No. S222996

IN THE SUPREME COURT OF CALIFORNIA

MARK LAFFITTE, *et al.,*

Plaintiffs-Respondents,

v.

ROBERT HALF INTERNATIONAL, INC., *et al.,*

Defendants-Respondents,

DAVID BRENNAN,

Objector-Appellant.

SECOND APPELLATE DISTRICT, DIVISION SEVEN, NO. B249253;
LOS ANGELES SUPERIOR COURT, NO. BC 321317
[RELATED TO NOS. BC 455499 & 377930], HONORABLE MARY H. STROBEL

APPLICATION OF PROFESSOR WILLIAM B. RUBENSTEIN FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF; [PROPOSED] BRIEF OF *AMICUS CURIAE* PROFESSOR WILLIAM B. RUBENSTEIN

Martin N. Buchanan (SBN 124193)
Law Offices of Martin N. Buchanan
665 W. Broadway, Suite 1700
San Diego, CA 92101
(619) 238-2426

Counsel for Amicus Curiae *Professor William B. Rubenstein*

APPLICATION OF PROFESSOR WILLIAM B. RUBENSTEIN FOR PERMISSION TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Professor William B. Rubenstein seeks permission to file the attached Brief of *Amicus Curiae.*

STATEMENT OF INTEREST

Amicus is the Sidley Austin Professor of Law at Harvard Law School and (since 2008) the sole author of *Newberg on Class Actions*, the leading treatise on class action law in the United States. In 2015, Professor Rubenstein re-wrote the entire volume of the *Newberg* treatise addressing attorney's fees and, for several years, he published a regular column entitled, *Expert's Corner*, in the publication, *Class Action Attorney's Fee Digest.* Professor Rubenstein has also served as an expert witness in roughly 50 class action fee-related matters in the past decade. Professor Rubenstein therefore has significant scholarly and practical experience on fee matters.[1]

Professor Rubenstein respectfully submits this Brief for two independent reasons. *First*, other parties in this matter have relied, in their briefing, on citations to the *Newberg* treatise; however, in doing so, they have cited to earlier editions of the Treatise.[2] Professor Rubenstein seeks to correct the record and to place before this Court in this important case the

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[1] Professor Rubenstein, who taught law in California at Stanford Law School (2 years) and UCLA School of Law (10 years), is also admitted to practice law in the state of California (# 235312).

[2] *See, e.g.*, Answer Brief on the Merits (Class Plaintiff and Respondent Mark Laffitte) at 15, 43 (citing Conte & Newberg, 4 Newberg on Class Actions,§ 13:80); Brief of Amici Curiae Eight Class Action Scholars in Support of Respondents at 18, 24 (citing 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions (4th ed. 2002) § 14:6).

fee research and fee approach reported in the current edition of the Treatise. *Second*, Professor Rubenstein aims to fill a gap left open by the other briefs filed to date: namely, an elucidation of the empirical evidence concerning, and the values served by, the lodestar cross-check aspect of percentage-based fee awards. Professor Rubenstein agrees with those parties who have argued that a percentage approach is a proper fee method for courts to employ in common fund cases. Other briefs have noted that the percentage method is a valuable approach because it properly incentivizes plaintiffs' counsel to step forward and serve the important function of private attorneys general. These briefs have not, however, focused on the fact that in a common fund case, it is the class itself that is paying those fees. Given that, a court's role is not only to select fee methods that properly incentivize plaintiffs' counsel, but simultaneously – and as importantly – to ensure that the fee does not over-tax the absent class members for the services provided. A lodestar cross-check is the best – indeed, really the only – means for ensuring against excessive percentage awards and hence for safeguarding the absent class members' interests.

This case was fully briefed on November 12, 2015 and amicus briefs were due 30 days later, or by December 11, 2015. Calif. Rules of Court 8.520(f)(2). However, "for good cause, the Chief Justice may allow later filing." *Id.* The most recent amicus brief was filed with this Court's permission on January 5, 2016. *Amicus* proposes to file this brief at this time because the facts prompting its filing – *i.e.*, the citations to the earlier edition of the *Newberg* treatise and the omission of focus on the percentage method's potential to harm class members – did not arise until the completion of *amicus* briefing. *Amicus* promptly collected and reviewed the merits and *amicus* briefs in this matter, quickly drafted this brief, and proposes to file this additional *amicus* brief within a few business days of the filing of the last *amicus* briefs.

HOW THE PROPOSED BRIEF WILL ASSIST THE COURT

This brief aims to assist the Court in four ways: unlike the already-filed briefs [1] it will provide empirical evidence on courts' use of the lodestar cross-check; [2] it will illuminate the benefits of that method; [3] it will approach the fee issue with the interests of class members, not just attorney incentives, in mind; and [4] it will provide a different perspective as the sole *amicus* brief not filed by, or on behalf of, plaintiffs' lawyers.

DISCLOSURE

No party, or counsel for any party, in the matter pending before this Court either authored the proposed *amicus curiae* brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. No person or entity has made any monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

For the foregoing reasons, *amicus curiae* Professor William B. Rubenstein respectfully requests that the Court accept the accompanying brief for filing and consideration.

Dated: January 11, 2016

Respectfully submitted,

LAW OFFICES OF MARTIN N. BUCHANAN

/s/ *Martin N. Buchanan*

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Martin N. Buchanan (#124193)

665 W. Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 238-2426
martin@martinbuchanan.com

Counsel for Amicus Curiae *Professor William B. Rubenstein*

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PRELIMINARY STATEMENT

Amicus agrees with the arguments set forth in many filed briefs that the percentage method is a proper fee approach in common fund class action cases. Unlike other *amici* and parties, however, *amicus* believes that a lodestar cross-check is an important component of that approach. The lodestar cross-check serves the valuable function of ensuring that counsel's percentage award is not excessive. While the parties and *amici* have urged the Court to embrace the percentage method because it generates the proper incentives for class counsel, none have noted the risk that the percentage award may over-compensate counsel.[1] Excessive fees are a problem because in a common fund case, the class members themselves are paying the fee award out of their recovery. Yet these class members are not present parties to the litigation and they rarely have enough of an incentive – nor enough of an opportunity[2] – to review and monitor class counsel's fee

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[1] The law professors' amicus brief, for example, has a heading that alludes to the potential for counsel receiving "windfall" fees, but that section only addresses the "perception" of high fees. Brief of Amici Curiae Eight Class Action Scholars in Support of Respondents at 28-29. The Answer Brief on the Merits (Class Plaintiff and Respondent Mark Laffitte), the *amicus* brief of the Consumer Attorneys of California, and the *amicus* brief of the Working Wardrobes also argue in favor of a percentage approach but do not address the concern that such an approach might take an excessive portion of the class's recovery from the class.

[2] This case presents a good example of the problem absent class members face in overseeing counsel's fee petition. Class counsel did not even *file* their motion for attorney's fees until a month *after* the deadline for class member objections. *Laffitte v. Robert Half International Inc.*, 231 Cal.App.4th 860, 871-72 (2014). While class members had received, in the class notice, the *level* that class counsel might seek, they had available to them before the objection deadline none of the details concerning the proposed fee nor counsel's argument in support of it. The lower courts found no legal problems with these procedures. *Id.* This Court should herein adopt a rule requiring courts to give class members a reasonable period of time (at least 21 days) *after* the filing of the fee *petition* to lodge

submissions. The Court stands as their fiduciary, ensuring that they are not over-taxed for the legal services that they received.

The lodestar cross-check is the key means by which a court can make that evaluation. The lodestar cross-check achieves this end because it provides a court with a simple data point: the relationship between the proposed percentage award and counsel's lodestar. If the proposed percentage award is too great a multiple of the lodestar, it risks being excessive. The cross-check not only protects the class from excessive taxing of their recoveries, it also accomplishes other ends: it guards against excessive fees with more precision than the rough sliding scale or mega-fund approaches that reduce percentages as recoveries increase; it makes transparent counsel's profit in any case; and, unlike the percentage method alone, the cross-check enables fee consistency across cases. Not surprisingly, therefore, most federal courts that employ a percentage fee approach use a lodestar cross-check when undertaking that analysis.

After describing how the cross-check operates (Part A, *infra*), *amicus* will discuss the key values of the cross-check (Part B, *infra*) and the concerns with it (Part C, *infra*), survey empirical evidence of its use (Part D, *infra*), and address how courts might apply it in a given case (Part E, *infra*). As noted after each Part heading below, much of this brief is taken directly from the current edition of the *Newberg* treatise authored by *amicus*,[3] with some modifications.

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objections thereto. Short of such a procedure – and likely even the presence of one – the only realistic check on counsel's fee petition is the judicial oversight itself.

[3] 5 William B. Rubenstein, Newberg on Class Actions (5th ed. 2015) (hereafter *Newberg on Class Actions*).

ARGUMENT

THIS COURT SHOULD EXPLICITLY EMBRACE THE PERCENTAGE FEE METHOD IN COMMON FUND CASES AND ENCOURAGE THE LOWER COURTS TO UNDERTAKE A LODESTAR CROSS-CHECK AS PART OF THAT ANALYSIS

A. The Lodestar Cross-Check Has Developed in Conjunction with the Proliferation of the Percentage Fee Method[4]

A lodestar cross-check ensures against a windfall by taking the absolute dollars counsel will receive via a percentage award and considering whether that number is greater or less than counsel's lodestar (the amount counsel would receive were they to be paid on an hourly basis). An example helps illuminate the value of the cross-check. If counsel settle a class action lawsuit for $100 million, they may be entitled to fee totaling 25% of that amount, or $25 million. A straight percentage approach, without a lodestar cross-check, simply awards counsel that $25 million, perhaps ensuring it is commensurate with several qualitative factors.[5]

The cross-check adds another quantitative step. Counsel are asked to submit the hours all professionals billed on the case, those professionals' hourly rates, and thence a total market value of the professional services rendered in the case. If that total lodestar is (magically) $25 million, then counsel's percentage award is precisely the same amount that they would have earned had they billed by the hour. If, however, counsel's lodestar is $10 million, the $25 million percentage award represents a multiplier of 2.5, meaning that the percentage award pays counsel 2.5 times their normal

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[4] Part A is taken directly from 5 *Newberg on Class Actions* § 15:85 (5th ed.), with some modifications.

[5] Most federal circuits require their courts to ensure the reasonableness of a fee award according to various multifactor tests. For a summary of the circuits' approaches, see 5 *Newberg on Class Actions* § 15:82 (5th ed.).

hourly billing rates. If counsel's total lodestar is $50 million, the $25 million percentage award represents a multiplier of .5, meaning that the percentage award pays counsel half of their normal hourly billing rates. Multipliers higher than 1 are typically referred to as "positive multipliers," those below 1 "negative multipliers." Courts sometimes refer to positive multipliers as "enhancements." These multipliers make transparent the profit or loss counsel incur in any given case and provide a constant to compare fee awards across cases, regardless of the size of the settlement and percentage.

The origin of the term "lodestar cross-check" lies in courts' shift in the 1990s from using a pure lodestar method in common fund cases to using a pure percentage method.[6] The central concern about the pure percentage method is that it may produce windfall fees;[7] the purpose of the lodestar cross-check is to guard against this concern by enabling a court to ascertain the relationship of the percentage award to counsel's billing for the case. Thus, the first use in the case law of the literal phrase "lodestar cross-check" appears to have occurred in a 1998 Third Circuit decision[8] (after that Circuit had moved toward a percentage approach), although that Circuit embraced the concept several years earlier[9] and the impulse to perform such a check long pre-dated the term.[10]

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[6] For a discussion of this history, see 5 *Newberg on Class Actions* § 15:64 (5th ed.).

[7] For a discussion of the costs and benefits of the percentage and lodestar methods, see 5 *Newberg on Class Actions* § 15:65 (5th ed.).

[8] *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 n.121 (3d Cir. 1998) ("Assuming that multipliers for risk or counsel's expertise are appropriate in the lodestar cross-check in common fund cases, they require particular scrutiny and justification.").

[9] *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) ("The court may . . . , as a check, want to

B. The Lodestar Cross-Check Serves Several Important Functions Including Ensuring That Counsel's Fee Does Not Take An Excessive Amount of the Absent Class Members' Recoveries[11]

The benefits of the lodestar cross-check are several. *First*, the lodestar cross-check guards against windfalls by providing a court with information about the relationship of the percentage award to class counsel's aggregate billing for the case.[12] Positive multipliers from 1-3 are the norm,[13] though higher multipliers are not unheard of and may well be

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use the lodestar method to assure that the precise percentage awarded does not create an unreasonable hourly fee.").

[10] *See, e.g., Cherner v. Transitron Elec. Corp*., 221 F. Supp. 55, 61 (D. Mass. 1963) ("[U]nless time spent and skill displayed be used as a constant check on applications for [percentage-based] fees there is a grave danger that the bar and bench will be brought into disrepute, and that there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation.").

[11] Part B is taken directly from 5 *Newberg on Class Actions* § 15:86 (5th ed.), with some modifications.

[12] *See, e.g., In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award."); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1050 (9th Cir. 2002) ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award."); *In re Cendant Corp. Litig*., 264 F.3d 201, 285 (3d Cir. 2001) ("The goal of [the lodestar cross-check] is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel."); *Goldberger v. Integrated Res.*, Inc., 209 F.3d 43, 50 (2d Cir. 2000) (expressing concern with benchmark percentages possibly leading to windfall profits, and noting that "we encourage the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage").

[13] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34 (2010) (hereafter

warranted in certain circumstances.[14] *Second*, the lodestar cross-check performs that safeguarding function better than the alternative sliding-scale[15] or mega-fund[16] tests, both of which respond to the windfall concern by seeking to award lower percentages as fund sizes increase. When employing those approaches, courts simply pick lower percentages out of thin air. By contrast, the lodestar cross-check enables a court to calibrate the appropriate bonus (or demerit) with a more fine-tuned and less back-of-the-envelope analysis. Thus, *third*, the lodestar cross-check makes transparent the profit that counsel will make in a particular case and thereby assists a court in determining whether counsel are entitled to that profit. It is one thing to say counsel deserve 25% of a common fund, but quite another to learn that this amount is two times their lodestar or 20 times their lodestar. In this sense, a cross-check might argue for a higher percentage award, as opposed to simply limiting percentage windfalls.[17]

"Fitzpatrick") (noting that in 204 cases employing a lodestar cross-check, the "lodestar multiplier … ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34"); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 273 (2010) (hereafter "Eisenberg & Miller") (reporting that in nearly 700 state and federal cases over a 16 year period, "the mean multiplier ranged from 1.19 in the Eleventh Circuit to 2.43 in the Fourth Circuit. Across case categories, the mean multiplier ranged from 2.35 in 'other' to 1.24 in employment cases").

[14] For empirical evidence on multipliers, see 5 *Newberg on Class Actions* § 15:89 (5th ed.).

[15] For a discussion of the sliding scale approach to percentage awards, see 5 *Newberg on Class Actions* § 15:80 (5th ed.).

[16] For a discussion of the mega-fund approach to percentage awards, see 5 *Newberg on Class Actions* § 15:81 (5th ed.).

[17] *Vizcaino*, 290 F.3d at 1050 ("Similarly, the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted.").

Fourth, the lodestar cross-check enables consistency in fee awards across cases in ways that the percentage method alone does not. It is true in the abstract that a 25% award in one case and a 25% award in another case are both 25%, such that the percentage method ensures some level of consistency. But again, since that 25% figure, standing alone, provides so little information about the fee's relationship to profit, it is a rather meaningless form of consistency. By contrast, a 25% award in a $10 million case that embodies a positive multiplier of 1.5 (times counsel's lodestar) is the functional equivalent of a 5% fee award in a $1 billion case that similarly embodies a positive multiplier of 1.5 (times counsel's lodestar). There may be reasons that the multiplier should be higher or lower in the $10 million case or the $1 billion case, but using the lodestar cross-check enables a discussion of those reasons by providing an apples-to-apples comparison. Awarding counsel 25% in each case, without more analysis, is simply stabbing in the dark and, absent a lodestar cross-check, there is no meaningful basis for comparing the 25% in the $10 million case to the 5% in the $1 billion case.

C. Concerns About the Lodestar Cross-Check May Be Exaggerated[18]

The central drawback of the lodestar cross-check is that it requires counsel to keep their lodestar, and then makes that data meaningful; hence, it generates the problems with the lodestar method itself, including the inefficiency of judicial oversight of billing records, the incentive for counsel to pad their hours, and the prolonging of litigation.[19] Moreover,

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[18] Part C is taken directly from 5 *Newberg on Class Actions* § 15:86 (5th ed.), with some modifications.

[19] For a discussion of the costs and benefits of the lodestar method, see 5 *Newberg on Class Actions* § 15:65 (5th ed.).

although the cross-check yields a multiplier number, that number alone does not magically reveal the reasonableness of the percentage proposed – the multiplier must be analyzed,[20] and there is not necessarily a right answer about whether a 2, 3, or 4 multiplier is apt in any particular case.

The competing values at stake in the two approaches have generally led courts to meld them: as discussed in the succeeding section, most courts today tend to utilize a percentage method but employ a lodestar cross-check in doing so. While inserting a lodestar analysis in the midst of the percentage approach reintroduces the problems with the lodestar method just listed, these costs of the lodestar cross-check are likely exaggerated and the value that the cross-check adds underappreciated.

The three primary costs of the lodestar cross-check are likely exaggerated for the following reasons:

- *First*, it is alleged that the cross-check will occupy significant judicial resources to undertake. However, courts in nearly every circuit have held that, for the purposes of a cross-check, they need not scrutinize each individual billed hour, but may instead focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.[21] Moreover, the value of the cross-check can be accomplished even if courts only occasionally undertake scrutiny of the submitted time records, as the submission requirement alone will lead lawyers to self-discipline the fee level they seek. For example, if counsel plan to seek a percentage award of 25% but know that the 25% level embodies a multiplier of 8 times

[20] For a discussion of how courts undertake this task, see 5 *Newberg on Class Actions* § 15:87 (5th ed.).

[21] *See, e.g.*, *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306–07 (noting that the "lodestar cross-check calculation need entail neither mathematical precision nor bean-counting," and that "[t]he district courts may rely on summaries submitted by the attorneys and need not review actual billing records"); *Goldberger*, 209 F.3d at 50 ("[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court."). For a breakdown by circuit, see generally, 5 *Newberg on Class Actions* § 15:86 (5th ed.).

their lodestar, in a no-cross-check jurisdiction, they will seek the full 25%; in a cross-check jurisdiction, knowing that the 8 multiplier will become transparent, they will likely cut their fee request to (say) 12.5%, to bring the multiplier (to 4) in line with appropriate bonus levels – even before the papers are submitted for judicial review. The cross-check therefore need not impose significant additional judicial resources.

- *Second,* it is argued that but for the cross-check, lawyers will not have to engage in the laborious task of keeping track of their hours. However, lawyers in complex litigation almost invariably keep track of their lodestar regardless of whether they will need to submit it to the court. Many do so because even a court using a percentage method may inquire into the time counsel spent on the case, as time invested is one of the factors courts use to determine the reasonableness of the percentage award.[22] Courts therefore instruct counsel to keep track of their hours even if the percentage method is likely to be used.[23] Lawyers also keep track of their time for their firms' own internal administrative reasons. And lawyers keep track of their time so that they may compare it to the time of the other lawyers in the case: specifically, when it comes time to allocate an aggregate fee among those firms, the firms will often use their relative lodestar as a starting point for that allocation.[24] For that reason alone, attorneys at almost every class action firm today keep track of their hours. The cross-check thus imposes no additional record-keeping burden.

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[22] Most circuits require their courts to assess the reasonableness of a percentage award through application of a multifactor test. *See* 5 *Newberg on Class Actions* § 15:77 (5th ed.). The factors are generally taken from the Fifth Circuit's *Johnson* case, *Johnson v. Georgia Highway Exp., Inc*., 488 F.2d 714, 717–19 (5th Cir. 1974), which in turn borrowed the factors from ABA Model Rule 1.5. ABA Model Rule of Professional Conduct 1.5(a). The first *Johnson* factor is the "time and labor required," as is the first factor in Model Rule 1.5(a).

[23] Federal Judicial Center, Manual for Complex Litigation, Fourth § 14.223 (2004) ("In advance of any fee-award hearing, counsel should submit time and expense records . . . .").

[24] For a discussion of fee allocation processes, see 5 *Newberg on Class Actions* § 15:23 (5th ed.).

- *Third,* counsel's incentives to pad their lodestars and prolong cases are dampened by other pressures. Ethical rules proscribe padding, pushing the practice into the shadows. Further, the sooner a case is resolved, the sooner counsel get paid. Finally, if the lodestar will be a starting point in the fee allocation process, each firm already has an incentive to run up its lodestar before the introduction of any cross-check; yet if the lodestar is the beginning point of fee allocation, each firm simultaneously has an incentive to police one another's lodestar. Hence, the padding fear may well also be exaggerated.

Amicus does not contend that the lodestar cross-check is perfect, rather that its benefits far outweigh its concerns.

D. Most Courts That Employ the Percentage Method Utilize a Lodestar Cross-Check in Conjunction with that Method[25]

Given the benefits of the lodestar cross-check, it is quite prevalent in federal fee jurisprudence. The various federal circuits provide different directions to their district courts concerning whether or not to undertake a lodestar cross-check. The circuits' approaches can be grouped into several categories:

- *Required.* One circuit (the Fifth) appears to require its district courts to perform a cross-check and has noted that its cross-check "may be more searching" than that of other circuits because the percentage is cross-checked by the full list of *Johnson* factors, not just the lodestar. [26]

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[25] Part D is taken directly from 5 *Newberg on Class Actions* §§ 15:88-15:89 (5th ed.), with some modifications.

[26] *Union Asset Mgmt. Holding A.G. v. Dell, Inc*., 669 F.3d 632, 644 & n.42 (5th Cir. 2012) (stating that "we endorse the district courts' continued use of the percentage method cross-checked with the *Johnson* factors" and that such a cross-check "may be more searching than the 'lodestar cross-check' commonly referenced in other courts").

- *Preferred.* Three circuits (the Second,[27] Third,[28] and Ninth[29]) make a cross-check discretionary, but have advised their trial courts that they "encourage" (Second Circuit), "recommend" or "suggest" (Third Circuit), or "find useful" (Ninth Circuit) a lodestar cross-check.

- *Discretionary.* Two circuits (First[30] and Eighth[31]) have held that the cross-check is entirely discretionary and district courts in two others (Sixth[32] and District of Columbia[33]) have interpreted their circuit's law in this fashion.

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[27] *Goldberger*, 209 F.3d at 50 ("[W]e *encourage* the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage." (emphasis added) (*citing In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995))).

[28] *In re AT & T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006) ("[W]e have recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award." (citations omitted)); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 300 ("Regardless of the method chosen, we have suggested it is sensible for a court to use a second method of fee approval to cross-check its initial fee calculation.").

[29] *Vizcaino*, 290 F.3d at 1050 ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award." (footnote omitted)).

[30] *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 308 (1st Cir. 1995) ("Given the peculiarities of common fund cases and the fact that each method, in its own way, offers particular advantages, we believe the approach of choice is to accord the district court discretion[,] . . . recognizing that the discretion we have described may, at times, involve using a combination of both methods when appropriate.").

[31] *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("[U]se of the 'lodestar' approach is sometimes warranted to double-check the result of the 'percentage of the fund' method.").

[32] *Michel v. WM Healthcare Solutions, Inc.*, 2014 WL 497031, at *14 (S.D. Ohio Feb. 7, 2014) (noting that district courts in the Sixth Circuit "have discretion to select the [most] appropriate method for calculating attorney fees in light of the circumstances of the actual case before it" and employing the percentage method with a lodestar cross-check).

- *No guidance.* Three circuits (the Fourth,[34] Tenth,[35] and Eleventh[36]) have not given guidance about the use of lodestar cross-checks, although multiple district courts in those circuits have performed such cross-checks, as cited in the prior notes.

- *Inapplicable.* One circuit (the Seventh) employs a market method, not a percentage method, in determining the reasonableness of common fund fee awards, so a cross-check is not applicable to that process (unless, in theory, market actors would build such a cross-check into their negotiated contracts).[37]

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[33] *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 101 (D.D.C. 2013) ("In this circuit . . . a lodestar cross-check is not required, although district courts are free to employ such a cross-check at their discretion to confirm the reasonableness of an award." (citations omitted)); *In re LivingSocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 20–21 (D.D.C. 2013), appeal dismissed (July 19, 2013), appeal dismissed sub nom. *In re LivingSocial Mktg. & Sales Practices Litig.*, 2013 WL 6825561 (D.C. Cir. Dec. 12, 2013) (using lodestar cross-check).

[34] *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 688–89 (D. Md. 2013) (using lodestar cross-check); *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 475–74 (W.D. Va. 2011) (using lodestar cross-check); *Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 760 (S.D.W. Va. 2009) (using lodestar cross-check).

[35] *In re Crocs, Inc. Sec. Litig.*, 2014 WL 4670886, at *4 (D. Colo. Sept. 18, 2014) (using lodestar cross-check); *Been v. O.K. Indus., Inc.*, 2011 WL 4478766, at *10–12 (E.D. Okla. Aug. 16, 2011) report and recommendation adopted, 2011 WL 4475291 (E.D. Okla. Sept. 26, 2011) (using lodestar cross-check); *Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc.*, 2010 WL 5387559, at *3–4 (D. Colo. Dec. 22, 2010) (using lodestar cross-check).

[36] *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1343–44 (S.D. Fla. 2007) (using lodestar cross-check); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1336 (S.D. Fla. 2001) (using lodestar cross-check).

[37] It would be efficient for clients who negotiate fees with counsel *ex ante* to negotiate for positive or negative multiplier levels (rather than percentages), as such a contract would calibrate counsel's reward to the risks that they were incurring and the outcomes they might achieve.

- *Forbidden.* No circuit forbids their trial courts from undertaking a lodestar cross-check.

This survey demonstrates that most circuits enable their trial courts to undertake a lodestar cross-check and that cross-checks are therefore quite prevalent in the jurisprudence.

Available empirical data also demonstrate that the lodestar cross-check is quite prevalent. Table 1, below, sets forth three empirical studies' findings concerning the prevalence of the different methods for ascertaining fees.

Table 1
Empirical Data on Courts' Utilization
of Percentage and Lodestar Fee Methods in Common Fund Cases

	1993-2002 Study[38]	2003-2008 Study[39]	2006-2007 Study[40]
Lodestar	13.6%	9.6%	12%
Percent	56.4%	37.8%	69%
Percent with Lodestar Cross-Check	24.3%	42.8%	
Other/N/A	5.7%	9.8%	20%

These data demonstrate three points about the prevalence of lodestar cross-checks:

- *First,* the data show that most courts utilize a percentage method and that most courts that utilize a percentage method undertake a lodestar cross-check. Courts start with the percentage method in the vast majority of cases – 69% in the two-year (2006-2007) study, 80.6% in the six-year (2003-2008 inclusive) study – but the data in

[38] Eisenberg & Miller, *supra* note 13, at 267 tbl.10.

[39] *Id.* at 267 tbl.10 (2010).

[40] Fitzpatrick, *supra* note 13, at 832.

the latter study show that more often than not when courts utilize the percentage method, they also undertake a lodestar cross-check. In about 53% of the percentage cases (42.8/80.6) courts utilized a cross-check.

- *Second*, the data demonstrate that the percentage method with a lodestar cross-check is the most prevalent form of fee method. In the one study enabling this comparison, 42.8% of courts utilized both a percentage and lodestar (which the study's authors suggest are cross-check cases), a number that outstripped both pure percentage cases (37.8%) and pure lodestar cases (9.6%).

- *Third*, the data demonstrate that courts have moved from a pure percentage-based approach to a "percentage and lodestar cross-check" approach over time. In the 1993-2002 data, 56.4% of the cases were pure percentage, while in the 2003-2008 data, these cases constituted only 37.8% of the total. This is about a one-third decrease in the use of the pure percentage approach. The big gain was in the courts' use of the mixed approach – it shot up about 75% from the first period to the second, growing from 24.3% to 42.8% of cases.

The cross-check is therefore judicially-encouraged, increasingly utilized, and widely applied.

E. A Positive Multiplier Should Be Expected in Most Cases[41]

While the lodestar cross-check enables a court to assess the reasonableness of a proposed percentage award by comparing that proposal to counsel's hourly billing in the case, the comparison simply yields a number reflecting the extent to which the proposed percentage award is a positive or negative multiple of counsel's lodestar. The number alone is just a number. A court must assess whether that number – the positive or negative fee multiplier – is reasonable in the context of the particular case.

[41] Part E is taken directly from 5 *Newberg on Class Actions* §§ 15:87-15:88 (5th ed.), with some modifications.

Appellant incorrectly argues that class counsel should rarely, or never, get a positive multiple of their lodestar.[42] This argument ignores the key and central fact that class action lawyers undertake class suits on a contingent fee basis. That means that they do not charge their clients (the class representative or the class) for the costs of the lawsuit or for their fees during the course of the lawsuit; and if the lawsuit fails, they recover nothing. The contingent fee lawyer is therefore investing her resources and time in her clients' suit, forestalling payment to a future date, and sharing the risk of losing that case with the client. Given the loan and risk, a contingent fee lawyer cannot provide services at the same rates that she would provide services to paying clients. Thus, if a lawyer in private practice can make $400 per hour from paying clients, it would obviously take, say, $500 per hour to incentivize that lawyer to abandon that practice and begin pursuing contingent fee cases instead: with the higher risk of nonpayment, and the loan of the attorney's services to the class, there must be some higher reward when a payday does arrive.[43] Judge Posner explains the point this way:

> It has been argued that contingent fees are often exorbitant. But it is easy to be misled here. A contingent fee must be higher than a fee

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[42] Appellant's Opening Brief on the Merits at 58 (stating in argument heading that this Court should "Eliminate Multipliers Altogether or Modify Multipliers for Contingent Risk in Class Actions"). The Brief of *Amici Curiae* Impact Fund and Western Center on Law and Poverty on Behalf of Themselves and 14 California Legal Services Organizations in Support of Plaintiffs-Respondents correctly notes that this argument is "untethered to the economic realities of litigation, statutory purpose, or any relevant equitable or policy considerations," *id.* at 2, and soundly refutes it.

[43] *Behrens v. Wometco Enterprises*, 118 F.R.D. 534, 548 (S.D. Fla. 1988) ("If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.").

> for the same legal services paid as or after they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the client's debt to the lawyer) is much higher than in the case of conventional loans, and the total amount of interest is large not only because the interest rate is high but because the loan may be outstanding for years – and with no periodic part payment, a device for reducing the risk borne by the ordinary lender.[44]

Given the risk of nonpayment that contingent fee lawyers face, it should not be surprising – nor necessarily problematic – if a lodestar cross-check yields a multiplier above 1, that is, a multiplier showing that the lawyers are getting paid more than their hourly billing rates. Indeed, it is arguable that successful class counsel should necessarily get a multiplier above 1 in most cases.[45] The hypothetical above, suggesting that it would take $500 per hour to incentivize someone to give up a $400 per hour hourly practice to go into contingent fee work, embodied a 1.25 multiplier ($500 being $400 x 1.25). Though the numbers are hypothetical, the reasoning provides a baseline from which to assess the multipliers produced through a lodestar cross-check.

Empirical evidence shows that multipliers tend to average in the 1-2 range in most cases. Table 2 sets forth two studies' data on multipliers, broken down by fund sizes. In each study, the authors divided their total

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[44] Richard A. Posner, Economic Analysis of Law 783 (8th ed. 2011); *see also* John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 480 (1981) ("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.").

[45] *See also* Brief of *Amici Curiae* Impact Fund and Western Center on Law and Poverty on Behalf of Themselves and 14 California Legal Services Organizations in Support of Plaintiffs-Respondents at 22-27.

universe of cases into ten tranches by size and then found the mean multiplier for a fund of that size; as the fund sizes (and hence the deciles) differ across the two studies, the Table notes the size of each decile for each study.

Table 2
Empirical Data on Mean Multiplier in Common Fund Cases – By Fund Size

Fund Size (in millions)	2003-2008 Study[46]		2006-2011 Study[47]	Fund Size (in millions)
<1.1	.88		.90	<318600
1.1-2.8	.95		.98	318600-927000
2.8-5.3	1.44		1.07	927000-1.89
5.3-8.7	1.59		1.07	1.89-3.0
8.7-14.3	1.49		1.16	3.0-4.5
14.3-22.8	1.68		1.38	4.5-7.3
22.8-38.3	1.83		1.69	7.3-11.5
38.3-69.6	1.98		1.68	11.5-19.2
69.6-175.5	2.70		1.94	19.2-44.6
>175.5	3.18		2.39	>44.6
Total	1.81[48]		1.42	

Table 2 makes four points about multipliers evident:

- *First*, overall multipliers are relatively modest – the mean total was 1.81 in one study and 1.42 in the other.

- *Second*, multipliers increase as fund size increases. This is true even though percentages decrease as fund size increases.[49]

[46] Eisenberg & Miller, *supra* note 13 at 274 tbl.15.

[47] William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with *amicus*).

[48] This total is taken from a different table than the rest of the data. Eisenberg & Miller, *supra* note 13, at 272 tbl.14.

[49] *See* 5 *Newberg on Class Actions* § 15:81 (5th ed.).

- *Third*, the smallest funds tend to generate awards at or just below counsel's lodestar, while the mean in the largest cases was below 2.5 in one study and just above 3 in the other. This shows that the basic range of multipliers is not terribly expansive, running from a floor around counsel's lodestar to a high point around 3 times lodestar, at the mean.

- *Fourth*, there is a not insignificant set of cases with lodestars that literally fall "off these charts" – *amicus* maintains a set of roughly 50 reported cases with multipliers over 3.5. Such higher multipliers may be appropriate in particular circumstances and should not be prohibited.

Amicus has elsewhere set forth a simple methodology for assessing whether the multiplier that emerges from a lodestar cross-check is reasonable.[50] For present purposes, *amicus* simply notes that the purpose of the lodestar cross-check is not to cabin counsel's percentage award at the level of its lodestar – indeed a positive multiplier is typically warranted – but rather to provide a measuring stick that can calibrate the level of profit appropriate in a given case.

[50] *See* 5 *Newberg on Class Actions* § 15:87 (5th ed.).

CONCLUSION

For the reasons discussed above, *amicus* urges this Court to explicitly embrace the percentage method in common fund cases and to encourage lower courts, when applying that method, to perform a lodestar cross-check so as to guard against excessive fee awards. The combination of the incentives created by the percentage method and the protections inherent in the lodestar cross-check represents the best approach to fees in class action cases from the perspective of the millions of individual class members who are served by such cases – and yet simultaneously bear the cost of them.

Dated: January 11, 2016

Respectfully submitted,

LAW OFFICES OF MARTIN N. BUCHANAN

/s/ *Martin N. Buchanan*

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Martin N. Buchanan (#124193)

665 W. Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 238-2426
martin@martinbuchanan.com

Counsel for Amicus Curiae *Professor William B. Rubenstein*

CERTIFICATION OF WORD COUNT

Pursuant to the California Rules of Court, counsel of record certifies that this Brief uses 13-point Roman type and contains 5,913 words, including footnotes. Counsel relies on the count of the computer program used to prepare this Brief.

Dated: January 11, 2016

LAW OFFICES OF MARTIN N. BUCHANAN

/s/ *Martin N. Buchanan*

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Martin N. Buchanan

CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 655 West Broadway, Suite 1700, San Diego, California 92101. On January 8, 2016, I served the foregoing **APPLICATION OF PROFESSOR WILLIAM B. RUBENSTEIN FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF; [PROPOSED] BRIEF OF *AMICUS CURIAE* PROFESSOR WILLIAM B. RUBENSTEIN** by mailing a copy by first-class mail to:

Kevin T. Barnes Law Offices of Kevin T. Barnes 5670 Wilshire Blvd., Suite 1460 Los Angeles, CA 90036	Judith M. Kline Paul Hastings LLP 515 South Flower St., 25th Floor Los Angeles, CA 90071
Lawrence W. Schonbrun Law Offices of Lawrence W. Schonbrun 86 Eucalyptus Road Berkeley, CA 94705	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 8, 2016, at San Diego, California.

Martin N. Buchanan