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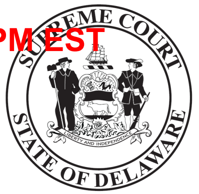

IN THE SUPREME COURT OF THE STATE OF DELAWARE

	)	
	)	No. 349, 2023
	)	
IN RE DELL TECHNOLOGIES INC.	)	CASE BELOW:
CLASS V STOCKHOLDERS	)	
LITIGATION	)	COURT OF CHANCERY
	)	OF THE STATE OF DELAWARE,
	)	Cons. C.A. No. 2018-0816-JTL
	)	

BRIEF OF *AMICI* PROFESSORS BAKER, FITZPATRICK AND SILVER IN SUPPORT OF APPELLEE AND AFFIRMANCE

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INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

In the proceeding below, a group of law professors submitted an amicus brief in which they addressed a question about court-awarded fees in common fund cases posed by Vice Chancellor Laster: "What do law professors say in favor or against the declining percentage method?" Corrected Brief of Law Professors as Amici Curiae ("Corrected Brief" or "CB"). Vice Chancellor Laster found that brief unpersuasive. *See In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679 (Del. Ch. 2023). The same group has now submitted a new brief in this Court urging reversal of Vice Chancellor Laster's opinion. *See* Brief of Law Professor *Amici* in Support of Objector-Appellant and Reversal ("Amicus Brief" or "AB").

We are also law professors with substantial bodies of scholarly work on fee awards and related matters. The Corrected Brief, the Amicus Brief, and Vice Chancellor Laster's opinion all cite us. We write separately because our views differ substantially from those of the opposing amici. In our opinion, Vice Chancellor Laster decided the issue below correctly.[1]

The question raised by Vice Chancellor Laster is whether a court should award a smaller fee percentage simply because plaintiffs' counsel recovered more money for their clients. Some courts do this. One of us (Professor Fitzpatrick) authored a

[1] We have no financial interest in the outcome of this proceeding. We are submitting this amicus brief on our own initiative, with the sole object of bringing our views to the attention of the Court. No party engaged us or offered to pay us for our time.

leading empirical study of prevailing practices. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811 (2010). But the way that most of these courts apply the declining percentage method is so indefensible that not even opposing amici defend it. Most courts simply award a smaller percentage *of the entire recovery* as the recovery grows in size. Thus, a court that might have awarded 20% of a $999 million settlement will award 10% of a settlement at $1 billion. This approach can make counsel *worse off* for recovering *more money*. In the example, recovering an additional $1 million reduces the fee from $199.8 million to $100 million. No rational client would hire a lawyer on terms like this, and, to our knowledge, no actual client has. Opposing amici agree that "*fixed* declining percentages . . . suffer from the problem" of encouraging lower net stockholder recoveries. AB.20-21.

But the Amicus Brief argues that Vice Chancellor Laster should have done the same thing on a *marginal basis*. Remarkably, the authors don't say what the marginal formula should be.[2] This is a telling omission. Setting declining marginal percentages is a tricky business. Judges need to assign both fee percentages and inflection points. For example, should it be 30% of the first $100 million, 25% of

[2] Opposing amici imply at various points that 15% is the correct percentage, but they nowhere explain what marginally declining formula led them to that number. *See* AB.7,14; CB.8 ("[A] 15% fee []would be more appropriate here than a 28% award."); CB.15.

the next $100 million, 20% of the next $100 million, and so on? Or should the percentages fall after every $200 million? Every $300 million? Should they step down 5% each time? 1%? Opposing amici have no answers whatsoever to these questions. Nor do we. Without more, the recommendation to apply declining marginal percentages is worse than useless: it is likely to create perverse incentives that harm claimants by discouraging lawyers from maximizing recoveries.

Opposing amici contend otherwise because lawyers tend to be paid more per hour of work in bigger common fund cases. From this, they infer that lawyers can be paid less in these cases without adverse consequences for investors because lawyers will continue to pursue them. A glaring flaw mars this contention: it assumes that, once lawyers choose to file a case, they will work just as hard and expend resources just as willingly no matter how they are compensated. This assumption is obviously false. Someone who is paid 30% of all funds recovered obviously has a stronger incentive to litigate than someone who is paid 30% of the first $10 million, 25% of the second $10 million, 20% of the third $10 million, and so forth.

But our larger point is this: there is no need for courts to try to figure out which amicus brief is right or wrong about the likely effects of declining marginal percentages because the people who have the greatest interest in figuring all this out—real clients in real marketplaces for real legal representation—have already

rendered their verdict. All of the available empirical evidence suggests that, when people hire lawyers on contingency, they almost always either pay their lawyers with fixed percentages or with *increasing* percentages based on procedural maturity (e.g., higher percentages if a case goes to trial than if it is resolved before trial). As far as anyone can tell, marginally declining percentages are used only rarely—and there is reason to believe that even the few examples we know of are tainted by clients seeking to maximize something other than their own net recoveries.

In our view, when judges must award attorneys' fees for clients they should not adopt novel arrangements that clients themselves do not voluntarily use. They should instead follow what real clients do in the real world. In other words, they should "mimic the market." After all, clients know best how to maximize their own net recoveries. That is what Vice Chancellor Laster did here and his decision should be affirmed.

ARGUMENT

I. FEE AWARDS SHOULD ENCOURAGE LAWYERS TO MAXIMIZE STOCKHOLDERS' NET RECOVERIES

In an article published in the *Columbia Law Review*, two of us (Professors Baker and Silver) urged trial judges to "keep uppermost in their minds that," when regulating fee awards,

> they are creating incentives for attorneys. Realizing this, [judges'] only object should be to select fee terms that motivate lawyers to maximize net recoveries for claimants. Choosing a fee arrangement for any other reason would disserve class members by discouraging their lawyers from representing them zealously, thereby creating a serious risk that class members would be denied due process of law.

Lynn A. Baker, Michael Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1448 (2015) [hereinafter "*Is the Price Right?*"].

This is not just a policy prescription; it is a legal obligation. As Professor Fitzpatrick has noted, judges who award attorneys' fees for clients say they sit in a fiduciary relationship to those clients. *See* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1152 n.8 (2021) [hereinafter "*A Fiduciary Judge*"] (citing 4 Newberg and Rubenstein on Class Actions § 13:40 (6th ed.) ("[S]o central is the protection of absent class members' rights that the court is said to have a 'fiduciary duty' toward absent class members in assessing . . . the reasonableness of class counsel's fees.")). Opposing

amici agree with this goal; they repeatedly emphasize the desire to put more dollars into stockholders' pockets. *See, e.g.,* AB.8-10 (promoting "net stockholder recovery").

But what is the best way to maximize the net recoveries of lawyers' clients? One way to do it is to rely on economic models, but, as Professor Fitzpatrick has explained with regret, the models are "indeterminate." Fitzpatrick, *A Fiduciary Judge*, at 1159. The answer depends on too many variables, including difficult ones to quantify, such as how well lawyers can be monitored.

Instead of relying on models, many courts[3] and academic commentators, including us,[4] believe that judges should "mimic the market" when awarding fees.

[3] The Seventh Circuit makes the market rate the sole determination in awarding class fees, *see, e.g.*, *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (holding that the district court must "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case"), and most other Circuits make the market rate at least one factor in the determination *see, e.g.*, *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 496 (3d Cir. 2017) ("the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained"); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (followed by many Circuits) (the attorney's "customary fee"), *overruled on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) ("the market rate").

[4] In addition to articles previously cited, see Charles Silver, *The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status Report on Securities Fraud Class Actions*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION (Sean Griffith et al. eds., 2018).

Professor John C. Coffee, Jr., perhaps the country's leading scholar of stockholder actions, urged this approach long ago:

> [T]he "law should mimic the market." In the class action context, that would mean attempting to award the fee that informed private bargaining, if it were truly possible, might have reached. The simplest way for the law to duplicate the bargain that informed parties would reach if agency costs were low is to look to fee award levels in actions brought by sophisticated private parties under the same or comparable statutes…. [I]f courts were to ask what fee structure an informed, sophisticated client would use to compensate his attorney when close monitoring is not feasible, they would at least have focused on the correct question.

John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 696-697 (1986).

The key insight supporting this development is that sophisticated plaintiffs with large claims can be expected to hire lawyers on terms that maximize their expected net recoveries—exactly the goal that judges, as absent class members' fiduciaries, should strive to achieve. Instead of "reinventing the wheel" and using novel compensation arrangements, judges can follow the lead of sophisticated plaintiffs and be reasonably confident of fulfilling their charge.

What does the market tell us about the optimal way to pay lawyers who work on contingency? First, it tells us that judges should adopt percentage-based fee formulas and reject lodestar formulas because real clients always use the former when engaging such attorneys. We have studied fee arrangements in the United

States for decades and we know of not a single instance in any type of litigation in which a sophisticated client used the lodestar method when hiring attorneys on contingency. To the best of our knowledge, they do so only in jurisdictions like England that prohibit percentage-based contingent fees. In view of this, the only plausible conclusion is that it is wrongheaded to evaluate the reasonableness of contingent lawyers' compensation in lodestar-based terms when percentage terms are an option. If the lodestar method was a good way of compensating lawyers for bearing costs and risks, sophisticated clients would have recognized this and agreed to pay lawyers a contingent hourly rate times a multiplier. Instead, clients prefer percentage-based contingency arrangements that eliminate the need to review monthly bills, discourage lawyers from dragging out cases, and reward lawyers for maximizing recoveries. Given that the lodestar method is a bad way of paying lawyers, it must also be a bad way of evaluating the reasonableness of their fees. If sophisticated clients do not care about lodestar multipliers when percentages are available, judges should not care about them either.

Second, the market tells us that judges should award either flat percentages of 25% to 40% or percentages that increase with the procedural maturity of the litigation (e.g., 25% of the recovery when a claim settles before a complaint is filed,

one-third thereafter, and 40% in the event of an appeal).[5] These are overwhelmingly the fee terms selected by real clients, including sophisticated clients, who hire lawyers on contingency. *See* Fitzpatrick, *A Fiduciary Judge,* at 1159-63. Of course, upward and downward deviations from these ranges should be allowed when evidence shows that, in similar matters, clients tend to pay more or less. But, in sum, a judge applying the "mimic the market" approach would review the evidence and do his or her best to estimate the terms that would have been agreed to had a sophisticated client, acting as an agent for all class members, negotiated with class counsel directly at the start of litigation.

Vice Chancellor Laster followed this prescription. His percentage fell within the most common fixed-percentage range. He even considered that the settlement took place at a "late stage"—only 19 days before trial was scheduled to begin—which, frankly, argues in favor of an even higher percentage than he awarded.

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[5] Although 33.3% appears to be the high end in Delaware stockholder litigation, we are aware of many contingent fee agreements in other contexts in which the agreed fee is 40%. *See, e.g.*, Eric Helland & Seth A. Seabury, *Contingent-Fee Contracts in Litigation: A Survey and Assessment*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 383, 387-88 (Jennifer Arlen ed., 2013).

II. THE MARKET HAS REJECTED THE DECLINING PERCENTAGE APPROACH

Opposing amici do not criticize the "mimic the market" approach. They offer no reason for thinking that sophisticated clients with large claims routinely, or even occasionally, prefer inferior compensation formulas to better ones. Yet, they urge the Court to endorse a fee formula that the market has rejected. With the exception of one context, which we address below, they do not show that sophisticated clients ever use their preferred approach. Instead, opposing amici ask the Court to have greater faith in them than in the lessons the market for legal services teaches about the advantages and deficiencies of various compensation structures. We are more cautious.

In *A Fiduciary Judge*, Professor Fitzpatrick examined the empirical evidence regarding how sophisticated parties pay lawyers they hire on contingency. His conclusion: "the data from sophisticated clients . . . did not find any marginally decreasing rates." *Id*. at 1170.[6] The reasons are easy to understand. Marginally

[6] This conclusion was based on a published study of corporations that hire lawyers on contingency to bring patent infringement cases and new data collected in corporate antitrust class actions, where, over nearly 20 years, large corporations never objected to large fee percentages even in the biggest class actions. Opposing amici argue that the antitrust data is distinguishable from this case because "M&A settlements rarely secure 100% of potential damages" while "antitrust cases typically allow for treble damages." AB.23. They think this is significant because antitrust plaintiffs can "settle for 50% of treble damages, give 33% of that award to their attorneys, and still recover actual damages." *Id*. In other words, they seem to think antitrust plaintiffs have money to burn, so why not give a little extra to the lawyers?

declining percentages mean marginally declining incentives to wrest more money from the defendant. That forces clients to monitor their lawyers even more to prevent them from shirking. But perhaps more importantly, marginally declining percentages require the parties to agree on when percentages should start declining and by how much. At what recovery should the rate start to fall? Should it fall to 30%? To 25%? At what recovery should it next fall? And so on. The answers to these questions are extremely difficulty to determine. For example, in order to construct declining percentages that maximize their own recoveries, clients would

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We did not know corporations were so magnanimous. But the premise of the argument is flawed. Antitrust class actions do not settle for "50% of treble damages"; on average, they settle for 19% of single damages. *See* John M. Connor & Robert H. Lande*, Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages,* 100 IOWA L. REV. 1997, 2010 (2015). Opposing amici also argue that the antitrust data is distinguishable because the representative plaintiffs in the antitrust cases received large incentive awards and these awards might have offset the gains they could have made by objecting to a fee request; they even attached a chart showing that they varied from four figures to perhaps as high as the low six figures. (It is difficult to tell precisely from their chart because they lumped together incentive awards to all representative plaintiffs in a given case.) *See* AB.23 & Ex. C. The flaws in this argument are many-fold. First, class members are allowed to object to fee requests without objecting to or otherwise impairing the underlying settlements and their incentive awards. Second, many of the representative plaintiffs in these cases had millions upon millions of dollars at stake; even an incentive award of six figures would not offset what they could have gained by shaving even a few percentage points off the fee award. Finally, incentive awards do not explain why *absent* corporate class members never objected any of these fee requests. Opposing amici also argue that the antitrust data actually supports their argument because the fee requests there "decline[d]" with size of recovery. AB.22. But the fee requests varied over a very narrow range—27.11% to 33.33%—*exactly* within the market range and *well above* the percentage they recommend.

need to know their lawyers' so-called "production functions"—essentially, what the outcome of the litigation would be at each additional unit of time invested by the lawyer. *See, e.g.*, Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503, 515-23 (1996). No one knows this, including the lawyer. For one thing, it depends on what the defendant will do in response to each additional unit of time invested by the lawyer. Moreover, even if the parties knew the production function, it would still be complicated to figure out where to set the inflection points in light of the other variables involved in the calculation. *See id*. All of this is so difficult that we are unaware of any academics who have attempted to calculate optimal declining percentages. Opposing amici realize all this, *cf.* CB.9 ("This approach, however, would require the investor to determine this baseline amount when selecting lead counsel and incorporate it into the retainer agreement."); not even they are willing to do it in this very case. *See supra* note 2.

The best that Professor Fitzpatrick could say about marginally declining rates is that they are "not unheard of in the marketplace." Fitzpatrick, *A Fiduciary Judge,* at 1170. Opposing amici base the portion of their brief entitled "Declining Percentages are Used in the Marketplace" on these "'not unheard of'" examples. AB.20 (quoting Fitzpatrick, *supra*). These examples are public pension funds that hire lawyers to bring securities fraud class actions. *See id.* (citing "sophisticated public-sector funds"). Opposing amici even cite *Is the Price Right?*, the *Columbia*

Law Review article that Professors Baker and Silver coauthored, to support them. *See* AB.20 n. 11. But opposing amici do not tell the rest of the story.

The rest of the story is politics. Nearly twenty years ago, Professor Coffee had this to say about these cases:

> I am aware that "declining" percentage of the recovery fee formulas are used by some public pension funds, serving as lead plaintiffs in the securities class action context. However, I have never seen . . . a large corporation negotiate such a contract (they have instead typically used straight percentage of the recovery formulas). My belief is that public pension funds prefer the "declining percentage" formula largely for political reasons, while private corporations disdain such formula for economic reasons. That is, public pension funds are frequently administered by elected political officials who are potentially subject to media and political criticism for conferring "windfall" fees on their attorneys. Necessarily, they seek to avoid criticism, and the declining percentage formula seems primarily a defensive strategy to protect political officials from such criticism. Corroborating this conclusion is the rareness of its use by private corporations (as Coca-Cola, PepsiCo and Admiral Beverage have implicitly confirmed in this case [by paying straight percentage fees in the typical range]).

Declaration of John C. Coffee, Jr., ¶ 22, *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004). Professor Silver has endorsed this conclusion as well. *See* Declaration of Charles Silver, ¶ 53, *In re Takata Airbag Product Liability Litigation (Economic Loss Track Cases Against Honda and Nissan)*, No. 15-md-02599 (S.D. Fla. Jan. 24, 2018). In other words, the examples from public pension funds are tainted; the public officials in those cases may not be trying to maximize the pension fund plaintiffs' net recoveries. But, because

everyone agrees courts should try to maximize the plaintiffs' net recoveries here, it follows that courts should not emulate these examples.

III. OPPOSING AMICI'S ANALYSIS IS BASED ON LODESTAR MULTIPLIERS AND THE MARKET HAS DECISIVELY REJECTED LODESTAR MULTIPLIERS AS A BASIS FOR FEES

What then recommends marginally declining percentages? Opposing amici say their approach is recommended by an examination of class action lawyers' lodestar multipliers. *See* AB.12 ("A lodestar cross-check could, and should, be used . . . ."); CB.6-9 (examining "average multiplier[s] to lodestar"). They argue that class action lawyers reap larger multipliers on their time from fee awards in bigger cases than in smaller cases, *see id.*, and this makes class action lawyers "overcompensated" in bigger cases, CB.2 (arguing that eschewing "a declining-percentage fee" would lead to "overcompensating class attorneys" in "large settlements"); CB.7 ("attorneys are . . . overcompensated after [a motion to dismiss] in cases involving high-market capitalization firms like Dell").[7] Given that lawyers are "overcompensated" in bigger cases, they argue that fees could be cut and the lawyers would still file these cases. *See* CB.8 ("[T]he conjecture that plaintiffs' firms will not pursue meritorious cases under a declining-fee approach ignores the significant money that firms make in those cases.").

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[7] They make the assertion more colorfully in one of the law review articles on which their amicus briefs are based: "[B]eing appointed as lead counsel in a securities class action that is likely to end with a large settlement is like receiving a winning lottery ticket." Stephen J. Choi, Jessica Erickson & A. C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions*, 17 J. EMPIRICAL L. STUD. 438, 464 (2020).

There are so many flaws in this logic that it is difficult to know where to begin. But let's start with the "overcompensation" point. The fact that one multiplier is bigger than another says nothing about which multiplier is too big and which multiplier is too small. For example, maybe lawyers are correctly compensated in big cases and undercompensated in smaller cases? Maybe lawyers are undercompensated in all cases but less so in big cases?[8] Without a theory for what the optimal lodestar multiplier is to begin with, comparing one lodestar multiplier to another tells us nothing.

Moreover, even if it were true that lawyers would *file* all the same cases if the courts awarded lower fee percentages, this does not tell us whether class members would be better off on net. Opposing amici argue that smaller fee awards for attorneys should leave larger net recoveries for stockholders, *see* AB.9 (providing a made-up example), and this is indeed possible. But is it *likely*? We think not. Net recoveries are a function of both the fee percentage *and* the number of dollars recovered. When lawyers receive declining percentages, their incentives also

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[8] *See, e.g.*, I.J. Alexander Dyck, et al., *How Pervasive is Corporate Fraud?* (Feb. 17, 2021), https://ssrn.com/abstract=2222608 (finding that lawyers currently pursue less than half of all securities fraud). Indeed, Pentwater itself contends that counsel failed to maximize the recovery in this case. *See* A367-381 (arguing that the settlement, although enormous, is small by comparison to the losses incurred). If Pentwater is right, counsel was incentivized insufficiently despite the possibility of earning large profits.

diminish. Even if a lawyer is willing to file a case, what they do or don't do after they file is driven by how they are paid.

One passage in particular demonstrates opposing amici's indifference to the quality of lawyers' efforts. They praise a Texas rule that "restricts contingency fees in class actions to 400% of lodestar." AB.9. Remarkably, they do so without noting that the rule was part of a sweeping package of lawsuit restrictions (also known as tort reforms) adopted in 2003 with the purpose to make many types of lawsuits unprofitable.[9] Sadly, based on our experience and study of Texas litigation, the package has had its desired effect.[10]

But there is no need to try to figure out who is right and who is wrong about what will happen under opposing amici's proposal. Real clients have already done this work and have flatly rejected opposing amici's lodestar-multiplier analysis. As we explained above, the market has rejected lodestar-based formulas for contingent

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[9] *See* Texans for Lawsuit Reform, Timeline of Reforms, https://www.tortreform.com/timeline-of-reforms/ (last visited Dec. 24, 2023) ("In 2003, TLR advocated our nation's most comprehensive tort reform bill . . . address[ing] several areas of Texas' legal system that were being abused[, including] . . . class action attorney fees.").

[10] Professor Silver studied the impact of the 2003 tort reforms on medical malpractice litigation and found that the frequency of lawsuits and payouts declined significantly. *See* Bernard S. Black et al., MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHAT IT DOES, AND WHY TORT REFORM HASN'T HELPED 11 (Cato Institute 2021).

legal representation. In particular, it has rejected capping percentages by a multiple of the lawyer's lodestar. Again, Professor Fitzpatrick canvassed the empirical evidence in *A Fiduciary Judge*; his conclusion: "I have never seen this method used in the market for contingency representation, whether among sophisticated or unsophisticated clients." *Id*. at 1167. Indeed, opposing amici have not cited a *single* example of any client anywhere that agreed to a fee contract that lowered percentages based on the lawyer's lodestar multiplier—not even one tainted by politics. Yet, that is the very method they are recommending to the Court! *See* AB.12 ("A lodestar cross-check could, and should, be used . . . .").

If there were any doubt that opposing amici's analysis has been flatly rejected by the market, the death knell can be found in their backup argument: returning to lodestar multipliers, they argue that lawyers' percentages should be reduced when cases are resolved *after* a motion to dismiss is denied versus before. *See* CB.7 ("[A]ttorneys are undercompensated before a motion to dismiss, but overcompensated afterwards . . . ."). In their companion law review article, they argue this is warranted because risk has been mitigated once the case has survived a motion to dismiss; less risk should mean lower lodestar multipliers and lower lodestar multipliers should again mean lower fee percentages. *See* Stephen J. Choi, Jessica Erickson & A. C. Pritchard, *The Business of Securities Class Action Lawyering*, 99 IND. L. J. (forthcoming), https://ssrn.com/abstract=4350971, at 62

(noting that "the riskiness of a case goes down as the litigation progresses" and arguing that, because, "the impact is largest in the cases against the largest companies," the "overcompensation (and thus incentive to overwork) is greatest for these cases"). As we noted above, real clients in the real marketplace do sometimes vary fee percentages on the procedural maturity the case achieved. But they do so in the exact opposite manner recommended by opposing amici! The market *increases* percentages as cases survive procedural stages, not decreases them.

Again, we have *never* seen a fee agreement that goes the other way, and, again, opposing amici cannot cite a *single* one. The reason is well known. As scholars have shown for many decades, the biggest drawback to the percentage-method is that lawyers will want to settle prematurely for too little. *See* Fitzpatrick, *A Fiduciary Judge,* at 1158-59 (citing over 50 years of scholarship). Clients mitigate this by *increasing* percentages as cases move along; decreasing percentages would only *exacerbate* the problem.[11] In other words, here again, opposing amici's recommendation only makes sense by assuming that case outcomes are not affected

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[11] *See, e.g.*, Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259, 260 (1997) (showing that percentages should increase with procedural maturity). Another way to mitigate the problem is to increase percentages with recovery size. *See, e.g.*, John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,"* 30 CARDOZO L. REV. 407, 432 (2008); Jill E. Fisch, *Lawyers on the Chopping Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 679 (2002).

by attorney effort after filing. Here again, that assumption is not based in reality. But, here again, there is no need to try to figure out who is right or who is wrong about what will happen if fee percentages decline as a case matures. Real clients have already done this work for us and they have rejected the idea. In our view, courts should not "experiment on" the stockholders here by subjecting them to novel theories of attorney compensation unknown in the real world.

CONCLUSION

Scholars have spent many lifetimes trying to figure out the best way for clients to pay their lawyers. The answer is indeterminate because there are too many variables and too many of them are unknowable. Judges could play central planner and try to figure out the ideal fee formula in every case. But, with respect, we think that is a fool's errand. The better and safer course is just to ask what real clients do when they hire lawyers on contingency. That's what Vice Chancellor Laster did and his decision should be affirmed.

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