UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE WELLS FARGO & COMPANY SHAREHOLDER DERIVATIVE LITIGATION	Lead Case No. 3:16-cv-05541-JST **SUPPLEMENTAL DECLARATION OF BRIAN T. FITZPATRICK IN SUPPORT OF CO-LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT AWARDS TO CO-LEAD PLAINTIFFS**
This Document Relates to: ALL ACTIONS.	

1. I filed a declaration in support of counsel's fee request on June 27. In this supplemental declaration, I respond to two objectors who took issue with my initial declaration.

2. First, I will address the objection filed by Ted Frank of the Hamilton Lincoln Law Institute on behalf of John Cashman. Mr. Frank asks the court to strike my initial declaration, a request he has made many times in the past. He argues that I opined on the law and therefore my declaration is not admissible. But I did not render opinions about the law. I rendered opinions about how empirical studies (what Mr. Frank colorfully calls "averaged . . . case law") and research on economic incentives that I and other scholars have published bear on the fee request here. For example, I opined on whether the facts of this case compare favorably to the facts of the typical class and derivative settlements found in these empirical studies to help the court decide whether to approve the requested fee award. I also opined that approving counsel's fee request would reflect what I view as the worthy incentives for class and derivative lawyers. Of course, I situated my opinions within the current legal framework in the Ninth Circuit because I wanted my opinions to be legally relevant to the court. But my declaration was not about how best to interpret Ninth Circuit case law. I have offered opinions similar to these in numerous cases. Indeed, I am only one of many legal scholars that attempt to aid courts with declarations of this kind; the others include Bill Rubenstein at Harvard, Sam Issacharoff and Geoff Miller at NYU, John Coffee at Columbia, Bob Klonoff at Lewis & Clark, and Charlie Silver at Texas.

3. The gravamen of Mr. Frank's brief is that counsel should get a lower fee award here because this settlement is large. As I explained in my initial declaration, following this practice gives counsel perverse incentives.

4. Mr. Frank argues that these perverse incentives can be overcome if courts reduce fee awards on a marginal basis rather than an absolute basis. But, as I explained in my initial declaration, this practice, too, gives counsel a perverse incentive to shift investment away from cases once the returns on their investment hit the point of declining margins. Mr. Frank says this will not happen because it is impossible for counsel to know when they have hit the point where, for example, they are likely to recover $100 million. But this is hardly impossible: counsel will know they are likely to recover $100 million when, as is often the case, they are in ongoing

settlement discussions with the defendant. If the defendant's last settlement offer was $100 million, then counsel will know they have likely reached the point of declining marginal returns. This is why other scholars of economic incentives reject marginal declining rates as well, *see* Richard Epstein, *Class Actions: The Need for a Hard Second Look*, 4 Civil Justice Report 11 (2002) ("It has been suggested that the fee . . . be 'tapered,' so that the percentage take is reduced with an increase in the size of the class settlement . . . . In general, however, this does not seem to be the right approach.")—and, if anything, endorse marginal *increasing* rates, *see* John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Columbia L. Rev. 669, 697 (1986) ("The most logical answer to this problem of premature settlement would be to base fees on a graduated, increasing percentage of the recovery formula—one that operates, much like the Internal Revenue Code, to award the plaintiff's attorney a marginally greater percentage of each defined increment of the recovery."); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 Columbia L. Rev. 650, 678 (2002) ("[The] last dollars of recovery are generally the most costly to produce.").

5. Indeed, I do not rest my opinion here on theory alone: we have market confirmation that declining marginal rates are not in the best interest of clients who hire lawyers who work on contingency. The best evidence comes from studies of sophisticated clients like corporations that hire lawyers in patent litigation. They do not use marginal declining fee percentages. They use either flat fee percentages or fee percentages that *increase* as the case prolongs. The average percentage in the former case is 38.6%, and the average percentage in the latter case varies from 28% to 40.2% as the case unfolds. *See* David Schwartz, *The Rise of Contingency Fees in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012).

6. Mr. Frank also says (at p. 12 of his objection) that I "conspicuously decline[d]" to tell the court that one of the Eisenberg-Miller empirical studies I cited in my initial declaration found a mean of 10.2% in settlements above $175.5 million. But, as Mr. Frank himself realizes because he rejects reliance on a later Eisenberg-Miller finding for the same reason, Eisenberg and Miller do not break down their data as finely as I do. Thus, the 10.2% figure that Mr. Frank cites

includes not only settlements around the size of the one here, but *all* settlements *above* this size as well—including *multi-billion* dollar settlements. Because fee percentages tend, on average, to keep declining as settlements get bigger, lumping them all together as Eisenberg and Miller do does not, in my opinion, give courts the most representative data possible. Mr. Frank said this even better himself. *See id*. (rejecting a later Eisenberg-Miller figure because, since "the . . . figure comprises *all* cases with recoveries above $67.5 million, it does not necessarily reflect a reasonable baseline fee for this case" (internal quotation marks omitted)).

7. Mr. Frank also says that despite the fact that Eisenberg-Miller lump all of their large settlements together, one district court judge has found their grouping entitled to more weight than my own. This is true. The court in that case wanted more than the eight data points that were in my $250-500 million grouping and used the Eisenberg-Miller figure for all cases above $175.5 million instead. I don't blame the court—no one wants more data more than I do—but, as I noted above, there is a cost to lumping multi-billion dollar cases in with $100 million cases: accuracy. The good news is that the tradeoff between accuracy and volume is not as stark in this case because there are almost twice as many data points in my $100-250 million grouping (14) as in my $250-500 million grouping. In any event, as I noted in my initial declaration, countless courts have relied on my groupings to assess fees.[1] Perhaps even more telling, Mr. Frank himself appears to have relied on my groupings rather than the Eisenberg-Miller groupings: he proposes a fee award equal to my 17.9% average between $100-250 million rather than the 10.2% figure he touted from Eisenberg and Miller for all cases above $175.5 million.

8. Second, let me address the objection filed by Kevin Fisher. Mr. Fisher criticizes me for not discussing my empirical findings with respect to derivative actions in particular. Although my empirical study included derivative settlements, I grouped them in the "Other" category in my study and do not have data available that is specific to them. Two of the three Eisenberg-Miller studies did the same thing (they lumped derivative cases into the "corporate"

[1] Mr. Frank argues that the fee request here is outside two standard deviations of the mean I found for the fourteen settlements between $100 million and $250 million, but that is because he does not round the fee request to one decimal place like I did to compare it to the numbers rounded to one decimal place in my empirical study.

category). Thankfully, the third Eisenberg-Miller study separated out derivative settlements. Yet, they found that average and median fee percentages in derivative cases were *even higher* than the average and median in all cases. *See,* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 950-52 (2017) (reporting mean and median fee awards of 29% and 31% in six derivative settlements versus 27% and 29% for all cases).

9. As I explained above, the Eisenberg-Miller study does not go on to report percentages for settlements in the size range of the settlement here, let alone for derivative settlements in the size range here. But Mr. Fisher does report such numbers from a source called "D&O Diary" that purports to list the largest derivative settlements in the last several years. I note that, consistent with the Eisenberg-Miller finding, the average reported by Mr. Fisher's six derivative settlements between $100 million and $250 million (18.9%) is *even higher* than the average I reported for all cases in that size range (17.9%). For this reason, it is my opinion that the data on derivative settlements tends to further *support* my opinion that it would be reasonable to award counsel here the requested fee award.

10. For all these reasons, it is still my opinion that the requested fee award is reasonable.

Executed on this 25th day of July, 2019, at New York, NY.

By: */s/ Brian T. Fitzpatrick*
Brian T. Fitzpatrick