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.[62] The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some $5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.[63] The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the $6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.[64] Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 Loy. L.A.L. Rev. 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

[61]See Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008). The report calculates $252 billion in total tort "costs" in 2007 and $246.9 billion in 2006, id., but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003).

[62]See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little? 158 U. Pa. L. Rev. 2043, 2043–44 (2010).

[63]In some of the partial settlements, see note 29 supra, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

[64]See, e.g., Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

	Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area	
Subject Matter	*2006 (n = 292)*	*2007 (n = 363)*
Securities	$1,899 (11%)	$1,467 (20%)
Labor and employment	$75.1 (28%)	$144.5 (26%)
Consumer	$126.4 (24%)	$65.3 (9%)
Employee benefits	$57.1 (13%)	$71.9 (26%)
Civil rights	$31.0 (12%)	$32.2 (39%)
Debt collection	$2.5 (28%)	$1.1 (19%)
Antitrust	$274.6 (26%)	$157.3 (24%)
Commercial	$347.3 (29%)	$18.2 (15%)
Other	$119.3 (8%)	$103.3 (17%)
Total	$2,932 (13%)	$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.[65] If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.[66] To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

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[65]Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

[66]See Hensler et al., supra note 7, at 427–30.

must be "reasonable."[67] Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.[68] The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.[69] The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a "lodestar cross-check").[70] My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.[71] The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.[72] Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

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[67]Fed. R. Civ. P. 23(h).

[68]The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (same); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

[69]See Eisenberg & Miller, supra note 15, at 31.

[70]Id. at 31–32.

[71]These numbers are based on the fee method described in the district court's order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel's motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an "other" method.

[72]See Eisenberg & Miller II, supra note 16, at 267.

that use the percentage-of-the-settlement method usually rely on a multifactor test[73] and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.[74] In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.[75] Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.[76] Nonetheless, presumptions, of course, can be overcome and, as one court has put it, "[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case."[77] The court added: "[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility."[78] It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court's order or counsel's motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.[79]

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

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[73]The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (six factors); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

[74]See Eisenberg & Miller, supra note 15, at 32.

[75]See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003).

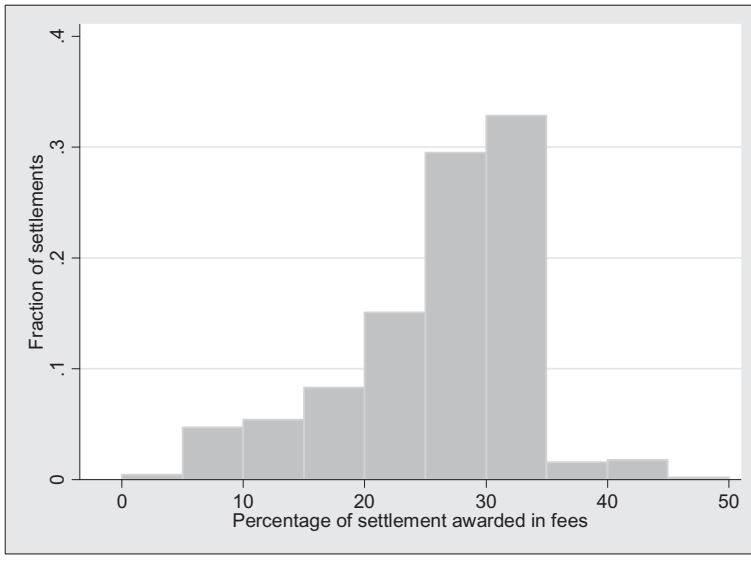
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

[77]*Camden I Condo. Ass'n*, 946 F.2d at 774.

[78]*Camden I Condo. Ass'n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

[79]See Eisenberg & Miller II, supra note 16, at 259.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.[80]

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,[81] a bit lower than the ranges in my

[80]It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

[81]See Eisenberg & Miller II, supra note 16, at 262.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

SOURCES: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Circuit	*Mean*	*Median*
First ($n = 27$)	27.0	25.0
Second ($n = 72$)	23.8	24.5
Third ($n = 50$)	25.4	29.3
Fourth ($n = 19$)	25.2	28.0
Fifth ($n = 27$)	26.4	29.0
Sixth ($n = 25$)	26.1	28.0
Seventh ($n = 39$)	27.4	29.0
Eighth ($n = 15$)	26.1	30.0
Ninth ($n = 111$)	23.9	25.0
Tenth ($n = 18$)	25.3	25.5
Eleventh ($n = 35$)	28.1	30.0
DC ($n = 6$)	26.9	26.0

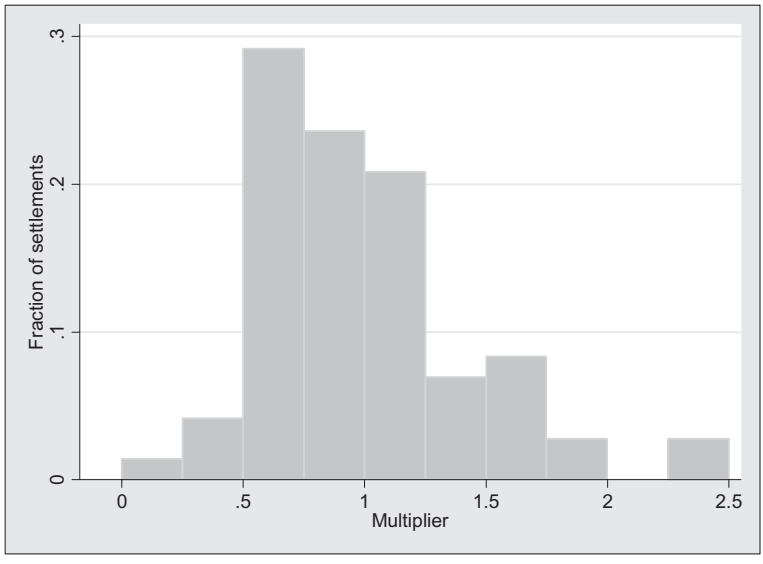
SOURCES: Westlaw, PACER, district court clerks' offices.

settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly $5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



SOURCES: Westlaw, PACER, district court clerks' offices.

are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.[82] To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

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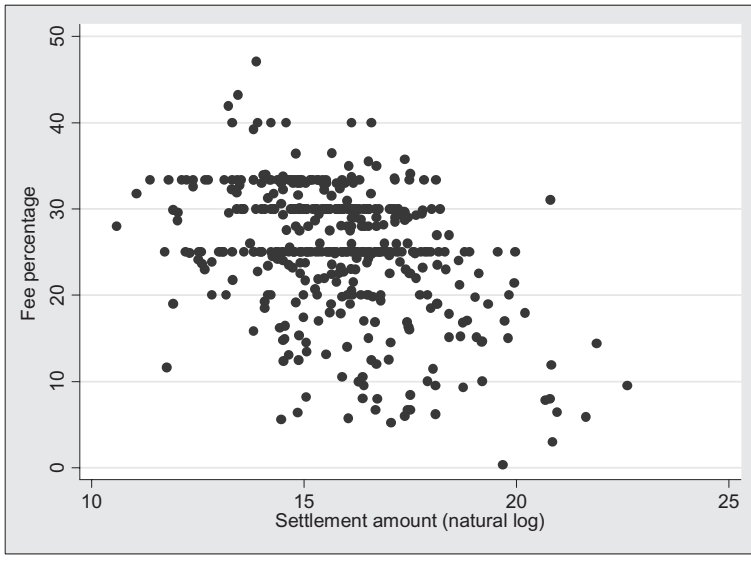
[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.[83] In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that 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.

[83]See Eisenberg & Miller II, supra note 16, at 265.

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
[$0 to $0.75] ($n = 45$)	28.8%	29.6%	6.1%
($0.75 to $1.75] ($n = 44$)	28.7%	30.0%	6.2%
($1.75 to $2.85] ($n = 45$)	26.5%	29.3%	7.9%
($2.85 to $4.45] ($n = 45$)	26.0%	27.5%	6.3%
($4.45 to $7.0] ($n = 44$)	27.4%	29.7%	5.1%
($7.0 to $10.0] ($n = 43$)	26.4%	28.0%	6.6%
($10.0 to $15.2] ($n = 45$)	24.8%	25.0%	6.4%
($15.2 to $30.0] ($n = 46$)	24.4%	25.0%	7.5%
($30.0 to $72.5] ($n = 42$)	22.3%	24.9%	8.4%
($72.5 to $6,600] ($n = 45$)	18.4%	19.0%	7.9%

SOURCES: Westlaw, PACER, district court clerks' offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
($72.5 to $100] ($n = 12$)	23.7%	24.3%	5.3%
($100 to $250] ($n = 14$)	17.9%	16.9%	5.2%
($250 to $500] ($n = 8$)	17.8%	19.5%	7.9%
($500 to $1,000] ($n = 2$)	12.9%	12.9%	7.2%
($1,000 to $6,600] ($n = 9$)	13.7%	9.5%	11%

SOURCES: Westlaw, PACER, district court clerks' offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.[84] It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.[85] Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.[86] The independent

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[84]See generally C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996). See also Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. Chi. L. Rev. 715, 724–25 (2008).

[85]See Brian T. Fitzpatrick, The End of Objector Blackmail? 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

[86]Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.[87]

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.[88] One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),[89] judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.[90]

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

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appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier ($6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

[87]Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008); Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994).

[88]Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

[89]See Fitzpatrick, supra note 85, at 1640.

[90]See Eisenberg & Miller II, supra note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, supra note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Settlement amount (natural log)	–1.77	–1.76	–1.76	–1.41	–1.78
	(–5.43)**	(–8.52)**	(–7.16)**	(–4.00)**	(–8.67)**
Age of case (natural log days)	1.66	1.99	1.13	1.72	2.00
	(2.31)**	(2.71)**	(1.21)	(1.47)	(2.69)**
Judge's political affiliation (1 = Democrat)	–0.630	–0.345	0.657	–1.43	–0.232
	(–0.83)	(–0.49)	(0.76)	(–1.20)	(–0.34)
Settlement class		0.150	0.873	–1.62	0.124
		(0.19)	(0.84)	(–1.00)	(0.15)
1st Circuit		3.30	4.41	0.031	0.579
		(2.74)**	(3.32)**	(0.01)	(0.51)
2d Circuit		0.513	–0.813	2.93	–2.23
		(0.44)	(–0.61)	(1.14)	(–1.98)**
3d Circuit		2.25	4.00	–1.11	—
		(1.99)**	(3.85)**	(–0.50)	
4th Circuit		2.34	0.544	3.81	—
		(1.22)	(0.19)	(1.35)	
5th Circuit		2.98	1.09	6.11	0.230
		(1.90)*	(0.65)	(1.97)**	(0.15)
6th Circuit		2.91	0.838	4.41	—
		(2.28)**	(0.57)	(2.15)**	
7th Circuit		2.55	3.22	2.90	–0.227
		(2.23)**	(2.36)**	(1.46)	(–0.20)
8th Circuit		2.12	–0.759	3.73	–0.586
		(0.97)	(–0.24)	(1.19)	(–0.28)
9th Circuit		—	—	—	–2.73
					(–3.44)**
10th Circuit		1.45	–0.254	3.16	—
		(0.94)	(–0.13)	(1.29)	
11th Circuit		4.05	3.85	4.14	—
		(3.44)**	(3.07)**	(1.88)*	
DC Circuit		2.76	2.60	2.41	—
		(1.10)	(0.80)	(0.64)	
Securities case		—			—
Labor and employment case		2.93		—	2.85
		(3.00)**			(2.94)**
Consumer case		–1.65		–4.39	–1.62
		(–0.88)		(–2.20)**	(–0.88)
Employee benefits case		–0.306		–4.23	–0.325
		(–0.23)		(–2.55)**	(–0.26)
Civil rights case		1.85		–2.05	1.76
		(0.99)		(–0.97)	(0.95)
Debt collection case		–4.93		–7.93	–5.04
		(–1.71)*		(–2.49)**	(–1.75)*
Antitrust case		3.06		0.937	2.78
		(2.11)**		(0.47)	(1.98)**

Table 12 *Continued*

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Commercial case		−0.028		−2.65	0.178
		(−0.01)		(−0.73)	(0.05)
Other case		−0.340		−3.73	−0.221
		(−0.17)		(−1.65)	(−0.11)
Constant	42.1	37.2	43.0	38.2	40.1
	(7.29)**	(6.08)**	(6.72)**	(4.14)**	(7.62)**
N	427	427	232	195	427
R^2	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.

SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.[91] Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.[92] On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.[93] Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as "unambiguous." Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

[91]See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

[92]Id. at 178–79.

[93]See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, supra note 81, at 734.

with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,[94] and that settlement classes were not associated with fee percentages in their 2003–2008 data set.[95]

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.[96]

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[94]See Eisenberg & Miller, supra note 15, at 61.

[95]See Eisenberg & Miller II, supra note 16, at 266.

[96]This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.[97] This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.[98] This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.[99]

V. Conclusion

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than $33 billion. Of this $33 billion, nearly $5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

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[97]See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

[98]The Ninth Circuit's differences persisted.

[99]See Eisenberg & Miller II, supra note 16, at 260.

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.