

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION ) MDL 2804**  
**OPIATE LITIGATION )**  
**) Case No. 1:17-md-2804**  
**)**  
**THIS DOCUMENT RELATES TO: ) Judge Dan Aaron Polster**  
**)**  
**ALL THIRD PARTY PAYOR ACTIONS )**

**THIRD PARTY PAYOR PLAINTIFFS' MOTION FOR FINAL APPROVAL  
OF CLASS ACTION SETTLEMENT AND FOR ATTORNEYS' FEES, EXPENSES, AND  
SERVICE AWARDS**

Third Party Payor (“TPP”) Plaintiffs Cleveland Bakers and Teamsters Health and Welfare Fund; Pipe Fitters Local Union No. 120 Insurance Fund; Pioneer Telephone Cooperative, Inc. Employee Benefits Plan; American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan; Louisiana Assessors’ Insurance Fund; Flint Plumbing and Pipefitting Industry Health Care Fund; United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania; and Sheet Metal Workers Local No. 25 Health & Welfare Fund, on behalf of themselves and the proposed Settlement Class<sup>1</sup> they represent, respectfully move this Court to enter an Order:

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<sup>1</sup> Unless otherwise noted, capitalized terms herein have the definitions set forth in the Settlement Agreement.

- Granting final approval of the class action settlement between TPPs and Settling Distributors under Rule 23(e)(2) of the Federal Rules of Civil Procedure;
- Confirming the appointment of Paul Geller and Mark Dearman of Robbins Geller Rudman & Dowd, LLP and Elizabeth Cabraser and Eric Fastiff of Lieff Cabraser Heimann & Bernstein, LLP, as Settlement Class Counsel, confirming the designation of Mr. Geller and Ms. Cabraser as Co-Lead Settlement Class Counsel, and further appointing James Dugan, II of The Dugan Law Firm, APLC as Settlement Class Counsel and designating Mr. Dugan as Co-Lead Settlement Class Counsel;
- Confirming the appointment of Settlement Class Representatives Cleveland Bakers and Teamsters Health and Welfare Fund; Pipe Fitters Local Union No. 120 Insurance Fund; Pioneer Telephone Cooperative, Inc. Employee Benefits Plan; American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan; Louisiana Assessors' Insurance Fund; and Flint Plumbing and Pipefitting Industry Health Care Fund; and further appointing United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania and Sheet Metal Workers Local No. 25 Health & Welfare Fund; Louisiana Assessors' Insurance Fund as additional Settlement Class Representatives;
- Awarding Settlement Class Counsel's requested attorneys' fees and expenses under Fed. R. Civ. P. 23(h);
- Awarding Settlement Class Counsel's requested Settlement Class Representative service awards;
- Entering judgment dismissing the TPP Actions by Settlement Class Members, coordinated under MDL No. 2804, with prejudice as to the Settling Distributors and directing Settlement Class Members to promptly dismiss the other Actions not coordinated under MDL No.

2804 with prejudice as to the Settling Distributors, in both instances without costs, except as provided in the Settlement Agreement;

- Discharging and releasing the Released Entities from all Released Claims;
- Permanently enjoining the institution and prosecution by Settlement Class Members and Releasers of any other action against the Released Entities in any forum asserting Claims in any way related to the Released Claims;
- Discharging and releasing Settlement Class Representatives, Settlement Class Members, and their counsel of the claims provided in Section IX.L of the Settlement Agreement; and
- Reserving and continuing exclusive jurisdiction over the Settlement, including the Escrow Account, the Escrow Agent, Settlement Class Counsel as the Escrow Account's tax administrator, and all future proceedings concerning the administration, consummation, and enforcement of this Settlement Agreement.

Plaintiffs' [Proposed] Order Granting Motion for Final Approval of Class Action Settlement and for Attorneys' Fees, Expenses, and Service Awards is separately submitted with this motion. The Settling Distributors do not oppose entry of the Final Approval Order.

This motion is supported by the following Memorandum of Points and Authorities and the accompanying Joint Declaration of Paul J. Geller and Elizabeth J. Cabraser in Support of TPP Plaintiffs' Motion for Final Approval of Class Action Settlement and for Attorneys' Fees, Expenses, and Service Awards ("Joint Declaration" or "Joint Decl.") and the Exhibits thereto.

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## MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs Cleveland Bakers and Teamsters Health and Welfare Fund; Pipe Fitters Local Union No. 120 Insurance Fund; Pioneer Telephone Cooperative, Inc. Employee Benefits Plan; American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan; Louisiana Assessors' Insurance Fund; Flint Plumbing and Pipefitting Industry Health Care Fund; United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania; and Sheet Metal Workers Local No. 25 Health & Welfare Fund<sup>2</sup> (collectively, "Settlement Class Representatives," "TPP Plaintiffs," or "Plaintiffs"), respectfully submit this Memorandum of Points and Authorities in support of their Motion for Final Approval of Class Action Settlement and for Attorneys' Fees, Expenses, and Service Awards between the TPP Plaintiffs and the Settling Distributors, and request entry of the [Proposed] Order Granting TPP Plaintiffs' Motion for Final Approval of Class Action Settlement and for Attorneys' Fees, Expenses, and Service Awards ("Final Approval Order").

### I. INTRODUCTION

This Settlement resolves claims by TPP Plaintiffs and Settlement Class Members against Settling Distributors for their alleged role in the nationwide opioid crisis, for which Settling Distributors will pay \$300 million, inclusive of any and all fees, expenses, and service awards ("Settlement Amount"). The Settlement compensates TPP Settlement Class Members for their claims of opioid-related economic loss, such as costs incurred to pay for treatment of individuals with substance use disorder, opioid use disorder ("OUD"), or other opioid-related conditions. The Settlement Amount shall not be subject to reduction, and, upon the occurrence of the Effective

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<sup>2</sup> The Court has not yet appointed United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania or Sheet Metal Workers Local No. 25 Health & Welfare Fund as Settlement Class Representatives, but TPP Plaintiffs seek their appointment herein.

Date, no funds will revert to the Settling Distributors. Settlement Class Members' claims will be paid pursuant to the Plan of Allocation described in the Expert Report of Professor Meredith Rosenthal Regarding Allocation of Settlement Proceeds (ECF 5614-7). Under the Plan of Allocation, any Settlement Class Member filing a valid claim prior to the end of the claims period will be paid its net allocative share, after the Court's final approval of the Settlement and absent any pending appeals.

## **II. SETTLEMENT NOTICE AND ADMINISTRATION TO DATE**

Pursuant to the Order Granting TPP Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e) ("Preliminary Approval Order") (ECF 5616), Interim Settlement Class Counsel on October 1, 2024, filed with the Court proof of dissemination of the Notice to TPPs (ECF 5662). As detailed in the Declaration of Eric J. Miller Regarding Dissemination of Notice (ECF 5662, 5662-1), A.B. Data mailed the Postcard Notice to 42,005 entities in its TPP Database, sent 1,041 emails to TPPs and their representatives with available email addresses, caused digital banner ads to appear on certain websites, disseminated a press release version of the Notice via *PR Newswire*, opened the settlement website ([www.TPPOpioidSettlement.com](http://www.TPPOpioidSettlement.com)), and opened a case-specific, toll-free telephone number with an interactive voice response system and live operators. *See* ECF 5662-1. Initial responses from TPPs have been positive and encouraging, with no objections, and just two non-litigating opt-outs received ahead of the objection and opt-out deadline on November 4, 2024. Joint Decl. ¶11.

## **III. ARGUMENT**

### **A. The Court Should Certify the TPP Settlement Class Under Rule 23(e)(2)**

The Court has already found that "it will likely be able to certify, under Rule 23(e)(2), the proposed Settlement Class as defined . . . , for settlement purposes only, because the Class and its



representatives likely meet all relevant requirements of [Rules 23(a) and 23(b)(3)].” Preliminary Approval Order (ECF No. 5616) at 4-5.<sup>3</sup> TPP Plaintiffs analyzed these requirements in their Motion for Preliminary Approval (ECF 5614) and briefly summarize them again below.

**1. The Settlement Class Meets the Requirements of Rule 23(a)**

Rule 23(a) requires numerosity, commonality, typicality, and adequacy. The Sixth Circuit has also adopted an implicit ascertainability requirement for classes certified under Rule 23(b)(3). *See In re Nat’l Prescription Opiate Litig.*, 2021 WL 320754, at \*3 (N.D. Ohio Feb. 1, 2021) (citing *Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016)).

Rule 23(a)(1): Numerosity requires that the class be “so numerous that joinder of all members is impracticable[.]” Fed. R. Civ. P. 23(a)(1). Here the Settlement Class contains over 40,000 TPPs, easily satisfying numerosity. *See, e.g., Snelling v. ATC Healthcare Servs. Inc.*, 2012 WL 6042839, at \*5 (S.D. Ohio Dec. 4, 2012) (a class of 40 or more is generally sufficiently numerous); *Rotuna v. W. Customer Mgmt. Grp., LLC*, 2010 WL 2490989, at \*3 (N.D. Ohio June 15, 2010) (1,800-member class easily satisfied numerosity).

Rule 23(a)(2): Commonality requires that class members share common questions of law or fact. To assess commonality, courts consider whether there is a common contention that, if resolved, would address all claims “in one stroke.” *McKnight v. Erico Int’l Corp.*, 655 F. Supp. 3d 645, 656-57 (N.D. Ohio 2023) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Here, TPPs’ claims are rooted in a core set of common questions about Settling Distributors’ alleged conduct. These questions are the same across the TPP Settlement Class because they relate to each Settling Distributor’s knowledge and actions. They are thus questions that can be fairly resolved for all Settlement Class Members at once.

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<sup>3</sup> Unless otherwise noted, all emphasis is added and citations are omitted.

Rule 23(a)(3): Typicality requires “the claims or defenses of the representative parties [to be] typical of the claims or defenses of the class[.]” Fed. R. Civ. P. 23(a)(3). A named plaintiff’s claim is typical if “it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.” *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007). Here, typicality is again satisfied because TPPs’ claims arise from Settling Distributors’ same alleged conduct and legal duties to prevent diversion within the prescription opioid supply chain, creating a clear nexus between TPP Plaintiffs’ claims and those of the TPP Settlement Class Members.

Rule 23(a)(4): Adequacy requires “the representative parties [to] fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In the Sixth Circuit, there are two criteria for determining adequacy: “(1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel.” *McKnight*, 655 F. Supp. 3d at 657 (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1976)).

The six appointed Settlement Class Representatives and two new proposed Settlement Class Representatives, which include named Plaintiffs in actions centralized in this MDL, and six of which are TPP bellwether Plaintiffs, have no interests antagonistic to Settlement Class Members and will continue to protect the Class’s interests in overseeing administration of the settlement and through any appeals. The Representatives understand their duties, have agreed to consider the interests of absent Settlement Class Members, and reviewed and uniformly endorsed the Settlement terms. The Representatives have further demonstrated their adequacy by participating actively in the case, and each Representative has expressed continued willingness to protect the Settlement Class until the Settlement is approved and its administration completed. Joint Decl.

¶¶25-26. Moreover, as demonstrated throughout this litigation, Interim Settlement Class Counsel have undertaken the ongoing pleading, briefing, investigation, discovery work, effort, and expense of the TPP cases in this MDL. Over the course of the more than six years since filing their clients' complaints, Interim Settlement Class Counsel have demonstrated their willingness to devote whatever resources are necessary to reach a successful outcome. They, too, satisfy Rule 23(a)(4). *Id.* ¶¶14-16.

## 2. The Settlement Class Meets the Requirements of Rule 23(b)(3)

Predominance: “To meet the predominance requirement [under Rule 23(b)(3)], a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof.” *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 544 (6th Cir. 2012). The TPP Settlement Class can be maintained under Rule 23(b)(3) because questions that turn on generalized proof predominate over questions that affect only individual TPPs. TPPs' claims depend, first and foremost, on common questions regarding Settling Distributors' alleged conduct. TPP Plaintiffs also allege a common, unifying injury that, like every TPP Settlement Class Member's injury, allegedly arises from the inordinate increase in opioid sales and diversion nationwide that began with the 1996 launch of OxyContin. These questions, capable of resolution with the same evidence for all TPPs, are the type of questions perfectly suitable for class-wide adjudication. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). And, while the extent of individual Settlement Class Members' damages may vary in degree, that variance does not defeat a finding of predominance for the Settlement Class as a whole. *See McKnight*, 655 F. Supp. 3d at 658 (citing *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 460 (6th Cir. 2020)).

Superiority: The Rule 23(b)(3) superiority requirement concerns whether a class action is a better method than individual litigation for adjudication of a claim. *See Pfaff v. Whole Foods*

*Mkt. Grp. Inc.*, 2010 WL 3834240, at \*7 (N.D. Ohio Sept. 29, 2010). From an efficiency standpoint, class treatment here is far superior to the litigation of thousands of individual TPP cases, each of which would have to prove the same wrongful conduct to establish Settling Distributors' wrongful conduct and would offer the same or similar evidence. Given that TPP Settlement Class Members number in the tens of thousands, a class-wide settlement avoids the possibility of just as many lawsuits with potentially inconsistent rulings and results. Moreover, because some TPPs are quite small, their damages would likely pale against the costs of litigating cases against the three largest pharmaceutical distributors in the United States. Thus, class-wide resolution of TPP Settlement Class Members' claims is plainly favorable as compared to other means of adjudication.

Ascertainability: Rule 23(b)(3) classes in the Sixth Circuit must also meet an implied ascertainability requirement, *see Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466 (6th Cir. 2017), and must include a class definition that is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member [of the proposed class,]" *Young*, 693 F.3d at 538. Here, Settlement Class Members can be identified based on their status as TPPs that provide healthcare and pharmacy benefits to eligible plan participants and beneficiaries, and that paid for prescription drugs and OUD treatment for beneficiaries of their plans in the Class Period. The TPP settlement classes with which Interim Settlement Class Counsel are experienced have demonstrated that TPP classes are readily ascertainable.

For the reasons set forth above, the Court should find that the TPP Settlement Class and its Representatives meet all relevant requirements of Rule 23(a) and (b)(3).

**B. The Settlement Is Fair, Reasonable, and Adequate Under Rule 23(e)(2)**

A court may approve a proposed class settlement only “after considering 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 . . . ; and (D) the proposal treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2); *see also McKnight*, 655 F. Supp. 3d at 661. The TPP-Distributors Settlement satisfies all four of these factors. In the Sixth Circuit, additional considerations guide the Rule 23(e)(2) inquiry: “(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.” *Int’l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007) (“UAW”). However, while the UAW factors “might have relevance on any particular set of facts[,] [w]here they do not, there is no occasion to consider them.” *McKnight*, 655 F. Supp. 3d at 661. Thus, while all of the UAW factors may not be relevant to the facts of the settlement at issue here, TPP Plaintiffs note that the settlement does nonetheless satisfy both the UAW and the Rule 23(e)(2) factors.

**1. Settlement Class Representatives and Interim Settlement Class Counsel Have Adequately Represented the Class Under Rule 23(e)(2)(A)**

Rule 23(e)(2)(A) is “redundant of the requirements of Rule 23(a)(4) and Rule 23(g)[.]” 4 William B. Rubinstein et al., *Newberg & Rubenstein on Class Actions* §13:49 (6th ed. 2022). Here, Interim Settlement Class Counsel have prosecuted this action and its fair resolution with vigor and dedication, and have fought hard to protect the interests of the Settlement Class as evidenced by the significant compensation available through the settlement. To achieve this outcome, Interim Settlement Class Counsel undertook significant efforts to uncover the facts at issue and engaged

in robust Rule 12 motion practice, submitting thorough and successful opposition briefs to Settling Distributors' motion to dismiss and certify the Order for appeal in the *Cleveland Bakers* case. Likewise, the TPP Settlement Class Representatives played an integral role in the litigation by closely consulting with counsel throughout the process. The Settlement Class Representatives who serve as TPP Bellwether Plaintiffs or briefing bellwethers have also further amended their complaints to conform with the best new evidence in the MDL, briefed important issues related to the Court's management of these cases, served numerous subpoenas, and negotiated production of claims data with third parties and Defendants. Moreover, the six appointed and two newly proposed TPP Settlement Class Representatives have each worked with counsel to review and evaluate the terms of the proposed Settlement Agreement, and each believes that the settlement is fair, reasonable, and adequate for the many reasons explained herein. Each Settlement Class Representative has also expressed its continued willingness to protect the Settlement Class until settlement administration is completed. *See* Joint Decl. ¶¶14-16, 25-26. Accordingly, both Settlement Class Representatives and Interim Settlement Class Counsel satisfy Rule 23(e)(2)(A).

**2. The Settlement Is the Product of Good Faith, Informed, Arm's-Length Negotiations Under Rule 23(e)(2)(B)**

Rule 23(e)(2)(B) requires that the parties negotiate the settlement at arm's length, which inquiry "aims to root out . . . 'collusive settlements.'" *Newberg* §13:50; *UAW*, 497 F.3d at 631. Here, resolution was achieved by way of good faith, informed, and arm's-length negotiations between experienced counsel with an understanding of the strengths and weaknesses of their respective positions. Joint Decl. ¶7. Prior to settling, the parties exchanged briefing across several cases, including the *Cleveland Bakers* case, other TPP bellwether cases, and the numerous case tracks in this MDL (as well as in state courts), which has informed the parties' understanding of their strengths and weaknesses. Settlement Class Representatives who are TPP Bellwether

Plaintiffs have already produced some, and are also actively working to obtain and produce additional, claims data. Where so much information has already been exchanged, “a court may assume that the parties have a good understanding of the strengths and weaknesses of their respective cases and hence that the settlement’s value is based upon such adequate information.” *Newberg* §13:49.

Settlements such as this, resulting from formal mediations conducted by experienced mediators, indicate the absence of fraud or collusion. *See Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 277 (6th Cir. 2016); *Waggoner v. U.S. Bancorp*, 2016 WL 7474408, at \*3 (N.D. Ohio Dec. 29, 2016). The parties’ two mediations, one with the Honorable Layn Phillips and one with Mr. Fouad Kurdi, were separated by almost two years of active litigation, and the 2024 mediation proved successful only after hard-fought negotiations that began months prior to the day of the in-person mediation and continued after the day of the in-person mediation. Joint Decl. ¶7. The proposed Settlement further does not include any indication of collusive negotiations, such as a clear sailing provision, and no portion of the Settlement Funds would revert to Settling Distributors even if this Court were to award no attorneys’ fees.

**3. The Relief Provided to the Settlement Class is Adequate Under Rule 23(e)(2)(C)**

In assessing whether the relief provided to the Settlement Class is adequate, the Court must take 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)[.]” Fed. R. Civ. P. 23(e)(2)(C).

Costs, risks, and delay of trial: First, the \$300 million Settlement is substantial in light of “the costs, risks, and delay of trial and appeal[.]” Fed. R. Civ. P. 23(e)(2)(C)(i). This Settlement not only avoids the clear obstacles present in litigating and trying individual TPP cases but assures that TPP Plaintiffs timely receive compensation only a short time after the Court turned once again to long-stayed claims by the TPPs. Even if individual TPP Plaintiffs achieved successful judgments, the years of delay in achieving that result, on top of the years the TPP Plaintiffs have been stayed from litigating their claims, would only further injure TPP Plaintiffs and Settlement Class Members. Settlement is the more prudent and expeditious route. Moreover, the Settlement serves the public interest in resolving a nationwide class action to benefit TPPs and conserve the Court’s resources by properly avoiding trial and appeals in this already long-standing MDL.

Effectiveness of the proposed method of distributing relief to the Class: The next factor considers “the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims[.]” Fed. R. Civ. P. 23(e)(2)(C)(ii). This consideration requires the Court to ensure, *inter alia*, that claims processing: (1) facilitates filing legitimate claims; and (2) is not unduly demanding. *See* Fed. R. Civ. P. 23(e) advisory committee’s note to 2018 amendment. Under this factor, Settlement Class Members must also be treated equitably relative to each other. This is accomplished through Dr. Rosenthal’s Plan of Allocation (ECF 5614-7), which is based on neutral, objective criteria, is the product of extensive and informed investigation and analysis, and will ensure a fair distribution of the Settlement Funds. Dr. Rosenthal is a preeminent TPP testifying economic expert, and she is thoroughly familiar with the operation of the healthcare industry and the TPPs’ role and costs in the delivery of healthcare to their beneficiaries.



With respect to the method of processing class member claims, A.B. Data is a highly qualified Notice and Claims Administrator. A.B. Data has demonstrated success in administering numerous national TPP settlements and will undoubtedly be an effective Notice and Claims Administrator in this action. Thus far, A.B. Data has successfully disseminated Notice (*see* ECF 5662), with no objections and just two opt-outs received to date. Joint Decl. ¶¶10-11. And, even so, there will be no reversions of the Settlement Funds to Settling Distributors because all Settlement Funds money, net of fees, expenses, and service awards, shall be distributed to the Settlement Class.

Terms of attorney's fees: As discussed further below in Section D.1, the Settlement is also fair, reasonable, and adequate with respect to the “terms of any proposed award of attorney’s fees, including timing of payment[.]” Fed. R. Civ. P. 23(e)(2)(C)(iii). Interim Settlement Class Counsel has requested 20% of the Settlement Funds, which is modest in comparison to other percentage-of-the-fund requests both in this Circuit and nationwide. And the Court’s ultimate decision as to whether to award attorneys’ fees, expenses, and Settlement Class Representative service awards does not impact or terminate the underlying Settlement Agreement. The terms of Interim Settlement Class Counsel’s fee request thus satisfy Rule 23(e)(2)(C)(iii) and should be approved.

Absence of side agreements: The fairness, reasonableness, and adequacy of a settlement must also consider “any agreement required to be identified under Rule 23(e)(3)[.]” Fed. R. Civ. P. 23(e)(2)(C)(iv). Under Rule 23(e)(3), “[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal.” Here, where the only such agreement is the Settlement itself, there is no risk that “related undertakings . . . may have influenced the terms of the settlement[.]” and this sub-factor supports the adequacy of relief. *See* Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2003 amendment.

**4. The Settlement Treats Class Members Equitably Relative to Each Other Under Rule 23(e)(2)(D)**

This factor “ensure[s] that similarly situated class members are treated similarly[.]” *Newberg* §13:56. In evaluating the fairness of a class settlement, Ohio district courts also ensure that the distribution of settlement proceeds is equitable. “Equity does not dictate that the proceeds must be shared on a pro-rata basis, so long as the ultimate distribution is fair, reasonable, and adequate.” *Harsh v. Kalida Mfg., Inc.*, 2021 WL 4145720, at \*7 (N.D. Ohio Sept. 13, 2021). Here, similarly to *Harsh*, each qualified claimant’s share of the Settlement is “based upon their calculated damages,” *id.*, turning on actual claims data and ARCOS data. No Settlement Class Member receives preferential treatment under the Settlement because each Settlement Class Member is entitled to a *pro rata* portion of the Settlement Funds based on the Plan of Allocation, which provides that any Class Member that files a valid claim prior to the end of the claims period, after final approval by the Court and absent pending appeals, will be paid its net allocative share.

Attached as Exhibit A to the Joint Declaration is the Declaration of Professor William B. Rubenstein, which further supports the relative equitable treatment of Class Members by providing additional information on allocation approaches in opioid settlements, generally, and in this settlement specifically. Professor Rubenstein, a Professor at Harvard Law School and leading national expert on class action law, describes the MDL 2804 allocation formula, its use in the *In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, MDL 2996 (N.D. Cal.) political subdivision class action settlement, and its data-driven parallels with the *McKinsey* TPP class action settlement and this MDL 2804 TPP class action Settlement. *See* Joint Decl. ¶9; Joint Decl. Ex. A (Rubenstein Decl.) ¶¶1-34. Professor Rubenstein explains how the prior MDL 2804 settlements informed the *McKinsey* TPP settlement and the instant Settlement and offers further support for the legitimacy of the proposed allocation formula. Ex. A ¶¶35-47. In sum,

Professor Rubenstein finds that “the proposed allocation formula is data driven, uses similar data for all class members, ensures that recovery levels correspond to harm levels, raises no Rule 23 red flags,” and he notes that “Judge Breyer explicitly blessed it, too, in granting final approval to the McKinsey TPP settlement.” *Id.* ¶49.

The Settlement thus satisfies Rule 23(e)(2)(D).

**C. The Court Should Appoint Settlement Class Counsel Under Rule 23(g)(1)**

Under Rule 23(g)(2), a court may appoint an applicant as class counsel “only if the applicant is adequate under Rule 23(g)(1) and (4).” In appointing Interim Settlement Class Counsel under Rule 23(g)(3), as well as Interim Co-Lead Settlement Class Counsel, the Court considered the time, effort, and resources that Mr. Geller, Ms. Cabraser, Mr. Dugan, Mr. Dearman, Mr. Fastiff, and their three firms have expended in representing the Settlement Class, as well as their cumulative many decades of experience in litigating and settling class actions on behalf of both other plaintiffs in this MDL and TPP plaintiffs in a variety of other cases. Moreover, Interim Co-Lead Settlement Class Counsel Paul Geller and Elizabeth Cabraser, and James Dugan, are Court-appointed members of the Plaintiffs’ Executive Committee, and Mr. Geller and Ms. Cabraser are Court-appointed members of the Settlement Negotiating Committee. Joint Decl. ¶¶5, 14-15. The Court concluded that Interim Settlement Class Counsel would fairly and adequately represent the interests of the Settlement Class. It should now confirm Mr. Geller, Ms. Cabraser, Mr. Dearman, and Mr. Fastiff and appoint Mr. Dugan as Settlement Class Counsel and designate Ms. Cabraser, Mr. Geller, and Mr. Dugan as Co-Lead Settlement Class Counsel.

**D. The Court Should Approve Counsel’s Requested Fees and Expenses Under Rule 23(h), as Well as the Requested Settlement Class Representative Service Awards**

**1. The Requested Attorneys’ Fees Are Reasonable Under Rule 23(h)**

Rule 23(h) governs the award of “reasonable” attorneys’ fees and nontaxable costs in class actions. Where, as here, “litigation leads to the creation of a common fund, district courts apply a two-part analysis to assess the reasonableness of an attorneys’ fee request.” *In re E. Palestine Train Derailment*, 2024 WL 4370003, at \*5 (N.D. Ohio Sept. 27, 2024) (citing *Harsh*, 2021 WL 4145720, at \*8). The Court first exercises “discretion” in selecting “the appropriate method to calculate the fees, using either the percentage-of-the-fund approach or the lodestar approach.” *Id.* The Court must then “consider six factors, known as the *Ramey* factors, to assess the reasonableness of the fee.” *Id.* (citing *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App’x 496, 498 (6th Cir. 2011)). The *Ramey* factors are:

(a) the value of the benefits rendered to the class; (b) society’s stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (c) whether the services were undertaken on a contingent fee basis; (d) the value of the services on an hourly basis; (e) the complexity of the litigation; and (f) the professional skill and standing of all counsel.

*Id.* (citing *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1194-97 (6th Cir. 1974)). Courts at their discretion may, and often do, consider other factors, such as fees awarded in other common fund cases, although none of these factors is alone dispositive. *See id.*

Interim Settlement Class Counsel are applying for attorneys’ fees of up to 20% of the \$300 million Settlement Funds (that is, fees of up to \$60 million), with this application inclusive of the common benefit assessment due under the Court’s Ongoing Common Benefit Order (ECF 4428), plus all reimbursable expenses and service awards. “It is not abnormal for negotiated attorneys’ fee awards to comprise 20% to 30% of the total award.” *Does 1-2 v. Déjà Vu Servs., Inc.*, 925 F.3d 886, 898 (6th Cir. 2019). The requested fee award is thus at the lower end of the range of

attorneys' fees regularly deemed reasonable by the Sixth Circuit; *see also, e.g., McKnight*, 655 F. Supp. 3d at 663 (approving attorneys' fees at 32.6% of settlement fund); *Brent v. Midland Funding, LLC*, 2011 WL 3862363, at \*19 (N.D. Ohio Sept. 1, 2011) (approving attorneys' fees at 29% of settlement amount and collecting cases). Moreover, around the country, "the most common percentages awarded by federal district courts nationwide using the percentage method were 25%, 30%, and 33%, with nearly two-thirds of awards between 25% and 35%, and with a mean award of 25.4% and a median award of 25%." *E. Palestine*, 2024 WL 4370003, at \*13 (citing Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010)). Settlement Class Counsel's requested 20% fee is, thus, well below the national average of percentages awarded in percentage-method cases.

Next, as analyzed below, Settlement Class Counsel's requested attorneys' fee award satisfies the six *Ramey* factors.

(1) Value of the Benefits Rendered to the Class: This, the first *Ramey* factor, is "widely regarded as the most important factor" and concerns "the number of individuals affected by the underlying allegations and the total settlement reached." *E. Palestine*, 2024 WL 4370003, at \*9 (cleaned up). Here, the Settlement Class comprises tens of thousands of TPPs across the country, and Settlement Class Members will receive equitable, *pro rata* distributions in direct relation to the harms they incurred as a result of Settling Distributors' alleged conduct. The \$300 million Settlement Funds are an excellent value for the Settlement Class. This amount reflects compensation between one group of the MDL 2804 plaintiffs (TPPs) and one group of MDL 2804 defendants (the Settling Distributors), and, given this scope, the settlement's value is proportional to other settlements reached in this MDL 2804 as well as to the TPP settlement in *McKinsey*.

(2) Society’s Stake in Rewarding the Attorneys Who Achieved These Benefits: This *Ramey* factor also weighs in favor of Settlement Class Counsel’s requested fee award. “Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society.” *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534 (E.D. Mich. 2003). This MDL 2804 is one of the largest and most complex MDLs yet encountered by a federal district court; under the leadership of this Court, numerous proceedings, trials, and settlements have progressed and benefitted countless individuals, organizations, governments, and, now, TPPs, all of which have felt the effects of the unprecedented public health crisis that has been the opioid epidemic. This gargantuan effort depended upon the efforts of many counsel, and public policy thus strongly supports the requested attorneys’ fees. Not only have Settlement Class Counsel in this case undertaken significant risk, time, and effort in prosecuting this litigation, but Settlement Class Counsel have been involved in the larger MDL 2804 for many years. “Attorneys who agree to champion large and complex class actions like this one ‘serve a benefit to society and the judicial process by enabling . . . claimants to pool their claims and resources’ to ‘achieve a result they could not obtain alone.’” *E. Palestine*, 2024 WL 4370003, at \*11 (quoting *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 1029, 1043 (S.D. Ohio 2001)). Settlement Class Counsel’s fee request – again, at the lower end of the range of percentage-of-the-fund fees typically awarded in common-fund cases in this Circuit – will ensure that adequate incentives exist for lawyers such as Settlement Class Counsel to continue to take on and prosecute complex cases like this one. *See id.*

(3) Whether Settlement Class Counsel’s Services Were Rendered on a Contingency Fee Basis: The third *Ramey* factor is “an important factor in determining the fee award” and is satisfied here. *Stanley v. U.S. Steel Co.*, 2009 WL 4646647, at \*3 (E.D. Mich. 2009). Settlement Class Counsel prosecuted this action on a contingent-fee basis from the beginning of this action, and

throughout the progression of the TPP cases, there has been a risk that Settlement Class Counsel would not recover for the extensive time and resources they have devoted. Indeed, this risk persists as to other Defendants who are not Settling Distributors. Thus, this factor weighs strongly in favor of granting Settlement Class Counsel’s fee request.

(4) The Value of Settlement Class Counsel’s Services on an Hourly Basis: “Given the preference in the Sixth Circuit for using the percentage-of-the-fund method to evaluate attorneys’ fees . . . , consideration of this fourth [*Ramey*] factor—which courts sometimes refer to as a ‘lodestar crosscheck’—is not required.” *E. Palestine*, 2024 WL 4370003, at \*11 (collecting cases). Nevertheless, courts may consider “summaries of Class Counsel’s hourly billing records . . . to determine the reasonableness of the percentage award.” *Id.* As the Court is aware, the undersigned Settlement Class Counsel and their firms have spearheaded the litigation of TPP claims in MDL 2804 since its inception seven years ago. Throughout the course of this MDL, they have advanced substantial TPP costs and invested thousands of hours in TPP-specific work, including the drafting, amendment, and defense of the TPP briefing bellwether complaint; TPP discovery; commencing and completing the TPP bellwether selection process; designing the TPP bellwether case tracks; negotiating, mediating, and settling the instant case with the three large Settling Distributors and their sophisticated counsel; and preserving the TPPs’ class allegations. This time, together with additional time incurred by TPP liaison counsel, other counsel to the TPP bellwether plaintiffs, counsel who performed duly authorized work specifically for the TPPs in connection with law, briefing, and settlement, and others, is reasonable given the complexity and novelty of this case – the first settlement by TPP plaintiffs in MDL 2804.

(5) The Complexity of the Litigation: The TPP cases, situated within the larger MDL 2804, are very factually and legally complex, and this settlement involves, on one side, a Settlement

Class of likely tens of thousands of TPPs and, on the other, the three largest pharmaceutical distributors in the country. Moreover, as detailed above and in the Motion for Preliminary Approval (ECF 5614), this settlement is the result of two mediations and follows years of initial investigation and briefing, as well as ongoing discovery. The TPP Distributors settlement is a complex piece of an even more complex whole, which further weighs in favor of granting Settlement Class Counsel's attorneys' fee request.

(6) The Professional Skill and Standing of All Counsel: Interim Settlement Class Counsel without doubt satisfy this last *Ramey* factor. They have diligently investigated and litigated this case (as well as numerous other case tracks in MDL 2804), and they have further extensive experience in litigating and settling TPP class actions in other cases across the country, most recently *In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, MDL No. 2996. Courts also consider the "quality of opposing counsel" in this *Ramey* factor, *In re Delphi Corp. Sec., Deriv. & "ERISA" Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008); they, too, have demonstrated high-quality and zealous representation of the Settling Distributors. The ability of both sets of equally matched counsel to negotiate a favorable result for the class speaks to the competence and professionalism of everyone involved.

Lastly, several additional considerations weigh in favor of the reasonableness of the attorneys' fee request. Any attorneys' fees and expenses awarded by the Court will be paid from the Settlement Funds only after the Court grants Final Approval and the judgment becomes final. The common benefit portion of any fees awarded shall be allocated by the existing Fee Panel among applicant firms that it determines did work that inured to the common benefit of the TPPs. The remaining amount awarded shall be allocated by Co-Lead Settlement Class Counsel among firms actively litigating on behalf of the TPP Settlement Class, with any appeals to such allocation



going to Special Master Cohen – an approach commonly permitted in this Circuit. *See, e.g., E. Palestine*, 2024 WL 4370003, at \*13 (finding that “Co-Lead Class Counsel, ‘who are most familiar with the work done by each firm and each firm’s overall contribution to the litigation,’ are best suited to apportion these fees among the firms involved” (quoting *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at \*7 (E.D. Pa. Jan. 3, 2008))).

For all of the reasons above, the Court should award Interim Settlement Class Counsel’s requested attorneys’ fees.

## **2. The Requested Expenses Are Reasonable Under Rule 23(h)**

With respect to expenses, “awards are customary when litigants have created a common settlement fund for the benefit of a class.” *Id.* (quoting *Delphi*, 248 F.R.D. at 504). “In determining whether requested expenses are compensable in this common fund, the Court should consider ‘whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases.’” *Id.* (quoting *Cardizem*, 218 F.R.D. at 535).

Here, Interim Settlement Class Counsel’s expense award is comprised of routine expenses billed by attorneys in similar cases. Counsel advanced these expenses without reimbursement or any guarantee of reimbursement. In total, Interim Settlement Class Counsel and counsel working for the benefit of TPPs in this MDL have incurred, or expect to incur shortly, expenses in the amount of \$750,000.00 while prosecuting this case on behalf of the TPP Settlement Class. These expenses have included, for example, filing fees, telephone and messenger charges, expert costs, eDiscovery database hosting, data vendor costs, and online legal research. Joint Decl. ¶23.

## **3. The Settlement Class Representative Service Awards Are Reasonable**

“[S]ervice awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs.”

*E. Palestine*, 2024 WL 4370003, at \*6 (quoting *Daoust v. Maru Rest., LLC*, 2019 WL 2866490, at \*6 (E.D. Mich. July 3, 2019)). In determining whether to grant service awards, Courts consider factors such as a class representative’s “actions to protect the class, the degree to which the class has benefitted, . . . the ultimate recovery to the class, and the sums awarded in similar cases.” *Id.* (citing 5 William B. Rubinstein et al., *Newberg on Class Actions* §17:13 (5th ed. 2019)).

Interim Settlement Class Counsel request service awards of \$10,000 for each of the eight Settlement Class Representatives. The eight Settlement Representatives undertook considerable time and effort in assisting the prosecution of this litigation, and their efforts have significantly advanced the protections afforded to and benefits that will be received by all other TPP Settlement Class Members. The total service award amount of \$80,000 is a small fraction (0.026%) of the total \$300 million Settlement Funds. And the per-representative amount of \$10,000 is well below service awards approved in other large common fund cases. *See, e.g., E. Palestine*, 2024 WL 4370003, at \*15 (collecting cases where courts approved service awards of \$15,000, \$25,000, and \$35,000, and approving service awards of \$15,000). The requested service awards are thus reasonable compensation for Settlement Class Representatives’ time and effort.

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that final approval of the Settlement be granted, pursuant to the criteria and procedures of Fed. R. Civ. P. 23(e), and in accordance with the terms set forth herein.

**Certificate of Compliance with Local Rule 7.1(f)**

Pursuant to Local Rule 7.1(f), the undersigned hereby certifies that the Memorandum in Support of Third Party Payor Plaintiffs' Motion for Final Approval of Class Action Settlement and for Attorneys' Fees and Expenses and Service Awards complies with the page limitations (30) established for complex track cases.

DATED: October 18, 2024

Respectfully submitted

*/s/ Paul J. Geller*

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Paul J. Geller  
Mark J. Dearman  
**ROBBINS GELLER RUDMAN & DOWD LLP**  
225 NE Mizner Boulevard, Suite 720  
Boca Raton, FL 33432  
Telephone: (561) 750 3000  
pgeller@rgrdlaw.com  
mdearman@rgrdlaw.com

*Interim Settlement Class Counsel; Counsel for  
Cleveland Bakers and Teamsters Health and  
Welfare Fund, and Pipe Fitters Local Union No.  
120 Insurance Fund*

*/s/ Elizabeth J. Cabraser*

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Elizabeth J. Cabraser  
Eric B. Fastiff  
**LIEFF CABRASER HEIMANN & BERNSTEIN  
LLP**  
275 Battery Street, 29th Floor  
San Francisco, CA 94111-3339  
Telephone: (415) 956-1000  
ecabraser@lchb.com  
efastiff@lchb.com

*Interim Settlement Class Counsel; Counsel for  
Pioneer Telephone Cooperative, Inc. Employee  
Benefits Plan, and American Federation of State,  
County and Municipal Employees District  
Council 37 Health & Security Plan*

*/s/ James R. Dugan, II*

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James R. Dugan, II  
**THE DUGAN LAW FIRM, PC**  
One Canal Place, Suite 1000  
New Orleans, LA 70130

*Third Party Payor PEC Representative; Counsel for  
United Food and Commercial Workers Health and  
Welfare Fund of Northeastern Pennsylvania, and  
Sheet Metal Workers Local No. 25 Health and  
Welfare Fund*

Jayne Conroy  
**SIMMONS HANLY CONROY**  
112 Madison Avenue, 7th Floor  
New York, NY 10016  
Telephone: (212) 784-6400  
jconroy@simmonsfirm.com

Joseph F. Rice  
**MOTLEY RICE**  
28 Bridgeside Blvd.  
Mt. Pleasant, SC 29464  
Telephone: (843) 216-9000  
jrice@motleyrice.com

Paul T. Farrell, Jr., Esq.  
**FARRELL & FULLER LLC**  
270 Munoz Rivera Ave., Suite 201  
San Juan, PR 00918  
Telephone: (304) 654-8281  
paul@farrellfuller.com

*Plaintiffs' Co-Lead Counsel*

*/s/ Peter Weinberger*

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Peter H. Weinberger (0022076)  
**SPANGENBERG SHIBLEY & LIBER**  
1001 Lakeside Ave. East, Suite 1700  
Cleveland, OH 44114  
Telephone: (216) 696-3232  
pweinberger@spanglaw.com

*Plaintiffs' Liaison Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 18, 2024, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. Copies will be served upon counsel of record by, and may be obtained through, the Court's CM/ECF system.

*/s/ Peter Weinberger*

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Peter H. Weinberger

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION** ) **MDL 2804**  
**OPIATE LITIGATION** )  
 ) **Case No. 1:17-md-2804**  
 )  
**THIS DOCUMENT RELATES TO:** ) **Judge Dan Aaron Polster**  
 )  
*ALL THIRD PARTY PAYOR ACTIONS* )

**JOINT DECLARATION OF PAUL J. GELLER AND ELIZABETH J. CABRASER  
IN SUPPORT OF THIRD PARTY PAYOR PLAINTIFFS' MOTION FOR FINAL  
APPROVAL OF CLASS ACTION SETTLEMENT AND FOR ATTORNEYS' FEES,  
EXPENSES, AND SERVICE AWARDS**

We, Paul J. Geller and Elizabeth J. Cabraser, declare and state as follows:

1. I, Paul J. Geller, am an attorney admitted to practice in the state of Florida. I am the managing partner of Robbins Geller Rudman & Dowd LLP's ("Robbins Geller") Boca Raton, Florida office, a founding partner of the firm, a member of its Executive and Management Committees, and head of the firm's Consumer Practice Group. This declaration is based upon my personal knowledge unless otherwise indicated. If called upon to testify as to the matters stated herein, I could and would competently do so.

2. I, Elizabeth J. Cabraser, am an attorney admitted to practice in the state of California. I am a founding partner of Lief Cabraser Heimann & Bernstein LLP ("Lief Cabraser") and a member of the firm's Executive Committee. This declaration is based upon my

personal knowledge unless otherwise indicated. If called upon to testify as to the matters stated herein, I could and would competently do so.

3. We submit this Joint Declaration in support of Third Party Payor (“TPP”) Plaintiffs’ Motion for Final Approval of Class Action Settlement and for Attorneys’ Fees, Expenses, and Service Awards.

4. We are Interim Co-Lead Settlement Class Counsel in this action. Mr. Geller’s firm represents Settlement Class Representatives Cleveland Bakers and Teamsters Health and Welfare Fund (“Cleveland Bakers”) and Pipe Fitters Local Union No. 120 Insurance Fund. Ms. Cabraser’s firm represents Settlement Class Representatives American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan and Pioneer Telephone Cooperative, Inc. Employee Benefits Plan.

5. We are both members of the Plaintiffs’ Executive Committee (“PEC”) in this MDL and are both also members of the Court-appointed Settlement Negotiating Committee in this MDL.

**I. Settlement History and Notice Plan**

6. Together with TPP Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e) (ECF 5614), we previously filed a declaration containing information about the litigation history and notice program (ECF 5614-1). Familiarity with that declaration is presumed herein.

7. This Settlement was the product of extensive arm’s-length negotiations. The parties initially engaged in preliminary settlement negotiations in 2022, leading to an in-person, all-day mediation with the Honorable Layn Phillips on September 12, 2022. Although that mediation did not succeed, conversations between the parties about settlement structure continued. On February 14, 2024, Settling Distributors agreed to mediate again with members of the Court-

appointed Settlement Negotiating Committee, who represent TPP Plaintiffs and proposed Settlement Class Representatives in this MDL; the two of us; our partners, including Mark Dearman and Eric Fastiff; Co-Lead Counsel Jayne Conroy; and PEC-member Peter Mougey. This mediation took place with the assistance of Mr. Fouad Kurdi, who successfully mediated previous opioids and opioids-related settlements, including the TPP class settlement in *In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, MDL No. 2996 (N.D. Cal.), which has been granted final approval by Judge Breyer. The parties participated in an intensive series of telephonic discussions and information exchanges, culminating in an all-day, in-person mediation in New York City, New York, with Mr. Kurdi on April 15, 2024. Following the mediation, Mr. Kurdi issued a double-blind “Mediator’s Proposal” which was accepted by all parties to the mediation and which forms the basis of this settlement.

8. On September 3, 2024, the Court preliminarily approved the class Settlement between TPP Plaintiffs and Settling Distributors (“Preliminary Approval Order”) (ECF 5616). The Court appointed us (Paul Geller and Elizabeth Cabraser) as Interim Co-Lead Settlement Class Counsel, and the two of us, as well as our colleagues Mark Dearman of Robbins Geller and Eric Fastiff of Lieff Cabraser, as Interim Settlement Class Counsel. The Court also approved A.B. Data, Ltd. as Notice and Claims Administrator for the Settlement. In the interim, we have proposed James R. Dugan, II of The Dugan Law Firm, APLC as additional Co-Lead Settlement Class Counsel.

9. Attached hereto as **Exhibit A** is the Declaration of Professor William B. Rubenstein. Professor Rubenstein is a Professor at Harvard Law School and leading national expert on class action law. His declaration describes the MDL 2804 allocation formula and its use in the *McKinsey* political subdivision class action settlement, and explains how the prior MDL



2804 settlements informed the instant Settlement and offers further support for the legitimacy of the proposed allocation formula.

## **II. Progress on Court-Approved Notice Program**

10. On October 1, 2024, pursuant to the Preliminary Approval Order, Interim Settlement Class Counsel filed the Declaration of Eric J. Miller Regarding Dissemination of Notice (“Miller Declaration”) (ECF 5662, 5662-1). As stated in the Miller Declaration, A.B. Data timely completed the Court-approved notice program by the notice date of September 17, 2024. The Miller Declaration describes implementation of the notice program to potential TPP Class Members.

11. To date, ahead of the objection and opt-out deadline of November 4, 2024, A.B. Data has received just two non-litigating opt-out requests and no objections.

12. In our opinion, the Court-approved notice program, as implemented by A.B. Data, satisfies due process and gives ample opportunity for TPPs to decide whether to opt out or object to the Settlement by the November 4, 2024 deadline.

13. Interim Co-Lead Settlement Class Counsel will oversee the completion of the notice program, keep the settlement website current, and report to the Court on completion of the notice program prior to the Fairness Hearing.

## **III. Interim Settlement Class Counsel**

14. Throughout this litigation, the vast majority of the work to represent TPP plaintiffs in this case and with respect to this particular Settlement has been performed by our two firms, Lief Cabraser and Robbins Geller, as well The Dugan Law Firm, APLC. We (Paul Geller and Elizabeth Cabraser) are Court-appointed members of both the PEC and the Settlement Negotiating Committee (*see* ECF 37, 118), and we have worked together (along with others) to negotiate and

implement at least nine global settlements in this MDL thus far, which will bring over \$50 billion in abatement funds to communities throughout the country.

15. James R. Dugan, II of The Dugan Law Firm, APLC, who Plaintiffs now move the Court to appoint as an additional Settlement Class Counsel – and to designate as another Co-Lead Settlement Class Counsel – is also a Court-appointed member of the PEC who was “designated to exclusively represent the interests of Third-Party Payor cases.” *See* ECF 34, 37.

16. Interim Settlement Class Counsel and Mr. Dugan have significant experience in TPP litigation and opioid litigation, and we have undertaken substantial work to prosecute opioid cases against many defendant groups. We have collectively undertaken an enormous amount of work, effort, and expense in this MDL on behalf of the TPP Settlement Class, and we will continue to do so through administration of the Settlement and any appeals.

#### **IV. Common Benefit and Hours, Lodestar, and Expenses**

17. For this case, Class Counsel and The Dugan Law Firm, APLC worked entirely on contingency and advanced both their time and the required expenses. We, and others in our firms, devoted thousands of hours and advanced whatever expenses were necessary to investigate and successfully resolve this case, all with no guarantee of reimbursement. In so doing, Class Counsel and The Dugan Law Firm declined opportunities to work on other cases in order to devote the necessary time, resources, and energy to this case.

18. Interim Settlement Class Counsel are applying for attorneys’ fees of up to 20% of the \$300 million Settlement Fund, with this application inclusive of the common benefit assessment due under the Court’s Ongoing Common Benefit Order (ECF 4428). Any attorneys’ fees and expenses awarded by the Court will be paid from the Settlement Fund only if, and after, the Court grants Final Approval and the judgment becomes final.

19. The common benefit portion of any fees awarded shall be allocated by the existing Fee Panel among applicant firms that it determines did work that inured to the common benefit of the TPPs. The remaining amount awarded shall be allocated by Co-Lead Settlement Class Counsel among firms actively litigating on behalf of the TPP Class, with any appeals to such allocation going to Special Master Cohen – an approach consistent with the prior common benefit fee allocation protocol and commonly permitted in this Circuit.

20. The information in this Joint Declaration regarding Class Counsel’s time and expenses is taken from time and expense reports and supporting documentation prepared and/or maintained each firm in their ordinary course of business.

21. Settlement Class Counsel and their firms have spearheaded the litigation of TPP claims in MDL 2804 since its inception seven years ago. Throughout the course of this MDL, they have advanced substantial TPP costs and invested thousands of hours in TPP-specific work.

22. These hours were spent on work that includes the drafting, amendment, and defense of the TPP briefing bellwether complaint; TPP discovery; commencing and completing the TPP bellwether selection process; designing the TPP bellwether case tracks; negotiating, mediating, and settling the instant case with the three large distributors and their sophisticated counsel; and preserving the TPPs’ class allegations.

23. As of October 18, 2024, Interim Settlement Class Counsel and counsel working for the benefit of TPPs in this MDL have incurred, or expect to incur shortly, expenses in the amount of \$750,000.00 while prosecuting this case on behalf of the TPP Settlement Class. These expenses have included, for example, filing fees, telephone and messenger charges, expert costs, eDiscovery database hosting, data vendor costs, and online legal research.

24. We believe the time reflected in the calculation and the expenses for which payment is sought herein are reasonable and were necessary for the effective and efficient prosecution and resolution of the TPP cases as to Settling Distributors.

**V. Settlement Class Representative Service Awards**

25. The six appointed Settlement Class Representatives – Cleveland Bakers and Teamsters Health and Welfare Fund; Pipe Fitters Local Union No. 120 Insurance Fund; Pioneer Telephone Cooperative, Inc. Employee Benefits Plan; American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan; Louisiana Assessors’ Insurance Fund; and Flint Plumbing and Pipefitting Industry Health Care Fund – together with the two newly proposed Settlement Class Representatives, United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania (“UFCW”) and Sheet Metal Workers Local No. 25 Health & Welfare Fund (“SMW”), include named Plaintiffs in actions centralized in this MDL, and six of them are TPP briefing or trial bellwether Plaintiffs. The TPP Settlement Class Representatives, UFCW, and SMW played an integral role in the litigation by closely consulting with counsel throughout the process.

26. The Settlement Class Representatives, UFCW, and SMW have no interests antagonistic to Settlement Class Members and will continue to protect the Class’s interests in overseeing administration of the Settlement and through any appeals. They each understand their duties, have agreed to consider the interests of absent Settlement Class Members, and reviewed and uniformly endorsed the Settlement terms. They have further demonstrated their adequacy by participating actively in the case, and each has expressed continued willingness to protect the Class until the Settlement is approved and its administration completed, and through any appeals.

27. Each Settlement Class Representative, together with UFCW and SMW, accordingly seeks a \$10,000 service award.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 18, 2024 in Aspen, Colorado.

*/s/ Paul J. Geller*

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Paul J. Geller

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 18, 2024 in San Francisco, California.

*/s/ Elizabeth J. Cabraser*

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Elizabeth J. Cabraser

# EXHIBIT A

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION** ) **MDL 2804**  
**OPIATE LITIGATION** )  
 ) **Case No. 1:17-md-2804**  
 )  
**THIS DOCUMENT RELATES TO:** ) **Judge Dan Aaron Polster**  
 )  
*ALL THIRD PARTY PAYOR ACTIONS* )

**DECLARATION OF PROFESSOR WILLIAM B. RUBENSTEIN**

1. I am the Bruce Bromley Professor of Law at Harvard Law School and have been recognized as a leading national expert on class action law and practice. Third Party Payor (“TPP”) plaintiffs seek final approval of the proposed class action settlement with the Settling Distributors.<sup>1</sup> Among other factors, the Court must determine whether the settlement proposal “treats class members equitably relative to each other.”<sup>2</sup> Co-Lead Class Counsel<sup>3</sup> have retained me to provide

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<sup>1</sup> The Settlement Agreement defines “Settling Distributors” as “Defendants Cencora, Inc. (‘Cencora’), Cardinal Health, Inc. (‘Cardinal’), and McKesson Corporation (‘McKesson’).” Class Action Settlement Agreement Among Third Party Payors and Settling Distributors, ECF 5614-2, at 1 (Aug. 30, 2024) (hereinafter “Settlement Agreement”).

<sup>2</sup> Fed. R. Civ. P. 23(e)(2)(D).

<sup>3</sup> The Settlement Agreement defines “Co-Lead Class Counsel” as Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein, LLP and Paul J. Geller of Robbins Geller Rudman & Dowd LLP. Settlement Agreement, at § I.N.

the Court information on allocation approaches in opioid settlements generally, and in this settlement specifically, so as to assist it in addressing this issue.<sup>4</sup>

2. This MDL is the largest and arguably most successful in American history. It (and the related McKinsey MDL, 2996) has generated 19 separate settlements distributing close to \$50 billion to communities throughout the country to remediate the impact of the opioid epidemic;<sup>5</sup> the Court has accomplished all this in less than seven years, notwithstanding the massive disruption caused by the intervening COVID-19 crisis. The only larger recoveries in American litigation history arose out of the asbestos and tobacco crises; however, asbestos litigation unfolded across decades and through myriad forms of litigation (countless individual lawsuits in and outside of MDLs, successful and unsuccessful class actions, bankruptcy trusts, etc.), while the latter, states-based Master Settlement Agreement for the tobacco litigation has been distributing its recovery over a 25-year arc. There is nothing close to the size and speed of what this MDL has accomplished.

3. Part of the success of the MDL is attributable to the fact that in an early phase related to the negotiation class certification process, plaintiffs and their counsel generated – in a completely unprecedented manner – a model for distributing settlement funds across every political subdivision in the United States. Eight of the 11 non-Tribal opioid settlements have

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<sup>4</sup> As the Court is generally aware of my qualifications, I provide those in Exhibit A, with a list of documents I reviewed in preparing this Declaration in Exhibit B. The text of the Declaration reviews some of my work assisting the Court and Special Master Francis McGovern in the negotiation class certification phase of the MDL. My last involvement in the MDL (which involved fee, not class certification, matters) terminated more than four years ago. Order Regarding Professor Rubenstein's Report and Recommendations, ECF 3320, at 1 (June 3, 2020). I sought and received the Court's approval before accepting this assignment.

<sup>5</sup> I chart these settlements in Exhibit C.



employed, as their default allocation mechanism, (a) this data-driven, (b) party-generated formula for (c) ensuring funds reach the most impacted communities, with two others (the Kroger settlement and the McKinsey School Districts settlement) using similar cross-jurisdictional approaches; even the eight Tribal settlements have relied on the negotiation class certification formula to some extent in their *sui generis* distributional matrix.<sup>6</sup> Given the relationship of the key distributional metric of the national opioid settlements to this MDL, I refer to it hereafter as the “MDL 2804 Allocation Formula.” Part I, *infra*, describes the history and substance of the MDL 2804 Allocation Formula, culminating with an explanation of how Judge Breyer found that it complied with the equitable treatment mandate of Rule 23(e)(2)(D) in approving the McKinsey Political Subdivision class action earlier this year.

4. The present settlement (and its counterpart TPP settlement with McKinsey) are unique among the 11 non-Tribal settlements in that the class members are not defined by geography alone, although some class members are geographic-specific entities and geography is not totally irrelevant. The settlement allocation process is accordingly different than the MDL 2804 Allocation Formula, but it is similarly committed to being data-driven, with a goal of ensuring that class members’ recoveries reflect relative differences in opioid saturation across the class. In Part II, *infra*, I describe the allocational methodology of this settlement, with that section culminating in an explanation of why the Court could find that the settlement’s approach easily

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<sup>6</sup> The Tribal settlements account for about 3% of all settlement amounts. See Exhibit C. The Tribal allocation formula is described in *Frequently Asked Questions About the Settlements of Tribal Opioid Claims Against Janssen/Johnson & Johnson and the Three Major Opioid Distributors* at 3-4, available at [www.tribalopioidsettlements.com/FAQs/Distributor/FAQs.pdf](http://www.tribalopioidsettlements.com/FAQs/Distributor/FAQs.pdf). That explanation reflects the data-driven, participatory nature of ensuring the Tribal funds reach the most impacted Tribal communities, with certain values imputed to Tribes based on the allocation formula developed during the negotiation class certification process.

comports with Rule 23(e)(2)(D)'s equitable treatment mandate, as did Judge Breyer in approving use of this same allocation plan in the parallel TPP settlement with McKinsey this past August.

5. Specifically, Rule 23(e)(2)(D)'s mandate that a class settlement allocation formula treat class members equitably relative to one another was first codified in 2018, although that codification reflected what had been the practice for decades.<sup>7</sup> The Rule aims to weed out bad practices, such as some portion of a class not receiving a recovery although relinquishing a claim, or different portions of the class receiving disparate recoveries for inexplicable reasons, or different segments of a class being subjected to different claim processes.<sup>8</sup> As explained in Part II, the proposed allocation formula here – like the MDL 2804 Allocation Formula itself – not only raises no red flags, these allocation formula are among the singular achievements of this remarkable MDL. The Court's task should be easy.

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<sup>7</sup> Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment ("The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, 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.").

For a general overview of Rule 23(e)(2)(D), see William B. Rubenstein, 4 *Newberg and Rubenstein on Class Actions* § 13:56 (6th ed. 2022 & 2024 Supp.) (hereinafter "*Newberg and Rubenstein on Class Actions*").

<sup>8</sup> *Newberg and Rubenstein on Class Actions* § 13:56 (reviewing red flags); see also Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment ("Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.").

**I.**  
**THE MDL 2804 ALLOCATION FORMULA**

6. As noted above, most of the opioid settlements have allocated recoveries by political subdivision, according to a formula developed under the auspices of this Court. This Part describes the formula, explains its history, and assesses its legitimacy.

Exemplary Use of the Formula

7. I use the McKinsey Political Subdivision class action settlement as exemplary of the many subdivision-based opioid settlements as this is the single subdivision settlement that was a formal class action and hence triggered judicial review, by Judge Breyer, of the allocation formula.

8. In that matter, the class was generally defined to encompass all political subdivisions of 49 states.<sup>9</sup>

9. Allocation of a \$207 million lump sum settlement unfolded at three levels:

- *Interstate*. The lump sum was initially divided by State, with the group of all political subdivisions within a State receiving an aggregate share based on a formula developed

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<sup>9</sup> Order Granting Preliminary Approval of Class Settlement and Direction of Notice under Rule 23(e) of the Federal Rules of Civil Procedure, *In re McKinsey & Co., Inc., National Prescription Opiate Consultant Litigation*, Case No. 3:21-md-02996-CRB, ECF 609, at 2 (Oct. 5, 2023) (“‘Class’ or ‘Settlement Class’ means: any (1) General Purpose Government (including, but not limited to, a municipality, county, county subdivision, city, town, township, parish, village, borough, gore, or any other entity that provides municipal-type government), (2) Special District within a State, and (3) any other subdivision, subdivision official (acting in an official capacity on behalf of the subdivision) or sub-entity of or located within a State (whether political, geographical or otherwise, whether functioning or nonfunctioning, regardless of population overlap, and including, but not limited to, nonfunctioning governmental units and public institutions).”). Indiana’s political subdivisions were excluded from the class, *id.* at ¶ 5, as those subdivisions had participated in a prior settlement between the State of Indiana and McKinsey pursuant to intra-negotiations between the State and those subdivisions.

in conjunction with the 2021 National Settlements.<sup>10</sup> Class Counsel explained that “[t]he states agreed amongst themselves as to inter-state allocations . . . .”<sup>11</sup>

- *Intrastate*. Each State’s share was then divided among its political subdivisions. The plan of allocation reflected two approaches. In allocating the 2021 National Settlements within a State, some States and their subdivisions had generated agreed-to intrastate allocation formulas; for those States, the plan of allocation simply adopted that prior plan. In allocating the 2021 National Settlements within a State, other States did not generate intrastate allocation agreements but instead fell back on a nationwide subdivision allocation agreement, referred to as the “default direct-to-subdivision allocation”; for those States, the plan of allocation simply adopted that default plan. As the settling parties pointed out, the effect of adopting these two approaches to intrastate allocations was simply to supply for this settlement the same intrastate infrastructure that characterized the 2021 National Settlements.<sup>12</sup>
- *Tiny subdivisions*. Finally, like the 2021 National Settlements, the McKinsey Political Subdivision plan of allocation placed one additional restriction on allocation: it allocated none of the common fund to political subdivisions with a population of 10,000 or less, unless that subdivision had filed a lawsuit and was therefore a litigating subdivision.

10. For purposes of applying the intraclass equity principle set forth in Rule 23(e)(2)(D), the first provision above (the interstate division) was straightforward and based on a plan the States hashed out among themselves in allocating the 2021 National Settlements. Its pedigree provided its legitimacy. So, too, for the third provision mentioned above (the exclusion

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<sup>10</sup> Plaintiffs’ Notice of Unopposed Motion and Motion for Preliminary Approval of Class Action Settlement: Memorandum of Points and Authorities in Support, *In re McKinsey & Co., Inc., National Prescription Opiate Consultant Litigation*, Case No. 3:21-md-02996-CRB, ECF 598, at 2 (Sept. 26, 2023) (defining “2021 National Settlements” as “the multi-state opioids industry settlements with Janssen Pharmaceuticals, Inc., McKesson Corporation, Cardinal Health, Inc., and AmerisourceBergen Corporation”).

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.* at 9 (“The Settlement is . . . designed to provide the direct payments that subdivisions negotiated in the earlier national settlements but that were missing from the McKinsey-AG settlement. Plaintiffs’ intention with this plan of allocation is to put Class members in, as nearly as possible, the position they would have been had they had the opportunity to actively negotiate the AG Settlement (as they did with every other national opioids settlement) . . . .”).

of small sub-divisions from direct monetary recovery). The 2021 National Settlements adopted a similar approach to ensure that monies were distributed to entities that actually expended significant resources remediating the opioid epidemic; these smaller subdivisions tended not to have done so themselves, yet they realized an indirect benefit from distributions to their overarching subdivisions (e.g., a small city/subdivision benefits from a distribution to the county within which it is situated). This approach was both sensible and supported by decisions approving allocations that exclude infeasible *de minimis* distributions.<sup>13</sup> Thus, it was the second step above (intrastate allocation) that represents the core of the MDL 2804 Allocation Formula and is the topic of the succeeding sections.

#### The Challenges in MDL 2804

11. As this Court is aware, the National Prescription Opiate MDL Litigation (MDL 2804) has presented unique challenges to the Court and parties. The MDL is primarily comprised of thousands of cases pursued by political subdivisions, Tribes, and third party payor (TPP) plaintiffs seeking compensation for the costs they have been forced to expend to combat the opioid epidemic; however, the largest plaintiffs – States themselves – have generally not filed suit in federal court and their relationship to the federal courts is unique.<sup>14</sup> There are few precedents for collecting all of the country’s political subdivisions into a single aggregate settlement, but there is

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<sup>13</sup> See, e.g., *Sims v. BB&T Corporation*, No. 1:15-CV-732, 2019 WL 1995314, \*4 (M.D.N.C. 2019) (explaining, where recoveries were essentially *de minimis*, “the justification for [] different treatment is obvious, as this *de minimis* recovery would cost more in processing than its value, and thus would increase administrative costs and diminish recovery to class members overall while providing marginal benefits to the few class members”) (cleaned up).

<sup>14</sup> U.S. Const. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

no way of simultaneously corralling all of the States into an aggregate settlement in a federal court. The many political subdivisions are, in turn, *political* subdivisions, so while their interests in this lawsuit may converge, their political orientations often diverge from one another and/or from their State governments. Generating consensus across the group is far more difficult than in other money damage classes – for instance, securities holders – where class members generally have aligned monetary incentives and, often, small amounts of money at stake. The defendants’ side of the v. is no less complex: the MDL plaintiffs have sued a variety of entities at every step of the opioid distribution level – manufacturers, distributors, pharmacies, pharmacy benefit managers, etc. – each of which played different roles, have differing levels of potential culpability and resources, and are represented by their own counsel. The MDL created something of a Rubik’s cube in imagining potential settlement opportunities.

12. Given that States were pursuing opioid cases outside the MDL, often in their own State courts, while many subdivisions had filed suit within the MDL, two lines of settlement negotiations emerged. Within the MDL, this Court appointed one of three Special Masters – the late Professor Francis McGovern – to oversee settlement discussions, while outside the MDL, some defendants pursued settlement opportunities directly with State governments.

13. The problem that plagued both settlement tracks was a familiar one: defendants were hesitant to make fulsome settlement offers unless they could be guaranteed some sort of finality, or so-called global peace. A settlement with only States would leave them litigating against subdivisions; a settlement with a nationwide class of subdivisions, while a step in the right direction, nonetheless seemed elusive because of limitations in the available settlement structures. Specifically, mandatory class actions under Rule 23(b)(1)(A) or (B) did not perfectly fit the

situation and were unlikely to receive judicial approval; an opt-out class action under Rule 23(b)(3) left defendants fearing they would pay an enormous sum to settle an inventory of cases but would end up still having to litigate against opt-out class members, likely those with the largest damage claims. As the Special Master and parties worked through these various class action settlement structures, Professor McGovern, with this Court's approval, brought me into the litigation to serve as an expert on class action rules and procedures.<sup>15</sup>

14. In the context of these discussions, Professor McGovern proposed applying to the class action setting a non-class method for reaching aggregate settlements among mass tort plaintiffs. Specifically, in the aggregate settlement setting, if one lawyer represents multiple plaintiffs, governing ethics rules bar the lawyer from accepting a lump sum settlement on behalf of all the clients unless and until each client agrees individually, after being informed of all the details (the lump sum, her share, everyone else's share, and the lawyer's share).<sup>16</sup> This ethics rule generates a holdout problem: if any one plaintiff objects, the lawyer is ethically obligated to reject the entire settlement for all the other plaintiffs.

15. In 2010, the American Law Institute adopted an approach to aggregate settlements that aimed to solve the holdout problem by substituting majority rule for individual consent.<sup>17</sup>

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<sup>15</sup> Notice Disclosing Expert Consultant, *In re: Nat'l Prescription Opiate Litig.*, Case No. 1:17-MD-2804, ECF 877 (Aug. 13, 2018).

<sup>16</sup> Model Rules of Pro. Conduct R. 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.").

<sup>17</sup> Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 3.17 (2010).

Specifically, the clients would agree before any negotiation that they would have the opportunity to vote yes/no on whether to accept the size of any proposed aggregate settlement, with a supermajority vote binding all (even those who voted against) to accept the sum; each client would know what her share of any aggregate settlement would be, and what the voting procedure would be, before consenting to join the voting bloc. But once joined, all would be bound by the majority vote at the backend.

16. Professor McGovern and I, with input from counsel for many disparate parties in this MDL, adopted this structure for class actions – generating an approach we called a “negotiation class action” – with similar features. If the Rule 23 class certification prongs were otherwise met, a court could certify a class for the sole purpose of negotiating an aggregate settlement with one or more defendants. The court would authorize notice directed to the class members setting forth the allocation scheme and voting rules and giving each class member a one-time opportunity to opt out. At the conclusion of the opt-out period, there would be a fixed class size. The defendant could then make a lump sum settlement offer knowing the precise contours of the group with which it was dealing. The class would vote on whether to accept the offer, with the supermajority vote binding all the class members, and with no class member having a second opportunity to opt out.<sup>18</sup>

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<sup>18</sup> Professor McGovern and I explained the approach in a law review article published the following year. Francis E. McGovern and William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 Tex. L. Rev. 73 (2020).



17. Plaintiffs’ Co-Lead Counsel herein took up the idea and filed a motion for negotiation class certification,<sup>19</sup> which this Court approved in a thorough decision in the summer of 2019.<sup>20</sup> Defendants and some putative class members sought interlocutory review of that decision under Rule 23(f). The Sixth Circuit granted the petition and, after full briefing and argument, reversed this Court’s decision in a split decision the following year.<sup>21</sup> The Circuit essentially held that the negotiation class approach was not consistent with the language and structure of Rule 23. In so holding, however, the majority cast no aspersion on the proposed allocation formula. On the contrary, the majority decision – when suggesting that the typical “litigation class” or “settlement class” might have been employed instead of the “negotiation class” – noted that, “There is no apparent reason why some of the procedural elements of the negotiation class, such as the supermajority voting scheme and county-level allocation formula, could not be used to facilitate the participation of more Plaintiffs in a lawful settlement class.”<sup>22</sup>

#### The Allocation Formula and its Development

18. I set forth that history to explain why a plan for allocating a lump sum settlement among all political subdivisions in the United States was developed prior to any settlement, and to explain the process by which it was developed and subsequently deployed.

19. Under the negotiation class certification approach, class members would have to make their opt-out decision before knowing the size of any lump sum settlement. The approach

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<sup>19</sup> Plaintiffs’ Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, ECF 1683 (June 14, 2019).

<sup>20</sup> *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019).

<sup>21</sup> *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020).

<sup>22</sup> *Id.* at 676 (emphasis added).

therefore turned on providing class members a sense of what their share would be. Given that information, class members would be able to calculate, before the opt-out period ended, how they would fare with, say, a \$100 million settlement, or a \$1 billion settlement, or a \$10 billion settlement. They could then make an informed decision about whether to stick with the group, based on both how their share of the total settlement accorded with their litigation goals and how equitable the allocation (and voting) formula seemed to them.

20. With this goal in mind, the Plaintiffs Executive Committee (PEC) set out to develop an allocation formula to apply to a lump sum settlement of opioid-related proceeds. There had been very few, if any, nationwide political subdivision class settlements, so there existed no template upon which to build. Regardless, because the opioid epidemic impacted different communities differently, any allocation formula would have to be opioid specific. To generate the formula, the PEC undertook four specific sets of tasks (writ large):

- *First*, the PEC used the tools of litigation to secure orders from this Court requiring the federal Drug Enforcement Agency (“DEA”) to release data contained in the DEA’s Automated Records and Consolidated Orders System/Diversion Analysis and Detection System (“ARCOS/DADS”) database, the so-called “ARCOS data.” As this Court explained, the ARCOS data “shows the precise number of opioid pills delivered to each City and County in America, partitioned by manufacturer and distributor and pharmacy” and hence proved “essential in settlement discussions regarding apportionment of any obligation amongst defendants, and allocation of any settlement funds to plaintiffs.”<sup>23</sup> The Court noted that the ARCOS data enabled settlement discussions to “proceed based on meaningful, objective data, not conjecture or speculation [and provided] invaluable, highly-specific information regarding historic patterns of opioid sales . . . .”<sup>24</sup>
- *Second*, gathering and analyzing the ARCOS data, and other public health data, helped set a baseline, but that baseline often hid important nuances. For example, the raw data

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<sup>23</sup> *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2182288, at \*1 (N.D. Ohio May 8, 2018).

<sup>24</sup> *Id.*

could provide a sense of the saturation of opioids in any political subdivision: one subdivision of 100,000 persons may have had 1,000,000 prescriptions filled, or 10 per person, while another subdivision of 100,000 persons may have had 1,000 prescriptions filled, or .01 per person. Yet although a political subdivision experienced enormous opioid saturation as measured by ARCOS prescription data, the public hospital that was inundated by those patients – and accordingly entitled to relief under the legal theories in the MDL lawsuits – may have been a county hospital, not the city’s hospital, and/or a neighboring city or county hospital. Thus, the PEC engaged a series of medical and public health experts to work with it, and the parties, to go beyond the ARCOS data set itself and generate an allocation approach that applied the compensation goals of the lawsuit to the public health data in a pertinent fashion. That approach allocated proceeds according to an algorithm based on three equally weighted, objective public health factors: “(1) the number of persons suffering opioid use disorder in the county; (2) the number of opioid overdose deaths that occurred in the county; and (3) the amount of opioids distributed within the county.”<sup>25</sup> The first factor was based on data collected by the federal Department of Health and Human Services and reported in the National Survey on Drug Use and Health; the second factor was based on data from the Multiple Causes of Death national mortality data, as reported by the National Center for Health Statistics, the Centers for Disease Control, and the Department of Health and Human Services; the third factor relied on the ARCOS data, as adjusted to account for negative outcomes.<sup>26</sup>

- *Third*, consistent with this effort, the PEC convened groups of plaintiff political subdivisions to help generate the allocation formula. Thousands of political subdivisions had lawsuits consolidated in the MDL, while many others were litigating in state courts outside the MDL. Through formal PEC-convened plaintiff meetings, as well as informal communications networks, many of these litigating entities participated in the development of the allocation formula. The presence of litigating entities, each with its own unique interests and perspective, enabled the types of nuances identified above to emerge and helped fashion a final allocation formula that took careful account of all the various factors at issue as much as possible.
- *Fourth*, as the main purpose of the negotiation class approach was to fix a large group of municipalities into an aggregate settlement group, the allocation formula had to be presented to and accepted by that mass of political subdivisions throughout the country, not just the more active players participating in the development process. In a truly stunning display of technological wizardry, the PEC developed an allocation formula website. The website encompassed a map of the United States and enabled a user to

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<sup>25</sup> Plaintiffs’ Memorandum in Support of Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re: Nat’l Prescription Opiate Litig.*, Case No. 1:17-md-02804-DAP, ECF 1820-1, at 55 (July 9, 2019) (hereinafter “Pl. Neg. Class Br.”).

<sup>26</sup> *Id.* at 55–59.

click on any county and see that county's share of the lump sum settlement, as well as to plug in a lump sum number and see the county's actual dollar recovery at that lump sum level. Perhaps most importantly, the map enabled one municipality to scroll across to a neighboring municipality and compare its take to that of its fellow class members.<sup>27</sup>

21. When the PEC moved for certification of a negotiation class, it included the proposed allocation formula as part of the motion,<sup>28</sup> given the centrality of the formula to ensuring that class members had sufficient information upon which to base their opt-out decision, were the Court to grant certification. As there was not yet a proposed settlement when the PEC moved for negotiation class certification, there was no reason for the Court to apply Rule 23(e)'s settlement approval principles. However, the Court appreciated that if it went ahead with the negotiation class, the parties negotiated a lump sum settlement, the class members voted on it and approved it, and Counsel then moved for final approval, the Court would have to apply Rule 23(e)(2)(D) at that point. And if the allocation formula failed, everything that preceded it would have been a complete – yet avoidable – waste of time.<sup>29</sup> The Court accordingly appointed one of the case's Special Masters (Cathy Yanni) to “provide the Court a one-time, neutral perspective on the proposed allocation . . . scheme[.]”<sup>30</sup>

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<sup>27</sup> The link to the allocation map (<https://allocationmap.iclaimsonline.com/>) is no longer operational, but in conjunction with the publication of Professor McGovern's and my law review article on negotiation class certification, the Texas Law Review generated a permanent link that preserves a snapshot of the landing page for the original site. *See In re: National Prescription Opiates [sic] Litigation*, MDL No. 2804 (N.D. Ohio), *Allocation Map*, at <https://perma.cc/6J6G-ATZZ>.

<sup>28</sup> *See* Pl. Neg. Class Br. at 55-60.

<sup>29</sup> Order Directing Special Master Yanni to Assess Fairness of Allocation and Voting Proposals to Non-Litigating Entities, ECF 2529, at 3 (Aug. 26, 2019) (“It would be perverse—and an enormous waste of judicial and societal resources—to launch this whole negotiation class only to later hold that the allocation or voting schemes, identified at the outset, were inequitable *ab initio*.”).

<sup>30</sup> *Id.*

22. Special Master Yanni's report focused on various aspects of the allocation formula at issue in the negotiation class structure, some of which are not pertinent here. As to the core allocation mechanism, however (the distribution based on the ARCOS and other public health data, as developed by the parties in conjunction with medical and public health experts), Special Master Yanni wrote this:

[T]he plan for allocating 75% of the settlement fund is objective, transparent, and fair. Settlement proceeds are allocated according to an algorithm based on three sets of objective public health data directly at the heart of this case: opioid-related overdoses, opioid-related deaths, and the distribution of opioid-related pills per capita in a given jurisdiction. The results are made transparent to the entire class, as any class member (or member of the public) can utilize an on-line allocation tool to see precisely what share of any settlement will go to each and every county in the country. This allocation model reflects a serious effort on the part of the litigating entities that devised it to distribute the class's recovery according to the driving force at the heart of the lawsuit – the devastation caused by this horrific epidemic. The legitimacy of the main allocation model supports an initial assumption that the litigating entities operated in good faith in developing the allocation plan.<sup>31</sup>

23. The Court reviewed Special Master Yanni's report in certifying the negotiation class and adopted her findings. The Court explained its reasoning, and why some objections to the core allocation plan were off base, as follows:

As to the allocation plan, the Court agrees with Special Master Yanni's conclusion that the method for allocating the core class recovery (75% of the fund) reflects a lot of hard work and is a significant and eminently fair step toward resolution of these many cases. **Nothing in the allocation model appears to skew toward any group other than those hardest hit by the opioid epidemic.**<sup>32</sup>

24. Because the Sixth Circuit reversed this Court's endorsement of the negotiation class approach, the negotiation class certification allocation formula was never formally subjected to the

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<sup>31</sup> Report of Special Master Cathy Yanni, ECF 2579, at 5 (Sept. 10, 2019).

<sup>32</sup> *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 553 (emphasis added).

Rule 23(e)(2)(D) analysis in the context of a proposed class action settlement. However, the guts of the allocation formula became part of later settlements and were met with informal approval of the many political subdivisions therein. To understand that piece of the story requires returning to the second settlement track identified in paragraph 12, above – the States-driven settlements.

#### Later Endorsement of the Allocation Formula

25. Defendants would necessarily have to settle with State governments outside the MDL, as many States had filed cases in their own State courts and those cases could not be removed and consolidated into the MDL. The defendants' concern, noted above, was that settling with a State would leave it open to cases from the State's political subdivisions. Some State attorneys general asserted the legal authority to shut down subdivision litigation, but arguably not all had such authority, and even among those who did, the politics of doing so was complicated. Accordingly, the defendants and States developed something of a carrot/stick approach to aggregate settlements – essentially, the defendants provided multi-year settlements and graduated the amount provided each year based on the presence or absence of subdivision litigation. This empowered the States to work with their subdivisions to cease litigating independently, as the State's recovery from a defendant would increase the less outstanding litigation existed in that State.<sup>33</sup>

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<sup>33</sup> The National Association of Attorneys General explained the provisions as follows:

Because of the unprecedented nature of this nationwide litigation – involving thousands of separate cases and tens of thousands of potential governmental claimants – there are several provisions calibrated to incentivize maximum participation by state and local governments and to incentivize early participation. They include the division of payments into base and bonuses, with bonuses based on participation levels. There are also suspension, offset, and look-back provisions that are intended to deter future opioid litigation against the companies by state and local governments, now that they have agreed to a \$26 billion

26. Of course, to accomplish the goal of curtailing subdivision litigation, each State had to generate a mechanism to allocate the State's recovery among its subdivisions that was sufficiently attractive to the subdivisions to get them to stop litigating independently. Some State AGs and their political subdivisions negotiated specific intrastate allocation mechanisms for that purpose and for those that did, that mechanism was employed as part of later settlement allocations, such as in the McKinsey Political Subdivision class action. In the States that were unable to establish intrastate allocation mechanisms, or otherwise did not, allocation defaulted to the data-driven, expert developed, class member participatory mechanism from MDL 2804; thus, the MDL 2804 Allocation Formula became known as the national default allocation mechanism.

27. Had the negotiation class been affirmed and led to a settlement, there would have been a settlement process enabling objections to the allocation mechanism and a direct application of Rule 23(e)(2)(D) within the litigation in which the default mechanism was established. An absence of objections in that setting could provide evidence upon which a court might rely in

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global nationwide settlement. These deterrents are substantially lessened in the event certain high levels (tiers) of participation by states and subdivisions are achieved nationally.

A state and its subdivisions can secure maximum payments for themselves by achieving full resolution (subject to certain minor exceptions) of the actual and potential opioid-related legal claims by public entities within the state. This can be done through voluntary opt-ins, legislation, judicial action, or any combination of these methods that resolves existing claims and bars future claims. States that are unable to achieve complete resolution can still receive substantial payments by resolving a significant portion of current and future subdivision claims. The partial payment percentages are set forth in sliding scales based on participation levels among subdivisions within a state.

National Association of Attorneys General, *Summary of State/Subdivision Agreements with Johnson & Johnson and 3 Major Pharmaceutical Distributors* at 1-2, available at <https://ncdoj.gov/wp-content/uploads/2021/07/2-pager-full-deal-final-002.pdf>.

affirming the *bona fides* of an allocation plan.<sup>34</sup> Although that form of direct evidence was lacking, the subsequent use of the default allocation plan by States and their political subdivisions throughout the country provides strong evidence of the fairness of the default plan. Put differently, (1) the MDL 2804 Allocation Formula is so equitable that interested parties relied on it where agreement was otherwise elusive and (2) political subdivisions throughout the country implicitly noted their endorsement of the Formula by electing to participate in the national settlements at levels sufficient to ensure their success.

#### The Legitimacy of the MDL 2804 Allocation Formula

28. Returning to the exemplary McKinsey Political Subdivisions settlement described above, as that settlement was a class action settlement, it required judicial approval. Judge Breyer accordingly applied Rule 23(e)'s settlement principles in reviewing the proposal. Rule 23(e)(2)(D), as amended in 2018, requires the Court to ensure that a proposed settlement “treats class members equitably relative to each other” before granting final approval to it.<sup>35</sup> As noted above, the Advisory Committee's notes to the 2018 codification of this factor provide context in

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<sup>34</sup> The Sixth Circuit has long instructed district courts to apply the so-called *UAW* or *International Union* factors in reviewing a proposed class action settlement, one of which is “the reaction of the class members to the proposed settlement.” See *Does 1-2 v. Déjà Vu Servs., Inc.*, 925 F.3d 886, 894–95 (6th Cir. 2019) (“In *UAW*, we established a seven-factor test to assess whether or not a class action settlement is ‘fair, reasonable, and adequate’ under Federal Rule of Civil Procedure 23(e). Those factors include: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest”) (cleaned up) (discussing *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007)). See also *Newberg and Rubenstein on Class Actions* § 13:58 (reporting and discussing fact that “[c]ourts have often held that if only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement”).

<sup>35</sup> Fed. R. Civ. P. 23(e)(2)(D).



stating, “Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.”<sup>36</sup>

29. As I explained to the Court in that matter,<sup>37</sup> there were four remarkable aspects of the history reported above that provided strong support for the conclusion that the MDL 2804 Allocation Formula met Rule 23(e)(2)(D)’s equitable goal.

30. *First, **substantively***, and most importantly, the MDL 2804 Allocation Formula is based on three sets of objective public health data, all reported by the federal government, as applied by public health and medical experts to the issues in this case. The data points themselves are remarkably precise indicators of the saturation of the opioid problem in any given area, and the further refinement of the data for use as an allocation formula relied on neutral public health and medical experts with no incentives to skew the data in any particular manner. There is little doubt that the allocation formula is solely directed at remediating the impact of the opioid epidemic on political subdivisions throughout the United States and is therefore substantively sound.

31. *Second, **procedurally***, and uniquely for class action practice, class members themselves were involved in developing the MDL 2804 Allocation Formula. This is unusual for class actions, as class members typically have so little at stake that it would be inefficient for them to spend time sorting out an allocation formula; courts, lawyers, and claims administrators do it for them. But here, of course, class members have significant economic, political, and social

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<sup>36</sup> Fed. R. Civ. P. 23(e)(2)(D) advisory committee’s note to 2018 amendment.

<sup>37</sup> See Declaration of Professor William B. Rubenstein in Support of Motion for Final Approval of Class Action Settlement, *In re McKinsey & Co., Inc., National Prescription Opiate Consultant Litigation*, Case No. 3:21-md-02996-CRB, ECF 628-2, at 22–26 (Nov. 15, 2023).

interests at stake. It is a credit to the MDL 2804 Allocation Formula that it resulted from the MDL 2804 PEC's effort to solicit class member input: the underlying premise of adjudication in the United States is, of course, that settlement decisions are vested with the client, not counsel,<sup>38</sup> and where plausible, class action should aim for no less.<sup>39</sup> One commentator has noted that the structure of negotiation class certification – figuring out an allocation formula before money is on the table and before the opt-out opportunity, as occurred in MDL 2804 – “is much more likely to result in an allocation that is fair to all segments of the class with their differing interests.”<sup>40</sup>

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<sup>38</sup> Model Rules of Prof'l Conduct R. 1.2(a) (“A lawyer shall abide by a client’s decision whether to settle a matter.”).

<sup>39</sup> Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 859–60 (2017) (describing how class members – particularly those with large stakes – have become more active in class action litigation and noting relationship to democratic-like values); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623, 1654–62 (1997) (discussing mechanisms for democratic decision-making in group litigation).

<sup>40</sup> Alan B. Morrison, *A Negotiation Class: A New, Workable, and (Probably) Lawful Idea*, 99 Tex. L. Rev. Online 49, 50 (2020). Professor Morrison explains:

That is because class counsel needs as many class members as possible to remain in the class so that the defendant will be willing to negotiate over as close to a global settlement as possible. A negotiation class is unlike the typical settlement in which the allocation is done by class counsel after the deal with the defendant is struck, when absent class members have little leverage. By contrast, in the negotiation class, the allocation occurs first, when class members are not forced to choose between no deal and a bad deal. As a result, in order to reach agreement on an allocation formula, class counsel must consider the interests of all subgroups within the class (or realistically, their lawyers), even if they are not actually at the bargaining table. And class counsel must listen and take those views into account so that the class supports the allocation when the judge is asked to certify the class, so that large numbers of class members do not opt out, and so that the class as a whole votes to support the ultimate settlement if class counsel is able to reach an agreement with the defendant.

*Id.*

32. *Third, historically*, Special Master Yanni, appointed by this Court, reviewed the allocation formula in real time and found it to be sound; the Court, in turn, adopted that finding after undertaking its own independent evaluation. To be sure, that review did not come in the context of a proposed settlement – rather, in the context of negotiation class certification as explained above – but these reviews nonetheless applied the principle of Rule 23(e)(2)(D) to the MDL 2804 Allocation Formula and found the formula sound.

33. *Fourth*, subsequent events provide strong support for the conclusion that the MDL 2804 Allocation Formula has been consented to by many class members. As noted above, significant class participation went into the formula at the outset. In the negotiation class certification proceedings in MDL 2804, only a few putative class members expressed any concern about this aspect of the allocation formula, and this Court’s decision explained that the objections were either based on a misunderstanding of the facts underlying the formula and/or addressed by other aspects of the settlement.<sup>41</sup> Although negotiation class certification never came to fruition, the parties generating the subsequent 2021 National Settlements all employed the MDL 2804 Allocation Formula as a default and relatively few political subdivisions opted not to participate. This shows that the Formula drew support from both States and political subdivisions, as it was used precisely where those entities were unable to otherwise generate an intrastate allocation plan and/or because it provided a satisfactory intrastate allocation plan.

34. Given this history, it is not surprising that Judge Breyer found that the McKinsey Political Subdivision settlement’s use of the MDL 2804 Allocation Formula satisfied the equitable distribution requirement of Rule 23. There, too, class members showed remarkable support for

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<sup>41</sup> *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 553.

the settlement and its allocation formula: only 79 of 33,000 Class Members submitted valid opt out requests, meaning that 99.76% of the Class Members participated in the settlement.<sup>42</sup> The order granting final approval explained:

The plan tracks the allocation agreements reached between the states and their subdivisions as to the portion of each state's share under the 2021 National Settlements. As set forth in the 2021 National Settlements:

The allocation of the Settlement Fund allows for different approaches to be taken in different states, such as through a State-Subdivision Agreement. Given the uniqueness of States and their Subdivisions, Settling States and Participating Subdivisions are encouraged to enter into State-Subdivision Agreements in order to direct the allocation of their portion of the Settlement Fund.

Each Class member with a population above 10,000 or that filed a lawsuit against McKinsey raising the issues alleged in the Master Complaint shall be eligible for a *pro rata* share of the Net Settlement Fund based on a proposed plan of allocation. In those states without negotiated agreements, the plan will follow the default allocation provided for in the national settlements, *i.e.*, the "default" direct-to-subdivision allocation of 15% will be used, with the remaining net settlement funds going to an abatement fund.<sup>43</sup>

Thus, Judge Breyer concluded that, "The plan of allocation as set out by Class Counsel treats Class Members equitably relative to one another and complies with the requirements of Federal Rule of Civil Procedure 23."<sup>44</sup>

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<sup>42</sup> Order Granting Final Approval of Class Action Settlement and Award of Attorneys' Fees and Costs, *In re McKinsey & Co., Inc., National Prescription Opiate Consultant Litigation*, Case No. 3:21-md-02996-CRB, ECF 665, at 3 (Feb. 2, 2024).

<sup>43</sup> *Id.* at 4 (cleaned up).

<sup>44</sup> *Id.*

**II.**  
**THIS SETTLEMENT’S PROPOSED ALLOCATION FORMULA  
TREATS CLASS MEMBERS EQUITABLY RELATIVE TO EACH OTHER**

The Proposed Allocation Formula

35. As the present settlement is not one among political subdivisions and hence cannot directly employ the MDL 2804 Allocation Formula, it requires a return to first principles and application of those principles to the proposal.

36. Settlement allocation formulas aim to distribute an aggregate fund (a) among a group of class members (b) on the basis of the harm remedied by the settlement in an (c) equitable fashion. To hit the third mark, each group member’s proportion of the settlement fund should have a meaningful relationship to the proportion of the harm suffered by that class member.

37. The class in this case consists of “private benefit plans that provide health and welfare benefits to their members and their families, including reimbursement for some or all of the costs of prescription opioids that were on their approved formularies, and often for the resulting medical claims (e.g., OUD [opioid use disorder] treatment and emergency visits).”<sup>45</sup>

38. The allegations underlying the settlement are that “the opioid industry’s practices uniquely harmed TPPs by causing them to pay for prescription opioids rather than for safer, non-addictive, and lower-cost prescription drugs (including over-the-counter pain relievers) that would have been used otherwise, and further paid for opioid addiction-related treatment that followed.”<sup>46</sup>

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<sup>45</sup> Third Party Payor Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e), *In re: Nat’l Prescription Opiate Litig.*, Case No. 1:17-md-02804-DAP, ECF 5614, at 3 (Aug. 30, 2024).

<sup>46</sup> *Id.*

39. The allocation plan proposes to distribute the common fund according to precisely these two factors – how much did each class member (over)pay for opioids themselves and how much did each class member (over)pay for OUD.<sup>47</sup> Moreover, the plan proposes to use actual data related to opioid prescriptions and opioid-related health care to generate the precise allocation numbers as much as possible.<sup>48</sup> The prescriptions themselves are identified in the class member’s data by drug names.<sup>49</sup> The OUD amount is generated by assessing the quantity of OUD claims suffered by each class member (members with OUD x number of years covered) and then multiplying that number by an accepted estimate of the excess costs per patient attributable to OUD.<sup>50</sup> This general approach clearly treats class members equitably toward one another as it carefully matches the allegations in the lawsuit with the proposed distribution and employs hard data to generate precise numbers.

40. The approach faces only one real hurdle, which is the absence of *complete* data for all class members. Data deficiencies are two-fold: (a) the class period is sufficiently broad (1996–2024) that some class members do not have precise data for every one of those years; and (b) the class is sufficiently large that some class members lack access to relevant data altogether. Professor Rosenthal’s plan solves those data problems in ways tailored to each. For class members without complete data, the missing year’s data can be calculated simply by extrapolating from the

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<sup>47</sup> Expert Report of Professor Meredith Rosenthal Regarding Allocation of Settlement Proceeds, *In re: Nat’l Prescription Opiate Litig.*, Case No. 1:17-md-02804-DAP, ECF 5614-7, at 3 (Aug. 30, 2024) (“[T]he proposed allocation takes as its point of departure . . . the total dollar value of opioid claims and of medical treatment for enrollees with opioid use disorder (“OUD”) . . .”).

<sup>48</sup> *Id.* at ¶¶ 12–16.

<sup>49</sup> *Id.* at ¶ 13.

<sup>50</sup> *Id.* at ¶¶ 14–15.

available data and adjusting based on the prevalence of OUD in the population during the missing years.<sup>51</sup> For class members without access to any claims data, Professor Rosenthal calculates a loss formula from those class members with data then applies it to the class members without data by (a) estimating the size of that member's client pool, (b) then multiplying that number by "an average dollar amount of opioid-related spending per enrollee per year,"<sup>52</sup> with that average generated from the data of those class members with data, all of which is also (c) adjusted by location to account for the geographically-distinct impact of the epidemic.<sup>53</sup>

#### The Legitimacy of the Proposed Allocation Formula

41. Five key factors about Professor Rosenthal's proposed allocation formula provide support for the conclusion that it treats class members equitably relative to one another, as Rule 23(e)(2)(D) requires.

42. *First, **the allocation plan is entirely data driven**.* It employs actual class member data where available, rendering it similar in this phase to any securities class action distribution plan that simply tracks purchases, sales, and shares. Where data is unavailable, the plan fills out these holes by again relying on the best available estimates of what those data would be, extrapolating from available data and/or supplying well-accepted, published, peer-reviewed, public health estimates of (for example) the costs of OUD.

43. *Second, **the plan employs the same data driven approach across the whole class, indeed even filling data gaps for some class members with data derived from other class***

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<sup>51</sup> *Id.* at ¶¶ 17–20.

<sup>52</sup> *Id.* at ¶ 23.

<sup>53</sup> *Id.* at ¶¶ 21–26. A version of this same methodology is used when class members covered only prescription drugs but not other care or vice versa. *Id.* at ¶ 27.

members. No class members are treated differently than one another. The claim value for all class members with available data is generated in the same manner and the claim value for class members missing data is generated according to the same gap-filling approach. There is obvious equity within each of these two tranches of class members. Better still, the data that are supplied for class members with missing data are data generated from the information available in the claims' histories of class members with data. This approach ensures that there is equity across the tranches, that the individual allocation to each class member with data, on the one hand, and the allocation to each class member without data, on the other, are effectively a product of all the information available across the class.

44. Third, the plan uses data to ensure that class member recoveries are directly related to the harms alleged in the lawsuit. To say that an allocation is data-driven suggests it is objective in nature but does not, standing alone, prove that it is equitable. What makes it so is that the data is employed for the single purpose of allocating the funds according to the harms alleged in the lawsuit. Here, the data Professor Rosenthal's plan employs reflect actual harm from the opioid epidemic – either excess payments for opioid prescriptions or excess costs generated by Opioid Use Disorder. In many ways, this allocation is far simpler than the MDL 2804 Formula, as the cost of the epidemic to these TPP class members is reflected directly in their payment data (or estimates thereof). As explained above, allocating recoveries across political subdivisions raised more nuances because one political subdivision may have been the site of an enormous dump of prescriptions, but the public hospital handling the fall out may have been in the next county over. With TPPs, however, their costs are their costs, full stop. And these costs directly



reflect the relative impact of the opioid epidemic on each TPP class member, consistent with the goal of all 2804 settlements regardless of structure, plaintiffs, or defendant.

45. *Fourth, none of the red flags that raise allocation concerns are present here.* In *Newberg and Rubenstein on Class Actions*, I catalogue a set of concerns courts consider allocation red flags that might trigger closer scrutiny of an allocation plan:<sup>54</sup>

- Settlements may raise a red flag, I report, “where part of the class receives relief and another significant part receives no relief.” This concern is not applicable here as all class members will receive relief relative to the harm they suffered.
- Similarly, courts are wary if “compensation would be more difficult [to claim] for some class members [as opposed to] others . . . [even though] both groups have the same claims.” Again, this plan raises no such concern as the claiming process applies equally across the board.
- Finally, if class members are in fact differently situated as to one another but treated as if they were not, this may be a concern. But the only differential situation here is a data gap and, as explained above, that gap is filled using objective data primarily drawn from the very class members with data, hence ensuring equity across the class.

46. In the treatise, I conclude by stating that the Court’s goal, as to this prong, “is to ensure that similarly situated class members are treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they were similarly situated.” That principle perfectly captures the substance of Professor Rosenthal’s plan.

47. *Fifth, not surprisingly, therefore, Judge Breyer found that this same distributional plan met the requirements of Rule 23(e)(2)(D)’s equitable principle* in approving a settlement between a similar TPP class and McKinsey in that MDL.<sup>55</sup>

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<sup>54</sup> All of the succeeding quotations are from *Newberg and Rubenstein on Class Actions* at § 13:56.

<sup>55</sup> Order Granting Final Approval of Class Action Settlement and Award of Attorneys’ Fees and Expenses and Class Representative Service Awards, *In re McKinsey & Co., Inc., National*

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48. Given the enormous magnitude of the opioid problem, the quantity of political actors and lawyers involved in addressing it, and the level of the monetary relief afforded in the many settlements that aim to remedy it, the actual legal language of various allocation formulas can sound dense and ring in buzzwords. But when parsed, there is little doubt that allocation efforts in opioid-related settlements generally, and in MDL 2804 in particular, have been one of the hallmark achievements associated with this landmark MDL.

49. I have, accordingly, testified that:

- The parties in MDL 2804 developed the MDL 2804 Allocation Formula using objective public health data, in consultation with medical and public health experts, in a manner that encouraged and relied on stakeholder/class members input and approval; Special Master Yanni and this Court both independently approved the mechanism in the context of negotiation class certification; States, political subdivisions, settling defendants in other national settlements showed their approval of it by making it the default intrastate allocation formula; and Judge Breyer explicitly blessed it in granting final approval to the McKinsey Political Subdivisions settlement.
- So too here: the proposed allocation formula is data driven, uses similar data for all class members, ensures that recovery levels correspond to harm levels, raises no Rule 23 red flags, and Judge Breyer explicitly blessed it, too, in granting final approval to the McKinsey TPP settlement. Both the content of the allocation formula and this history provide strong support by which the Court could conclude that Rule 23(e)(2)(D)'s intraclass equity requirement has been met.



October 9, 2024

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William B. Rubenstein

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*Prescription Opiate Consultant Litigation*, Case No. 3:21-md-02996-CRB, ECF 739, at 2 (Aug. 5, 2024) (finding that the “Plan of Allocation treats TPP Class members equitably relative to one another”).

# **EXHIBIT A**

*In re: National Prescription Opiate Litigation*  
Case No. 1:17-md-2804  
U.S. District Court for the Northern District of Ohio

**DECLARATION OF PROFESSOR WILLIAM B. RUBENSTEIN**

**EXHIBIT A**  
**BACKGROUND AND QUALIFICATIONS**

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

2. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my appended c.v., Exhibit A). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*. Between 2008 and 2017, I rewrote the entire multivolume treatise from scratch as its Fifth Edition and, subsequently, produced the treatise's Sixth Edition – *Newberg and Rubenstein on Class Actions* – which was published in 2022. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

3. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. Between 2010 and 2023, the Judicial Panel on Multidistrict Litigation (JPML) annually invited me to give a presentation on the current state of class action law at its MDL Transferee Judges Conference. The Federal Judicial Center invited me to participate as a panelist (on the topic of class action settlement approval) at its March 2018 judicial workshop celebrating the 50<sup>th</sup> anniversary of the JPML, Managing Multidistrict and Other Complex Litigation Workshop. The Second Circuit invited me to moderate a panel on class action law at the 2015 Second Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

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

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

6. I have been retained as an expert witness in more than 110 cases and as an expert consultant in another 30 or so cases. These cases have been in state and federal courts throughout the United States; most have been class actions and other complex matters, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification, to the reasonableness of settlements and fees, to the preclusive effect of class action judgments. I have been retained by counsel for plaintiffs, for defendants, and for objectors.

7. Courts have appointed me to serve as an expert in complex fee matters:

- In 2015, the United States Court of Appeals for the Second Circuit appointed me to argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal in 2016.<sup>1</sup>
- In 2017, the United States District Court for the Eastern District of Pennsylvania appointed me to serve as an expert witness on certain attorney's fees issues in the National Football League (NFL) Players' Concussion Injury Litigation (MDL 2323). In my final report to the Court, I recommended, *inter alia*, that the Court

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<sup>1</sup> See *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015), *aff'd sub nom. DeValerio v. Olinski*, 673 F. App'x 87 (2d Cir. 2016).

should cap individual retainer agreements at 22%, a recommendation that the Court adopted.<sup>2</sup>

- Between 2018-2020, this Court appointed me to serve as an expert consultant to Special Master McGovern and the Court on complex class action and common benefit fees issues in this matter, the National Prescription Opiate Litigation (MDL 2804).
- The United States District Courts for the Southern District of New York and the Eastern District of Pennsylvania have both appointed me to serve as a mediator to resolve complex matters in class action cases, including fee issues.

8. Courts have often relied on my expert witness testimony.<sup>3</sup>

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<sup>2</sup> *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at \*1 (E.D. Pa. Apr. 5, 2018) ("I adopt the conclusions of Professor Rubenstein and order that IRPAs' fees be capped at 22% plus reasonable costs.").

<sup>3</sup> *See, e.g., In re Genetically Modified Rice Litig.*, 764 F.3d 864, 872 (8th Cir. 2014); *In re Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-MD-02843-VC, 2023 WL 8445812, at \*2 (N.D. Cal. Oct. 10, 2023); *Benson v. DoubleDown Interactive, LLC*, No. 18-CV-0525-RSL, 2023 WL 3761929, at \*2 (W.D. Wash. June 1, 2023); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2022 WL 18108387, at \*7 (E.D. Va. Nov. 8, 2022); *Reed v. Light & Wonder, Inc.*, No. 18-CV-565-RSL, 2022 WL 3348217, at \*1-\*2 (W.D. Wash. Aug. 12, 2022); *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-CV-0256 (LAK), 2021 WL 2453972 at \*3 (S.D.N.Y. June 15, 2021); *In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617, 623 (N.D. Cal. 2021); *Kater v. Churchill Downs Inc.*, No. 15-CV-00612-RSL, 2021 WL 511203, at \*1-\*2 (W.D. Wash. Feb. 11, 2021); *Wilson v. Playtika Ltd.*, No. 18-CV-5277-RSL, 2021 WL 512230, at \*1-\*2 (W.D. Wash. Feb. 11, 2021); *Wilson v. Huuuge, Inc.*, No. 18-CV-5276-RSL, 2021 WL 512229, at \*1-\*2 (W.D. Wash. Feb. 11, 2021); *Amador v. Baca*, No. 210CV01649SVWJEM, 2020 WL 5628938, at \*13 (C.D. Cal. Aug. 11, 2020); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at \*10 (S.D. Ill. Dec. 16, 2018); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2018 WL 6305785, at \*5 (M.D.N.C. Dec. 3, 2018); *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at \*4 (E.D. Pa. Apr. 5, 2018); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 3175924, at \*3 (N.D. Cal. July 21, 2017); *Aranda v. Caribbean Cruise Line, Inc.*, No. 1:12-cv-04069, 2017 WL 1369741, at \*5 (N.D. Ill. Apr. 10, 2017), *aff'd sub nom. Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792 (7th Cir. 2018); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at \*9 (S.D.N.Y. Sept. 2, 2015); *Asghari v. Volkswagen Grp. of Am., Inc.*, No. 13-CV-02529 MMM, 2015 WL 12732462, at \*44 (C.D. Cal. May 29, 2015); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010); *Commonwealth Care All v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236, at \*2 (Mass. Super. Aug. 5, 2013).

9. I have been retained in this case to provide the Court information concerning the issues set forth in the first paragraph of my Declaration. I am being compensated for providing this Declaration. I was paid a flat fee in advance of preparing my Declaration, so my compensation is in no way contingent upon the content of the Declaration.

10. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this and related cases, a list of which is attached as Exhibit B. I have also re-read the case law and scholarship relevant to the issues herein.

11. My full c.v. is set forth in the succeeding pages.



**PROFESSOR WILLIAM B. RUBENSTEIN**

Harvard Law School - AR323  
1545 Massachusetts Avenue  
Cambridge, MA 02138

(617) 496-7320  
rubenstein@law.harvard.edu

ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Bruce Bromley Professor of Law	2018-present
Sidley Austin Professor of Law	2011-2018
Professor of Law	2007-2011
Bruce Bromley Visiting Professor of Law	2006-2007
Visiting Professor of Law	2003-2004, 2005-2006
Lecturer in Law	1990-1996

*Courses:* Civil Procedure; Class Action Law; Remedies; Legal Profession  
*Awards:* 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence  
*Membership:* American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

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

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

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law	1995-1997
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*Courses:* Civil Procedure; Federal Litigation  
*Awards:* 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law	1994, 1995
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BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor	Summer 2005
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LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel	1987-1995
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- Litigated impact cases in federal and state courts throughout the United States.
- Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country and coordinated work with private cooperating counsel nationwide.
- Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

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

Law Clerk	1986-87
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PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern	Summer 1985
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## EDUCATION

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

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

## SELECTED COMPLEX LITIGATION EXPERIENCE

### *Professional Service and Highlighted Activities*

- ◇ *Author*, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS (6<sup>th</sup> ed. 2022); NEWBERG ON CLASS ACTIONS (sole author since 2008, sole author of entirely re-written Fifth Edition (2011-2019))
- ◇ *Speaker*, Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (provided presentation to MDL judges on recent developments in class action law and related topics (2010, 2011, 2013-2019))
- ◇ *Panelist*, Federal Judicial Center, *Managing Multidistrict Litigation and Other Complex Litigation Workshop* (for federal judges) (March 15, 2018)
- ◇ *Amicus curiae*, authored *amicus* brief on proper approach to incentive awards in class action lawsuits in conjunction with motion for rehearing *en banc* in the United States Court of Appeals for the Eleventh Circuit (*Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020))
- ◇ *Amicus curiae*, authored *amicus* brief in United States Supreme Court on proper approach to *cy pres* award in class action lawsuits (*Frank v. Gaos*, 139 S. Ct. 1041 (2019))
- ◇ *Amicus curiae*, authored *amicus* brief in California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc.*, 376 P.3d 672, 687 (Cal. 2016) (noting reliance on *amicus* brief))
- ◇ *Amicus curiae*, authored *amicus* brief in the United States Supreme Court filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion*, No. 09-893, 131 S. Ct. 1740 (2011))
- ◇ *Adviser*, American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania
- ◇ *Co-Chair*, ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007
- ◇ *Planning Committee*, American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007
- ◇ "Expert's Corner" (Monthly Column), *Class Action Attorney Fee Digest*, 2007-2011

### *Judicial Appointments*

- ◇ *Co-Mediator.* Appointed by the United States District Court for the Eastern District of Pennsylvania to help mediate a complex attorney's fees issue (*In re National Football League Players' Concussion Injury Litigation*, Civil Action No. 2:12-md-02323 (E.D. Pa. June-September 2022))
- ◇ *Mediator.* Appointed by the United States District Court for the Southern District of New York to mediate a set of complex issues in civil rights class action (*Grottano v. City of New York*, Civil Action No. 15-cv-9242 (RMB) (May 2020-January 2021))
- ◇ *Expert consultant.* Appointed by the United States District Court for the Northern District of Ohio, and Special Master, as an expert consultant on class certification and attorney's fees issues in complex multidistrict litigation (*National Prescription Opiate Litigation*, MDL 2804, Civil Action No. 1:17-md-2804 (N.D. Ohio Aug. 13, 2018; June 29, 2019; March 10, 2020))
- ◇ *Expert witness.* Appointed by the United States District Court for the Eastern District of Pennsylvania as an expert witness on attorney's fees in complex litigation, with result that the Court adopted recommendations (*In re National Football League Players' Concussion Injury Litigation*, 2018 WL 1658808 (E.D. Pa. April 5, 2018))
- ◇ *Appellate counsel.* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *DeValerio v. Olinski*, 673 F. App'x 87, 90 (2d Cir. 2016))

### *Expert Witness*

- ◇ Retained as an expert witness concerning reasonableness of attorney's fee request (*In re Apple Inc. Securities Litigation*, Case No. 4:19-cv-02033-YGR (N.D. Cal. 2024))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Brown v. Google LLC*, Civil Action No. 4:20-cv-03664 (N.D. Cal. 2024))
- ◇ Submitted expert witness declaration concerning proper approach to – and reasonableness of – attorney's fee request (*Parris v. Meta Platforms, Inc.*, Case No. 2023LA000672 (Illinois Circuit Court, DuPage Cty., 2024))
- ◇ Submitted expert witness declaration concerning proper approach to – and reasonableness of – attorney's fee request (*Barr v. SelectBlinds LLC*, Civil Action No. 2:22-cv-08326-SPG-PD (C.D. Cal. 2023))
- ◇ Submitted expert witness declaration on history and equity of proposed allocation system in complex class action settlement (*In re McKinsey & Co. Inc. National Prescription Opiate Consultant Litigation*, Case No. 3:21-md-02996-CRB (N.D. Cal. 2023))
- ◇ Submitted expert witness declaration concerning reasonableness of proposed hourly rates used in lodestar cross-check submission (*In re National Veterans Legal Services Program, et al. v. United*

States, Case No. 1:16-CV-00745-PLF (D. D.C. 2023))

- ◇ Submitted expert witness declarations concerning reasonableness of – and proper approach to – attorney’s fees in context of issue class action judgment (*James, et al., v. PacifiCorp, et al.*, Civil Action No. 20CV33885 (Oregon Circuit Court, Multnomah Cty. 2023))
- ◇ Retained as an expert witness concerning reasonableness of attorney’s fee request (*In re Wells Fargo & Company Securities Litigation*, Case No. 1:20-cv-04494-GHW (S.D.N.Y. 2023))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney’s fee request (*In re Facebook, Inc. Consumer Privacy User Profile Litigation*, Civil Action No. 3:18-cv-02843-VC (N.D. Cal. 2023))
- ◇ Submitted expert witness declaration concerning constitutionality of proposed procedures for resolving aggregate claims within a bankruptcy proceeding (*In re PG&E Corporation and Pacific Gas and Electric Company*, Bankruptcy Case No. 19-30088 (N.D. Cal. Bankrpt. 2023))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney’s fee request (*Health Republic Insurance Company v. United States*, Civil Action No. 1:16-cv-0259C (Ct. Fed. Cl. 2023))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney’s fee request (*Benson, et al. v. DoubleDown Interactive, LLC, et al.*, Civil Action No. 2:18-cv-00525 (W.D. Wash. 2023))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney’s fees request (*In re Twitter Inc. Securities Litigation*, Case No. 4:16-cv-05314 (N.D. Cal. October 13, 2022))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney’s fee request (*Ferrando v. Zynga Inc.*, Civil Action No. 2:22-cv-00214 (W.D. Wash. 2022))
- ◇ Retained as an expert witness concerning fee structures in complex mass/class litigation (*In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, Sub-Master Docket No. 17-9001L, (Ct. of Federal Claims, 2022-))
- ◇ Submitted an expert witness declaration concerning reasonableness of proposed settlement in nationwide securities class action, in light of competing litigation (*In re Lyft, Inc. Securities Litigation*, Case No. 4:19-cv-02690 (N.D. Cal. August 19, 2022))
- ◇ Submitted an expert witness declaration concerning reasonableness of common benefit attorney’s fee request (*In re: Zetia (Ezetimibe) Antitrust Litigation*, MDL No. 2836, 2:18-md-2836 (E.D. Va. July 12, 2022))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney’s fee request (*Reed v. Scientific Games Corp.*, Civil Action No. 2:18-cv-00565 (W.D. Wash. 2022))
- ◇ Submitted an expert witness declaration concerning reasonableness of proposed settlement in nationwide securities class action, in light of competing litigation (*In re Micro Focus International PLC Securities Litigation*, Master File No. 1:18-cv-06763 (S.D.N.Y., May 4, 2022))

- ◇ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Americredit Financial Services, Inc., d/b/a/ GM Financial v. Bell*, No. 15SL-AC24506-01 (Twenty-First Judicial Circuit Court, St. Louis County, Missouri, March 13, 2022))
- ◇ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Marjory Stoneman Douglas High School Shooting FTCA Litigation*, Case No. 0:18-cv-62758 (S.D. Fla. February 7, 2022))
- ◇ Expert witness declaration concerning expected claiming rates in class action submitted to court (*In re: Tiktok, Inc., Consumer Privacy Litigation*, No. 1:20-cv-04699 (N.D. Ill. Jan. 24, 2022))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-CV-0256 (LAK), 2021 WL 2453972 (S.D.N.Y. June 15, 2021))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Kater v. Churchill Downs*, Civil Action No. 2:15-cv-00612 (W.D. Wash. 2020))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Wilson v. Playtika, LTD*, Civil Action No. 3:18-cv-05277 (W.D. Wash. 2020))
- ◇ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Wilson v. Huuuge*, Civil Action No. 3:18-cv-005276 (W.D. Wash. 2020))
- ◇ Submitted expert witness declarations and testified at fairness hearing concerning (1) reasonableness of attorney's fee request and (2) empirical data confirming robustness of class claims rate (*In re Facebook Biometric Information Privacy Litigation*, Civil Action No. 3:15-cv-03747-JD (N.D. Cal. (2020))
- ◇ Retained as an expert witness on issues regarding the Lead Plaintiff/Lead Counsel provisions of the Private Securities Litigation Reform Act of 1995 (PSLRA) (*In re Apple Inc. Securities Litigation.*, Civil Action No. 4:19-cv-02033-YGR (N.D. Cal. (2020))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Amador v. Baca*, Civil Action No. 2:10-cv-01649 (C.D. Cal. February 9, 2020))
- ◇ Submitted an expert witness declaration concerning reasonableness of class action settlement (*In re: Columbia Gas Cases*, Civil Action No. 1877CV01343G (Mass. Super. Ct., Essex County, February 6, 2020))
- ◇ Submitted an expert witness declaration, and reply declaration, concerning reasonableness of attorney's fee request (*Hartman v. Pompeo*, Civil Action No. 1:77-cv-02019 (D.D.C. October 10, 2019; February 28, 2020))
- ◇ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724, 16-MD-2724 (E.D. Pa. May 15, 2019))

- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, relied upon by court in awarding fees (*Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018))
- ◇ Submitted expert witness affidavit and testified at fairness hearing concerning second phase fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.*, Case No. 217-2010-CV-00294 (New Hampshire Superior Court, Merrimack County (2018))
- ◇ Submitted expert witness report – and rebutted opposing expert – concerning class certification issues for proposed class action within a bankruptcy proceeding (*In re Think Finance*, Case No. 17-33964 (N.D. Tex. Bankrpt. 2018))
- ◇ Submitted expert witness declaration concerning specific fee issues raised by Court at fairness hearing and second declaration in response to report of Special Master (*In re Anthem, Inc. Data Breach Litigation*, Case No. 15-MD-02617-LHK (N.D. Cal. 2018))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request following plaintiffs' verdict at trial in consumer class action (*Krakauer v. Dish Network, L.L.C.*, Civil Action No. 1:14-cv-00333 (M.D.N.C. 2018))
- ◇ Submitted three expert witness declarations and deposed by/testified in front of Special Master in investigation concerning attorney's fee issues (*Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, Civ. Action No. 1:11-cv-10230 (D. Mass. 2017-18))
- ◇ Retained as an expert witness on issues regarding the preclusive effect of a class action judgment on later cases (*Sanchez v. Allianz Life Insurance Co. of N. Amer.*, Case No. BC594715 (California Superior Court, Los Angeles County (2018))
- ◇ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter*, declaration submitted to tribunals in Korea and Taiwan (2017))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 2017 WL 3175924 (N.D. Cal. July 21, 2017))
- ◇ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation*, Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))
- ◇ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation*, Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 2017 WL 1047834 (N.D. Cal., March 17, 2017))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.*, 2017 WL 1368741 (N.D. Ill., April



10, 2017))

- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016)))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC*, Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.*, Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company*, Case No. 11 Civ. 3487 (S.D.N.Y. 2015))
- ◇ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter that settled before trial (*Johnson v. Caremark RX, LLC*, Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))
- ◇ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.*, Case No. 1:09-cv-00554 (D.R.I. (2015)))
- ◇ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc.*, 2015 WL 12732462 (C.D. Cal. May 29, 2015))
- ◇ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation*, 08-CV-4772-LTS-DCF (S.D.N.Y. (2015)))
- ◇ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)
- ◇ Submitted an expert witness declaration and testified at Special Master proceeding concerning

reasonableness of attorney's fee allocation in sealed fee mediation (2014-2015)

- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation*, MDL 13-02424 (C.D. Cal. (2014))
- ◇ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))
- ◇ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.*, Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))
- ◇ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC*, Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))
- ◇ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation*, Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))
- ◇ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel, referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.*, 993 F. Supp. 2d 1154 (C.D. Cal. (2014))
- ◇ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.*, Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))
- ◇ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems*, Case No. BC448383, California Superior Court, Los Angeles County (2013))
- ◇ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck*, No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))
- ◇ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.*, Case No. 3:12-cv-00589-REP (E.D. Va. (2013))
- ◇ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of Anet expected value of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))
- ◇ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass.



Super. Aug. 5, 2013))

- ◇ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC*, Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))
- ◇ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.*, Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))
- ◇ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello*, 175 So. 3d 596, 609-10 (Ala. 2014))
- ◇ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung*, Case No. BC 460783, California Superior Court, Los Angeles County (2012))
- ◇ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP*, Case No. BC484090, California Superior Court, Los Angeles County (2011))
- ◇ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.*, Case No. CIV-2008-1008-W (W.D. Ok. (2011))
- ◇ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*, Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))
- ◇ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))
- ◇ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation*, Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))
- ◇ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))
- ◇ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation*, 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))
- ◇ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))
- ◇ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

- ◇ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))
- ◇ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.*, Case No. CV-05-3222 (C.D. Cal. (2010))
- ◇ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))
- ◇ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))
- ◇ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))
- ◇ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No. 1735 (D. Nev. (2009))
- ◇ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))
- ◇ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))
- ◇ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))
- ◇ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))
- ◇ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))
- ◇ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))
- ◇ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

- ◇ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))
- ◇ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif*, Case No. KC034700, California Superior Court, Los Angeles County (2008))
- ◇ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))
- ◇ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.*, JAMS Arbitration No. 1220026252 (2007))
- ◇ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.*, Civil Action No. 06-11033 PBS (D. Mass. (2007))
- ◇ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al.*, No. 07-39 (E. D. Ky. (2007))
- ◇ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.*, No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))
- ◇ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))
- ◇ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))
- ◇ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))
- ◇ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))
- ◇ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.*, Missouri Circuit Court, St. Louis, MO (2005))
- ◇ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))
- ◇ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City*, Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

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

*Expert Consultant*

- ◇ Retained as a consulting expert in series of cases challenging AI generators (2024)
- ◇ Retained as a consulting expert in class action (*In re: East Palestine Train Derailment*, Case No. 4:23-CV-00242-BYP (N.D. Ohio 2024))
- ◇ Retained as a consulting expert in complex MDL/class action (*In re: Aqueous Film-Forming Foams Products Liability Litigation*, Case No. 2:18-md-2873-RMG (D. S.C. 2023-2024))
- ◇ Retained as an expert in confidential matter pending in international arbitration forum concerning litigation financing issues in complex litigation (2022-2023)
- ◇ Retained as an expert in matter pending in several federal courts concerning attorney's fees in class action setting (2022-2023)
- ◇ Provided expert consulting services to Planned Parenthood Federation of America and the American Civil Liberties Union Foundation concerning complex class certification, notice, and other procedural issues arising out of Texas's law banning abortion (*Whole Woman's Health v. Austin Reeve Jackson*, Civil Action No. 1:21-cv-00616 (W.D. Tex. 2021))
- ◇ Retained as an expert witness on class action issues in complex mass tort MDL (*In re Roundup Products Liability Litigation*, Civil Action No. 3:16-md-02741-VC (N.D. Cal. (2020))
- ◇ Provided expert consulting services to Harvard Law School Predatory Lending and Consumer Protection Clinic concerning complex class action issues in bankruptcy (*In re: ITT Educational Services Inc.*, Case No. 16-07207-JMC-7A (Bank. S.D. Ind. 2020))
- ◇ Provided expert consulting services to law firm concerning complex federal procedural and bankruptcy issues (*Homaidan v. Navient Solutions, LLC*, Adv. Proc. No. 17-1085 (Bank. E.D.N.Y 2020))
- ◇ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))
- ◇ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)
- ◇ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

- ◇ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))
- ◇ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))
- ◇ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)
- ◇ Retained by a Fortune 100 Company as an expert consultant on class certification issues
- ◇ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. 2:13-cv-00074-ABJ (D. Wy. (2013))
- ◇ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))
- ◇ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))
- ◇ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*, No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))
- ◇ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))
- ◇ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation*, MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))
- ◇ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRDRear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))
- ◇ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))
- ◇ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal. (2008))
- ◇ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.*, Civil No. 8-04194 (E.D. Pa. (2008))

- ◇ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))
- ◇ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))
- ◇ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))
- ◇ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))
- ◇ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari*, Supreme Court of California (2006))
- ◇ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))
- ◇ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))
- ◇ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))
- ◇ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)
- ◇ Served as an expert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

#### *Ethics Opinions*

- ◇ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))
- ◇ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))
- ◇ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2011))
- ◇ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))



- ◇ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))
- ◇ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

*Publications on Class Actions & Procedure*

- ◇ NEWBERG AND RUBENSTEIN ON CLASS ACTIONS (6<sup>th</sup> ed. 2022 and updates through 2024); NEWBERG ON CLASS ACTIONS (sole author since 2008, sole author of entirely re-written Fifth Edition (2011-2019))
- ◇ *Deconstitutionalizing Personal Jurisdiction: A Separation of Powers Approach*, Harvard Public Law Working Paper No. 20-34, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3715068](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715068).
- ◇ *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEXAS L. REV.73 (2020) (with Francis E. McGovern)
- ◇ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)
- ◇ *Procedure and Society: An Essay for Steve Yeazell*, 61 U.C.L.A. REV. DISC. 136 (2013)
- ◇ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)
- ◇ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)
- ◇ *Class Action Fee Award Procedures*, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)
- ◇ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)
- ◇ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)
- ◇ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)
- ◇ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle*, 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)
- ◇ *The Puzzling Persistence of the AMega-Fund@ Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)
- ◇ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)
- ◇ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)
- ◇ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

- ◇ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)
- ◇ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)
- ◇ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)
- ◇ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)
- ◇ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)
- ◇ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)
- ◇ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)
- ◇ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)
- ◇ *Supreme Court Round-Up*, 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)
- ◇ *Fee-Shifting For Wrongful Removals: A Developing Trend?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)
- ◇ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel*, 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)
- ◇ *Why The Percentage Method?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)
- ◇ *Reasonable Rates: Time To Reload The (Laffey) Matrix*, 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)
- ◇ *The "Lodestar Percentage" A New Concept For Fee Decisions?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)
- ◇ *Class Action Practice Today: An Overview*, in ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)
- ◇ *Shedding Light on Outcomes in Class Actions*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)
- ◇ *Finality in Class Action Litigation: Lessons From Habeas*, 82 N.Y.U. L. REV. 791 (2007)



- ◇ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees*, 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)
- ◇ *The American Law Institute's New Approach to Class Action Attorney's Fees*, 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)
- ◇ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?*, 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)
- ◇ *Supreme Court Round-Up*, 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)
- ◇ *On The Difference Between Winning and Getting Fees*, 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)
- ◇ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?*, 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)
- ◇ *On Plaintiff Incentive Payments*, 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)
- ◇ *Percentage of What?*, 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)
- ◇ *Lodestar v. Percentage: The Partial Success Wrinkle*, 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007) (with Alan Hirsch)
- ◇ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))
- ◇ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)
- ◇ *What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).
- ◇ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)
- ◇ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)
- ◇ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)
- ◇ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) (excerpted in COMPLEX LITIGATION 120-123 (1998))

*Selected Presentations*

- ◇ *Class Action Law Update*, MDL Transferee Judges Conference, Palm Beach, Florida, October 24, 2023 (scheduled)
- ◇ *Opioid Litigation: What's New and What Does it Mean for Future Litigation?*, RAND Institute for Civil Justice and RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation, RAND Corporation, October 22, 2020
- ◇ *The Opioid Crisis: Where Do We Go From Here?* Clifford Symposium 2020, DePaul University College of Law, Chicago, Illinois, May 28-29, 2020)
- ◇ *Class Action Law Update*, MDL Transferee Judges Conference, Palm Beach, Florida, October 30, 2019
- ◇ *Class Action Law Update*, MDL Transferee Judges Conference, Palm Beach, Florida, October 31, 2018
- ◇ *Attorneys' Fees Issues*, MDL Transferee Judges Conference, Palm Beach, Florida, October 30, 2018
- ◇ *Panelist*, Federal Judicial Center, Managing Multidistrict Litigation and Other Complex Litigation Workshop (for federal judges) (March 15, 2018)
- ◇ *Class Action Update*, MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017
- ◇ *Class Action Update*, MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016
- ◇ *Judicial Power and its Limits in Multidistrict Litigation*, American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016
- ◇ *Class Action Update & Attorneys' Fees Issues Checklist*, MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015
- ◇ *Class Action Law*, 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015
- ◇ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014
- ◇ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013
- ◇ *Class Action Remedies*, ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013
- ◇ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda*, Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

- ◇ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013
- ◇ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell*, UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013
- ◇ *Litigation's Mirror: The Procedural Consequences of Social Relationships*, Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012
- ◇ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012
- ◇ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012
- ◇ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012
- ◇ *Recent Developments in Class Action Law and Impact on MDL Cases*, MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011
- ◇ *Recent Developments in Class Action Law*, MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010
- ◇ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010
- ◇ *Unpacking The “Rigorous Analysis” Standard*, ALI-ABA 12<sup>th</sup> Annual National Institute on Class Actions, New York, New York, November 7, 2008
- ◇ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008
- ◇ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007
- ◇ *Current CAFA Consequences: Has Class Action Practice Changed?*, ALI-ABA 11<sup>th</sup> Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007
- ◇ *Using Law Professors as Expert Witnesses in Class Action Lawsuits*, ALI-ABA 10<sup>th</sup> Annual National Institute on Class Actions, San Diego, California, October 6, 2006
- ◇ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006
- ◇ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC

Law Review Symposium, Kansas City, Missouri, April 7, 2006

- ◇ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006
- ◇ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005
- ◇ ALI-ABA 9<sup>th</sup> Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005
- ◇ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005
- ◇ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005
- ◇ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005
- ◇ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005
- ◇ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

#### SELECTED OTHER LITIGATION EXPERIENCE

##### *United States Supreme Court*

- ◇ Served as *amicus curiae* and authored *amicus* brief on proper approach to *cy pres* award in class action lawsuits (*Frank v. Gaos*, No. 17-961, October Term 2018)
- ◇ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (*Rosebrock v. Hoffman*, 135 S. Ct.1893 (2015))
- ◇ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion*, No. 09-893, 131 S. Ct. 1740 (2011))
- ◇ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))
- ◇ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))
- ◇ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

##### *Attorney's Fees*

- ◇ Appointed by the United States District Court for the Eastern District of Pennsylvania as an expert witness on attorney's fees in complex litigation, with result that the Court adopted recommendations (*In re National Football League Players' Concussion Injury Litigation*, 2018 WL 1658808 (E.D.Pa. April 5, 2018))

- ◇ Appointed by the United States District Court for the Northern District of Ohio as an expert consultant on common benefit attorney's fees issues in complex multidistrict litigation, with result that the Court adopted recommendations (*In re: Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2020 WL 8675733 (N.D. Ohio June 3, 2020))
- ◇ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *DeValerio v. Olinski*, 673 F. App'x 87, 90 (2d Cir. 2016)).
- ◇ Co-counsel in appeal of common benefit fees decision arising out of mass tort MDL (*In re Roundup Prod. Liab. Litig.*, Civil Action No. 21-16228, 2022 WL 16646693 (9th Cir, 2022))
- ◇ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016))

#### *Consumer Class Action*

- ◇ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.*, 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)
- ◇ Co-class counsel in \$8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation*, 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

#### *Disability*

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

#### *Employment*

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

#### *Equal Protection*

- ◇ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))
- ◇ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (*en banc*))
- ◇ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia' firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11<sup>th</sup> Cir. 1997))

*Fair Housing*

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

*Family Law*

- ◇ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Svcs.*, 656 So.2d 902 (Fla. 1995))
- ◇ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

*First Amendment*

- ◇ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding for university student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))
- ◇ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

*Landlord / Tenant*

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

*Police*

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

*Prison Conditions*

- ◇ Co-counsel in appeal of class certification decision in damages class action arising out of conditions in St. Louis City Jail (*Cody v. City of St. Louis for & on behalf of Medium Sec. Inst.*, 103 F.4th 523, 526 (8th Cir. 2024))

*Racial Equality*

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

SELECTED OTHER PUBLICATIONS

*Editorials*

- ◇ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
- ◇ *Play It Straight*, NEW YORK TIMES, October 16, 2004

- ◇ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004
- ◇ *Toward More Perfect Unions*, NEW YORK TIMES, November 20, 2003 (with Brad Sears)
- ◇ *Don't Ask, Don't Tell, Don't Believe It*, NEW YORK TIMES, July 20, 1993
- ◇ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

#### BAR ADMISSIONS

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

# **EXHIBIT B**



*In re: National Prescription Opiate Litigation*  
Case No. 1:17-md-2804  
U.S. District Court for the Northern District of Ohio

**DECLARATION OF PROFESSOR WILLIAM B. RUBENSTEIN**

**EXHIBIT B**

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

**A. *In re: National Prescription Opiate Litigation, Case No. 1:17-md-02804-DAP (N.D. Ohio)***

1. Plaintiffs' Renewed and Amended Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, ECF No. 1820
2. Plaintiffs' Memorandum in Support of Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, ECF No. 1820-1
3. [Proposed] Order Certifying Negotiation Class and Directing Notice, ECF No. 1820-2
4. Plaintiffs' Reply Brief in Further Support of Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, ECF No. 2076
5. Order Directing Special Master Yanni to Assess Fairness of Allocation and Voting Proposals to Non-Litigating Entities, ECF No. 2529
6. Report of Special Master Cathy Yanni, ECF No. 2579
7. Memorandum Opinion Certifying Negotiation Class, ECF No. 2590
8. Order Certifying Negotiation Class and Approving Notice, ECF No. 2591
9. Opinion and Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, ECF No. 3177
10. Memorandum in Support of Distributors' Motion to Certify Under 28 U.S.C. § 1292(b) the Court's February 21, 2020 Order Denying in Part Their Motion to Dismiss Third-Party Payor Claims, for Purposes of Seeking Immediate Appeal of the Court's Rulings that Denied Dismissal of the RICO Claims, ECF No. 3257-1
11. Plaintiffs' Memorandum in Opposition to Distributors' Motion to Certify Under 28 U.S.C. § 1292(b) the Court's February 21, 2020 Order Denying in Part Their Motion to Dismiss Third-Party Payor Claims, for Purposes of Seeking Immediate Appeal of the Court's Rulings that Denied Dismissal of the RICO Claims, ECF No. 3269
12. Order Denying Distributors' Motion to Certify for Immediate Appeal Under 28 U.S.C. § 1292(b) the Court's February 21, 2020 Order, ECF No. 3289
13. Order to Establish Qualified Settlement Fund, Appoint Panel of Common Benefit and Contingency Fee Fund Arbiters, Approve Fee Fund Allocation and Distribution Process, and Approve Common Benefit Cost Payment and Assessment, ECF No. 3828
14. Bellwether Order, ECF No. 4920
15. Order Regarding TPP Bellwether Process, ECF No. 5060
16. Order to Establish Qualified Settlement Funds, Appoint Panel of Common Benefit and Contingency Fee Funds Arbiters, Approve Fee Fund Allocation and Distribution Process, and Approve Common Benefit Cost Payment and Assessment, ECF No. 5088
17. Order Amending TPP Bellwether Process, ECF No. 5097

18. Memorandum in Support of Master Motion for Extension of Time for Third Party Payors to Produce Plaintiff Fact Sheets and Corresponding Documents and Data, ECF No. 5169-1
19. Defendants' Response to TPP Plaintiffs' "Master Motion" for an Extension of Time to Submit Plaintiff Fact Sheets, ECF No. 5180
20. Order Confirming the TPP Bellwether Process, ECF No. 5225
21. Order Resolving Disputes Regarding Proposed CMO, ECF No. 5271
22. Case Management Order for Third Party Payor Bellwether Cases, ECF No. 5281
23. Amended Case Management Order for Third Party Payor Bellwether Cases, ECF No. 5297
24. *Nunc Pro Tunc* Amended Case Management Order for Third Party Payor Bellwether Cases, ECF No. 5298
25. Joint Motion to Stay Deadlines in the *Nunc Pro Tunc* Amended Case Management Order for Tracks 16-19, ECF No. 5393
26. Joint Motion for Entry of Order Governing Production of Medical and Pharmacy Claims Data in Third Party Payor Plaintiff Bellwethers – Tracks 16-19, ECF No. 5467
27. Joint Motion to Sever and Stay Cardinal Health, Inc., AmerisourceBergen Drug Company, and McKesson Corporation, ECF No. 5470
28. Third Party Payor Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e), ECF No. 5614
29. Joint Declaration of Paul J. Geller and Elizabeth J. Cabraser in Support of Third Party Payor Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e), ECF No. 5614-1
30. Class Action Settlement Agreement Among Third Party Payors and Settling Distributors, ECF No. 5614-2
31. Third Party Payor Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e) Exhibit B, ECF No. 5614-3
32. Third Party Payor Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e) Exhibit C, ECF No. 5614-4
33. Third Party Payor Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e) Exhibit D, ECF No. 5614-5
34. Declaration of Eric J. Miller in Support of Third Party Payor Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement, ECF No. 5614-6
35. Expert Report of Professor Meredith Rosenthal Regarding Allocation of Settlement Proceeds, ECF No. 5614-7
36. [Proposed] Order Granting Third Party Payor Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e), ECF No. 5614-8
37. Order Granting Third Party Payor Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e), ECF No. 5616

**B. *In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, Case No. 3:21-md-02996-CRB (N.D. Cal.)**

38. Transfer Order, ECF No. 1
39. Pretrial Order No. 2: Order Appointing Plaintiffs' Lead Counsel and Plaintiffs' Steering Committee, ECF No. 211
40. Pretrial Order No. 3: Protocol for Common Benefit Work and Expenses, ECF No. 215
41. Pretrial Order No. 7: Initial Case Management Order, ECF No. 293
42. McKinsey Defendants' Notice of Motion and Motion to Dismiss the Complaints on the Grounds of *Res Judicata* and Release; Memorandum of Points and Authorities in Support, ECF No. 310
43. McKinsey Defendants' Notice of Motion and Motion to Dismiss for Lack of Personal Jurisdiction; Memorandum of Points and Authorities, ECF No. 313
44. Subdivision Plaintiffs' Opposition to McKinsey Defendants' Motion to Dismiss on the Grounds of *Res Judicata* and Release, ECF No. 345
45. Subdivision Plaintiffs' Opposition to McKinsey Defendants' Motion to Dismiss on the Grounds of *Res Judicata* and Release Exhibit A, ECF No. 345-2
46. Plaintiffs' Memorandum of Points and Authorities in Opposition to McKinsey Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, ECF No. 347
47. McKinsey Defendants' Reply Memorandum of Points and Authorities in Further Support of Motion to Dismiss the Complaints on the Grounds of *Res Judicata* and Release, ECF No. 357
48. McKinsey Defendants' Reply in Support of Motion to Dismiss for Lack of Personal Jurisdiction, ECF No. 363
49. Order for Supplemental Briefing, ECF No. 370
50. McKinsey Defendants' Supplemental Brief in Further Support of Motion to Dismiss the Complaints on the Grounds of *Res Judicata* and Release, ECF No. 378
51. Order Denying Motion to Dismiss for Lack of Personal Jurisdiction, ECF No. 439
52. McKinsey Defendants' Notice of Motion and Motion to Dismiss Master Complaints for Failure to State a Claim; Memorandum of Points and Authorities, ECF No. 462
53. NAS, TPP, and Tribal Plaintiffs' Memorandum of Points and Authorities in Opposition to McKinsey Defendants' Motion to Dismiss Master Complaints for Failure to State a Claim, ECF No. 481
54. Plaintiffs' Notice of Motion and Motion for Entry of Pretrial Order No. 9 Establishing a Common Benefit Fee and Expense Fund; Memorandum of Points and Authorities In Support, ECF No. 555
55. Declaration of Elizabeth J. Cabraser in Support of Plaintiffs' Motion for Entry of Pretrial Order No. 9 Establishing a Common Benefit Fee and Expense Fund, ECF No. 555-1
56. Declaration of Elizabeth J. Cabraser in Support of Plaintiffs' Motion for Entry of Pretrial Order No. 9 Establishing a Common Benefit Fee and Expense Fund Exhibit A, ECF No. 555-2
57. Declaration of Elizabeth J. Cabraser in Support of Plaintiffs' Motion for Entry of Pretrial Order No. 9 Establishing a Common Benefit Fee and Expense Fund Exhibit B, ECF No. 555-3

58. Declaration of Elizabeth J. Cabraser in Support of Plaintiffs' Motion for Entry of Pretrial Order No. 9 Establishing a Common Benefit Fee and Expense Fund Exhibit C, ECF No. 555-4
59. Pretrial Order No. 9: Establishing a Common Benefit Fee and Expense Fund, ECF No. 567
60. First Amended Master Complaint (School Districts), ECF No. 593-2
61. Amended Master Class Action Complaint (Subdivision), ECF No. 597
62. Plaintiffs' Notice of Unopposed Motion and Motion for Preliminary Approval of Class Action Settlement; Memorandum of Points and Authorities in Support, ECF No. 598
63. Declaration of Aelish M. Baig in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, ECF No. 598-1
64. Declaration of Aelish M. Baig in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement Exhibit 1, ECF No. 598-2
65. Declaration of Aelish M. Baig in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement Exhibit 2, ECF No. 598-3
66. Declaration of Cameron R. Azari, Esq. Regarding Settlement Notice Plan and Notices, ECF No. 598-4
67. [Proposed] Order Granting Preliminary Approval of Class Settlement and Direction of Notice Under Rule 23(e) of The Federal Rules of Civil Procedure, ECF No. 598-5
68. Plaintiff School Districts' Unopposed Notice of Motion and Motion for Preliminary Approval of Class Action Settlement; and Memorandum of Points and Authorities in Support, ECF No. 599
69. Plaintiff School Districts' Unopposed Notice of Motion and Motion for Preliminary Approval of Class Action Settlement; and Memorandum of Points and Authorities in Support Exhibit 1, ECF No. 599-1
70. Plaintiff School Districts' Unopposed Notice of Motion and Motion for Preliminary Approval of Class Action Settlement; and Memorandum of Points and Authorities in Support Exhibit 2, ECF No. 599-2
71. Plaintiff School Districts' Unopposed Notice of Motion and Motion for Preliminary Approval of Class Action Settlement; and Memorandum of Points and Authorities in Support Exhibit 3, ECF No. 599-3
72. Plaintiff School Districts' Unopposed Notice of Motion and Motion for Preliminary Approval of Class Action Settlement; and Memorandum of Points and Authorities in Support Exhibit 4, ECF No. 599-4
73. Plaintiff School Districts' Unopposed Notice of Motion and Motion for Preliminary Approval of Class Action Settlement; and Memorandum of Points and Authorities in Support Exhibit 5, ECF No. 599-5
74. Plaintiff School Districts' Unopposed Notice of Motion and Motion for Preliminary Approval of Class Action Settlement; and Memorandum of Points and Authorities in Support Exhibit 6, ECF No. 599-6
75. [Proposed] Order Granting Preliminary Approval of Class Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e), ECF No. 599-7
76. Order Granting Preliminary Approval of Class Settlement and Direction of Notice Under Rule 23(e) of The Federal Rules of Civil Procedure, ECF No. 609
77. Amended Order Granting Preliminary Approval of Class Settlement and Direction of Notice Under Rule 23(e) of The Federal Rules of Civil Procedure, ECF No. 617

78. Amended Order Granting Preliminary Approval of Class Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e), ECF No. 621
79. Order Granting Final Approval of Class Action Settlement and Award of Attorneys' Fees and Costs, ECF 665
80. Second Expert Report of Professor Meredith Rosenthal, ECF No. 699-4
81. [Updated] Order Granting Final Approval of Class Action Settlement, Award of Attorney's Fees and Expenses and Class Representative Service Awards, ECF No. 739

**C. Other**

82. Janssen Settlement Agreement in *National Prescription Opiate Litigation*, available at <https://nationalopioidsettlement.com/wp-content/uploads/2023/01/Janssen-agreement-03302022-FINAL2-Exhibit-G-as-of-1.9.23.pdf>
83. BrownGreer, *National Opioid Settlement Dashboards*, available at <https://nationalopioidsettlement.com/wp-content/uploads/2023/10/Opioid-Payment-Dashboard-10.19.23.pdf>

# **EXHIBIT C**

*In re: National Prescription Opiate Litigation*  
Case No. 1:17-md-2804  
U.S. District Court for the Northern District of Ohio

**DECLARATION OF WILLIAM B. RUBENSTEIN**

EXHIBIT C  
Opioid Settlements to Date

	<b>Settlement</b>	<b>Amount</b>	<b>Uses MDL 2804 Allocation Formula</b>
1	Teva	\$4,246,567,371.76	Yes
2	Allergen	\$2,372,972,184.12	Yes
3	Walgreens	\$5,522,528,766	Yes
4	Walmart	\$2,739,533,911.21	Yes
5	CVS	\$4,904,201,178	Yes
6	Distributors	\$21,000,000,000	Yes
7	Janssen	\$5,000,000,000	Yes
8	Kroger	\$1,200,000,000	Similar geographical impact-based formula
9	McKinsey Political Subdivisions	\$207,000,000	Y
10	McKinsey TPP	\$78,000,000	Class member impact-based formula
11	McKinsey School Districts	\$23,000,000	Similar geographical impact-based formula
	<b>TOTAL</b>	\$47,293,803,411.09	
1	Teva Tribal	\$119,181,538.15	Used negotiated inter-Tribal impact-based allocation formula, relying in part on MDL 2804 Allocation Formula
2	Allergen Tribal	\$70,945,809.89	
3	Walgreens Tribal	\$148,356,029.40	
4	Walmart Tribal	\$77,939,879	
5	CVS Tribal	\$130,344,085.26	
6	Distributor Tribal	\$515,000,000	
7	McKinsey Tribal Settlement	\$39,500,000	
8	J&J Tribal Settlement	\$150,000,000	
	<b>TOTAL</b>	\$1,251,267,341.70	

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>IN RE: NATIONAL PRESCRIPTION</b>	)	<b>MDL 2804</b>
<b>OPIATE LITIGATION</b>	)	
	)	<b>Case No. 1:17-md-2804</b>
	)	
<b>THIS DOCUMENT RELATES TO:</b>	)	<b>Judge Dan Aaron Polster</b>
	)	
<i>ALL THIRD PARTY PAYOR ACTIONS</i>	)	

**[PROPOSED] FINAL ORDER AND JUDGMENT GRANTING  
THIRD PARTY PAYOR PLAINTIFFS’ MOTION FOR FINAL APPROVAL OF CLASS  
ACTION SETTLEMENT, AND AWARD OF ATTORNEYS’ FEES AND EXPENSES  
AND SETTLEMENT CLASS REPRESENTATIVE SERVICE AWARDS**

Before the Court is Third Party Payor (“TPP”) Plaintiffs’ Motion for Final Approval of Class Action Settlement, and Award of Attorneys’ Fees and Expenses and Settlement Class Representative Service Awards. The background, procedural history, and Settlement terms were summarized in the Court’s Order Granting Third Party Payor Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement and Direction of Notice Under Federal Rule of Civil Procedure 23(e). *See* ECF 5616 (“Preliminary Approval Order”). In brief, the Settlement between Interim Settlement Class Counsel for Third Party Payor Plaintiffs, on behalf of a proposed



Settlement Class of TPPs, and Settling Distributors<sup>1</sup> provides \$300 million to compensate the Settlement Class for harms allegedly incurred as part of the ongoing, nationwide opioid crisis.

## **I. CLASS CERTIFICATION AND SETTLEMENT APPROVAL**

When presented with a motion for final approval of a class action settlement, a court first evaluates whether certification of a settlement class is appropriate under Rule 23(a)-(b) of the Federal Rules of Civil Procedure. Rule 23(a) provides that a class action is proper only if four requirements are met: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a)(1)-(4). As relevant here, certification of a Rule 23(b)(3) settlement class action requires that: (1) “the questions of law or fact common to class members predominate over any questions affecting only individual members”; and (2) “a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). In its Preliminary Approval Order, the Court concluded that the Settlement Class, as defined therein, and its Settlement Class Representatives were likely to satisfy these requirements and that Interim Settlement Class Counsel met the requirements of Rule 23(g). *See* ECF 5616. The Court finds no reason to disturb its earlier conclusions, as the requirements of Rule 23(a), (b)(3), and (g) were satisfied then, and they remain satisfied now. Accordingly, the Court concludes that certification of the Settlement Class is appropriate.

After finding that the Settlement Class satisfies Rule 23(a) and (b)(3), the Court must determine whether the Settlement is fundamentally “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). The Court is familiar with the standards applicable to certification of a settlement class, having applied these standards in the Preliminary Approval Order to conclude that the Settlement appeared to be “fair, reasonable, and adequate[.]” ECF 5616; *see also* *Whitlock v. FSL*

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<sup>1</sup> Cencora, Inc. (f/k/a AmerisourceBergen Corporation), Cardinal Health, Inc., and McKesson Corporation (collectively, “Settling Distributors”).

*Mgmt., LLC*, 843 F.3d 1084, 1093 (6th Cir. 2016) (analyzing the seven factors that govern the “fair, reasonable, and adequate” inquiry in the Sixth Circuit); *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992) (noting that district courts enjoy broad discretion when applying the Rule 23(e)(2) factors).

Now, in granting final approval of the Settlement, the Court has considered each of the Rule 23(e) factors and finds that the Settlement Class Representatives and Interim Settlement Class Counsel have adequately represented the Settlement Class; the Settlement Agreement was negotiated at arm’s length; the relief provided for the Settlement Class is adequate; and the Plan of Allocation treats Settlement Class Members equitably relative to one another. *See* Fed. R. Civ. P. 23(e)(2).

These conclusions are bolstered by the Settlement Class Members’ favorable reaction to the Settlement: \_\_\_ TPPs objected to the settlement, and, out of over 40,000 potential Settlement Class Members that were notified, only \_\_\_ TPPs (less than \_\_\_%) excluded themselves from the settlement. This factor supports final approval. *See Whitlock*, 843 F.3d at 1093 (considering as part of the Rule 23(e)(2) seven-factor analysis “the reaction of absent class members”).

In addition, the Court finds that the Court-approved notice provided to the Settlement Class pursuant to the Settlement Agreement and the Preliminary Approval Order fully complied in all respects with the requirements of Fed. R. Civ. P. 23 and due process, and the notice was reasonably calculated under the circumstances to apprise the Settlement Class Members of the pendency of this Action, their right to object to or exclude themselves from the Settlement, and their right to appear at the Fairness Hearing.

The Court also finds that the Settling Distributors have complied with the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711-1715, and its notice requirements by providing appropriate federal and state officials with information about the Settlement Agreement.

## **II. REQUESTED ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARDS**

“The determination of a reasonable fee must be reached through an evaluation of a myriad of factors, all within the knowledge of the trial court, examined in light of the congressional policy underlying the substantive portions of the statute providing for the award of fees.” *United Slate, Tile & Composition Roofer, Damp & Waterproof Workers Ass’n, Local 307 v. G & M Roofing & Sheet Metal Co.*, 732 F.2d 495, 501 (6th Cir. 1984); *see also Feiertag v. DDP Holdings, LLC*, 2016 WL 4721208, at \*6 (S.D. Ohio Sept. 9, 2016) (applying factors to determine a reasonable attorneys’ fee). Attorneys’ fees may be properly awarded as a “percentage of the fund method.” *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993).

Interim Co-Lead Settlement Class Counsel request a fee award of 20% of the Settlement Funds, plus all reimbursable costs and service awards (*see* ECF \_\_\_). The fee amount includes the common benefit obligations due under the Court’s common benefit-related Orders (*see* ECF 4428, May 9, 2022 Ongoing Common Benefit Order).

## **III. CONCLUSION**

Accordingly, the Court hereby orders, adjudges, finds, and decrees as follows:

The Court **DISMISSES** the Actions coordinated under MDL No. 2804 and all claims contained therein, as well as all of the Released Claims with prejudice as to the Released Entities only. The Parties are to bear their own costs, except as otherwise provided in the Settlement Agreement.

Only those entities listed in the Opt-Out Report appended to Exhibit 1 of the Supplemental Joint Declaration of Elizabeth J. Cabraser and Paul J. Geller (ECF \_\_\_) that timely submitted valid requests to opt out of the Settlement Class are not bound by this Order. Those entities are not entitled to any recovery from the Settlement.

The Court **GRANTS** class certification for settlement purposes only.

The Court **CONFIRMS** the appointment of Interim Settlement Class Counsel Paul J. Geller, Elizabeth J. Cabraser, Mark J. Dearman, and Eric B. Fastiff as Settlement Class Counsel and further appoints James R. Dugan, II of The Dugan Law Firm, APLC as Settlement Class Counsel. The Court also **CONFIRMS** the appointment of Interim Co-Lead Settlement Class Counsel Paul J. Geller and Elizabeth J. Cabraser as Co-Lead Settlement Class Counsel and additionally appoints James R. Dugan as Co-Lead Settlement Class Counsel.

The Court **CONFIRMS** the appointment of Settlement Class Representatives Cleveland Bakers and Teamsters Health and Welfare Fund; Pipe Fitters Local Union No. 120 Insurance Fund; Pioneer Telephone Cooperative, Inc. Employee Benefits Plan; American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan; Louisiana Assessors' Insurance Fund; and Flint Plumbing and Pipefitting Industry Health Care Fund, and further appoints United Food and Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania and Sheet Metal Workers Local No. 25 Health & Welfare Fund as additional Settlement Class Representatives.

The Court **GRANTS** Co-Lead Settlement Class Counsel's request for attorneys' fees and costs, subject to the Court's common benefit-related Orders. The Court hereby **AWARDS**: notice and administration costs, expert costs, and Settlement Class Counsel expenses; attorneys' fees of 20% of the Settlement Funds; and the below service awards. The attorneys' fee award includes the common benefit obligations due under the Court's common benefit-related Orders, which shall be allocated by the existing Fee Panel among qualified applicants firms that that it determines did work that inured to the common benefit of the TPPs. The fee award net of the common benefit assessment shall be allocated by Co-Lead Settlement Class Counsel firms actively litigating on behalf of the TPP Class, with any appeals to such allocation going to Special Master Cohen.

The Court **GRANTS** Settlement Class Counsel's request for service awards of \$10,000 to each of the Settlement Class Representatives.

The Court hereby discharges and releases the Released Claims as to the Released Entities, as those terms are used and defined in the Settlement Agreement.

The Court hereby permanently bars and enjoins the institution and prosecution by any Settlement Class Representative, Settlement Class Member, Releasor, and anyone claiming through or on behalf of any of them, of any other action against the Released Entities in any court or other forum asserting any of the Released Claims, or any claim related in any way to the Released Claims, as those terms are used and defined in the Settlement Agreement.

All Settlement Class Members, Releasors, and anyone claiming through or on behalf of any of them, shall cooperate with the Settling Distributors to promptly dismiss with prejudice as to any of the Released Entities the Actions listed on Exhibit A to the Settlement Agreement that are not coordinated under MDL No. 2804 and all other pending litigation asserting any Released Claims against any of the Released Entities.

The Court hereby discharges and releases all Settlement Class Representatives, Settlement Class Members, and their counsel of the claims provided in Section IX.L. of the Settlement Agreement.

Neither the Settlement Agreement nor any act performed or document executed pursuant to or in furtherance of the Settlement: (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim or of any wrongdoing or liability of the Settling Distributors or Released Entities; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Settling Distributors or Released Entities in any civil, criminal, or administrative proceeding in any court or other forum. Notwithstanding the foregoing, the Settling Distributors and/or the Released Entities may file the

Settlement Agreement and/or this Final Judgment in any other action that may be brought against them to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar, or any theory of claim preclusion or issue preclusion or similar defense.

Therefore, pursuant to, and in accordance with, Fed. R. Civ. P. Rule 23, the Court hereby fully and finally approves the Settlement Agreement in its entirety and finds that the Settlement Agreement is fair, reasonable, and adequate. The Court also finds that the Settlement Agreement is in the best interests of the Settlement Class Representatives and all Settlement Class Members, and is consistent and in compliance with all applicable laws and rules. The Court further finds that the Settlement Agreement is the product of intensive, thorough, serious, informed, and non-collusive negotiations overseen by the mediator. The Court further finds that the Parties have evidenced full compliance with the Preliminary Approval Order.

All objections to the Settlement Agreement are found to be without merit and are overruled.

Without further approval from the Court, and without the express written consent of Settlement Class Counsel and Settling Distributors, the Settlement is not subject to any material modification.

The terms of the Settlement and of this Final Order and Judgment are forever binding on the Settling Parties and Settlement Class Members, as well as their respective heirs, executors, administrators, predecessors, successors, affiliates, and assigns. Settlement Class Members include all entities within the Class definition in Section III.A.1.(a). of the Settlement Agreement that did not submit a timely and valid Opt-Out in accordance with the procedures in the Settlement Agreement and the Preliminary Approval Order.

The Court finds that the Settlement is a good-faith settlement that bars any Claim by any Non-Released Entity against any Released Entities for contribution, indemnification, or otherwise

seeking to recover all or a portion of any amounts paid by or awarded against that Non-Released Entity to any Settlement Class Member or Releasor by way of settlement, judgment, or otherwise on any Claim that would be a Released Claim were such Non-Released Entity a Settling Distributor, to the extent that a good-faith settlement (or release thereunder) has such an effect under applicable law, including, without limitation, O.H. Code § 2307.28 and similar laws in other states or jurisdictions.

The Court further reserves and retains exclusive and continuing jurisdiction over the Settlement, including the Escrow Account, the Escrow Agent as its administrator, and all future proceedings concerning the administration and enforcement of the Settlement Agreement and to effectuate its terms.

In the event that, for any reason, the Effective Date does not occur in accordance with the terms of the Settlement Agreement then: (i) this Final Judgment shall be rendered null and void to the extent provided by and in accordance with the Settlement Agreement and shall be vacated; (ii) all Orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Settlement Agreement; and (iii) the Settlement Funds shall be returned to Settling Distributors in accordance with the Settlement Agreement.

The Court finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay, and directs immediate entry of this Final Judgment by the Clerk of the Court.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

\_\_\_\_\_  
THE HONORABLE DAN A. POLSTER  
UNITED STATES DISTRICT JUDGE