

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
CENTRAL CIVIL WEST

In re: TV WRITERS CASES,
Case No. BC 268 836

Declaration of Theodore Eisenberg
Appendix A

I. Background and Qualifications

1. I have taught a seminar on empirical methods and their relation to the legal system at Cornell Law School for many years. I taught a similar seminar: (1) at NYU School of Law in the fall of 2007, and (2) at the Fondazione Collegio Carlo Alberto as part of the IEL program in 2006, 2007, 2008, and 2009 (and will do so in 2010). I taught a similar course at the Centre for Advanced Legal Studies at Tel-Aviv University in 2009, and am scheduled to teach a similar course to law professors at the 2010 meeting of the Southeastern Association of Law Schools. I have also taught courses on civil rights many times.

2. I am the author of many empirical studies, including several empirical studies relating to attorney fees and class actions.¹ Such studies or analyses span more than two decades and include: *A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions After Goldberger v. Integrated Resources, Inc.*, 29 WASH. U. J. LAW & POLICY 5 (2009) (with M. Perino & G. Miller); *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871 (2008) (with G. Miller & E. Sherwin), reprinted in 4 ICFAI UNIVERSITY J. OF

¹ For convenience, I refer to "my" empirical studies. Such reference of course includes the contributions made by co-authors to the studies.

ALTERNATIVE DISPUTE RESOLUTION 51 (2008); *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553 (2008) (with K. Clermont); *Comment, Evidence of the Need for Aggregate Litigation*, 163 J. INSTITUTIONAL & THEORETICAL ECONOMICS 158 (2007); *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303 (2006) (with G. Miller); *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VANDERBILT L. REV. 1529 (2004) (with G. Miller); *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004) (with G. Miller); *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L. Q. 979 (1994); *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988) (with S. Schwab); *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (with S. Schwab); *The Reality of Constitutional Tort Litigation*, in CIVIL RIGHTS AND ATTORNEY FEES ANNUAL HANDBOOK 3 (J. Lobel & B. Wolvovitz eds. 1987) (with S. Schwab) (preliminary, condensed version of above Cornell article); CIVIL RIGHTS LEGISLATION (LexisNexis 2004) (5th ed. 2004).

3. I have filed affidavits or declarations in previous actions relating to attorney fees in class actions cases.

4. My empirical scholarship has been funded by the National Science Foundation, Guy Carpenter, the South Carolina Death Penalty Resource Center, Project '87 (a joint project of the American Historical Association and the American Political Science Association), and the American Bar Foundation. A current empirical project in which I am participating is funded by the Australian Research Council. The Council, a statutory

authority within the Australian Government, “supports the highest-quality fundamental and applied research and research training through national competition across all disciplines, with the exception of clinical medicine and dentistry.” See <http://www.arc.gov.au/>.

5. I am scheduled to be inducted later this year as a Fellow of the American Academy of Arts and Sciences, I am a Fellow of the Royal Statistical Society, I received a Cornell University Provost’s Award for Distinguished Scholarship, and I have been invited to present the endowed Rosenthal lectures at Northwestern University, currently scheduled for March 2010.

6. As indicated by the list of publications on my C.V., my empirical studies of the legal system have appeared in leading law reviews and in peer-reviewed journals in several disciplines. The student-edited law reviews include HARVARD LAW REVIEW, STANFORD LAW REVIEW, CORNELL LAW REVIEW, UCLA LAW REVIEW, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, and the UNIVERSITY OF CHICAGO LAW REVIEW. The peer-reviewed journals include the JOURNAL OF THE ROYAL STATISTICAL SOCIETY, the JOURNAL OF THE AMERICAN STATISTICAL ASSOCIATION, the JOURNAL OF FINANCIAL ECONOMICS, the RAND JOURNAL OF ECONOMICS, the JOURNAL OF LEGAL STUDIES, the AMERICAN LAW AND ECONOMICS REVIEW, LAW AND SOCIAL INQUIRY, the JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY & THE LAW, JUDICATURE, and FUTURE CARDIOLOGY. As indicated on my C.V., I have served as a referee for many publishers and peer-reviewed journals that publish empirical scholarship.

7. My empirical studies have been the subject of stories in major media, including the New York Times, the Wall Street Journal, the Atlantic Monthly, and others. I have

testified about law-related empirical matters before federal and state legislatures.

8. For over 20 years, Justices of the United States Supreme Court have cited and relied on empirical studies authored or co-authored by me. Opinions of Supreme Court Justices referring to my empirical work include the majority opinion in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008); *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008); *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Ramdass v. Angelone*, 530 U.S. 156 (2000); *O'Dell v. Netherland*, 521 U.S. 151 (1997); *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); and *Brisco v. LaHue*, 460 U.S. 325 (1983).

9. My empirical analyses have also been relied on by many federal courts of appeal judges, federal district court judges, state court judges, and testifying experts. Opinions relating to class action attorney fee awards or incentive awards that use or refer to my work include *Rodriguez v. West Publishing Co.*, 563 F.3d 948, 958 (9th Cir. 2009); *Allapattah Services, Inc. v. Exxon Corp.*, 362 F.3d 739, 760 (11th Cir. 2004) (Judges Tjoflat and Birch, dissenting from denial of en banc review); *Klein v. O'Neal, Inc.*, 2010 WL 1435161, at *35 (N.D. Tex. 2010); *Fiala v. Metropolitan Life Ins. Co. Inc.*, 2010 WL 716176, at *8 (Sup. Ct. N.Y. 2010); *In re Metlife Demutualization Litigation*, 2010 WL 517389, at *55 (E.D.N.Y. 2010); *In re Marsh ERISA Litigation*, 265 F.R.D. 128 (S.D.N.Y. 2010); *Strawn v. Farmers Ins. Co. of Oregon*, 226 P.3d 86, 99 (Or. App. 2010); *In re Trans Union Corp. Privacy Litigation*, 2009 WL 4799954 (N.D. Ill. 2009); *Hall v. Children's Place Retail Stores, Inc.*, 669 F.Supp.2d 399, 403 n.35 (S.D.N.Y. 2009); *Loudermilk Services, Inc. v. Marathon Petroleum Co. LLC*, 623 F.Supp.2d 713, 724 (S.D. W. Va. 2009) ("Because the Eisenberg

and Miller study was a far more comprehensive analysis of similar cases than this Court could hope to achieve in a reasonable time, the Court accepts their results as a benchmark on which to judge a reasonable fee in this case.”); *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1209, 1211 (S.D. Fla. 2006); *In re OCA, Inc. Securities and Derivative Litigation*, 2009 WL 512081, at *20 (E.D. La. 2009); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 586 F.Supp.2d 732, 800 (S.D. Tex. 2008); *In re Cardinal Health Inc. Securities Litigations*, 528 F.Supp.2d 752, 755 n.2 (S.D. Ohio 2007); *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F.Supp.2d 249, 269 (D.N.H. 2007); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 388 (C.D. Cal. 2007); *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830, 853, 862-64, 866, 870 (E.D. La. 2007); *In re Cabletron Systems, Inc. Securities Litigation*, 239 F.R.D. 30, 38, 42 (D.N.H. 2006); *In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7-12 Litigation*, 447 F.Supp.2d 612, 629-32 (E.D. La. 2006); *Hicks v. Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. 2005); *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 80-81 (D. Mass. 2005), 221 F.R.D. 260, 286 (D. Mass. 2004); *In re Lupron Marketing and Sales Practices Litigation*, 2005 WL 2006833, at *5 (D. Mass. 2005); *In re HPL Technologies, Inc. Securities Litigation*, 366 F.Supp.2d 912, 914 (N.D. Cal. 2005).

10. I have presented my empirical analysis of attorney fees to federal MDL judges at the 42nd Transferee Judges' Conference, held in West Palm Beach, Florida, on October 26-28, 2009.

11. I have substantial experience in the study of discrimination litigation. I am the author of two casebooks, CIVIL RIGHTS LEGISLATION (LexisNexis 5th ed. 2004) and

BANKRUPTCY & DEBTOR-CREDITOR LAW (Foundation Press 3d ed. 2004). The civil rights casebook includes hundreds of pages on employment discrimination, including materials on age discrimination. Empirical studies by me that include employment discrimination claims include: *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009) (with C. Lanvers); *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (with C. Lanvers), in EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 2008 (K.C. Huang ed., Institutum Jurisprudentiaw, Tapei 2009); *Employment Arbitration and Litigation: An Empirical Comparison*, in ADR & THE LAW 8 (20th ed. 2006) (with E. Hill); *Appeal Rates and Outcomes in Tried and Non-Tried Cases*, 1 J. EMPIRICAL LEGAL STUD. 659 (2004); *The Government as Litigant: Further Tests of the Case Selection Model*, 5 AM. L. & ECON. REV. 94 (2003) (with H. Farber); *Litigation Realities*, 88 Cornell L. Rev. 119 (2002) (with K. Clermont); *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 ILLINOIS L. REV. 947 (with K. Clermont); *Trial Outcomes and Demographics: Is There A Bronx Effect?*, 80 TEXAS L. REV. 1839 (2002) (with M. Wells); *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. OF ECONOMICS S92 (1997) (with H. Farber); *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUDIES 257 (1995); *The Relationship Between Plaintiff Success Rates Before Trial and At Trial*, 154, Part 1, JOURNAL OF THE ROYAL STATISTICAL SOCIETY, Series A 111 (1991); *What Shapes Perceptions of the Federal Court System?*, 56 U. CHICAGO L. REV. 501 (1989) (with S. Schwab); LITIGATION MODELS AND TRIAL OUTCOMES IN CIVIL RIGHTS AND PRISONER CASES, 77 GEORGETOWN L.J. 15672

(1989); *The Importance of Section 1981*, 73 CORNELL L. REV. 596 (1988) (with S. Schwab); *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988) (with S. Schwab); *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (with S. Schwab).

12. I have served as a court-appointed mediator in major federal bankruptcy litigation, as assistant to the Special Master in voting rights litigation involving statistical matters, and as assistant to the Special Masters in the litigation arising out of the rescue, recovery, and/or debris removal operations and activities relating to the World Trade Center events of September 11, 2001.

13. I am the founder and editor of the JOURNAL OF EMPIRICAL LEGAL STUDIES, published by Wiley-Blackwell. I also serve on the editorial board of the AMERICAN LAW AND ECONOMICS REVIEW, and as an academic adviser to the National Center for State Courts. I have served as Chair of the Law and Social Science Section of the Association of American Law Schools (1996-97).

14. I serve on the board of directors of the Society for Empirical Legal Studies and served on the organizing committees for the first four Conferences on Empirical Legal Studies. I have also helped organize international conferences on empirical legal studies in Taiwan, Germany, and Israel. I have served on the board of directors of the American Law and Economics Association. I have been invited to speak about empirical legal studies or to report the results of my own studies on over one hundred occasions. I was commissioned by the Bureau of Justice Statistics to write and present a statistically-related paper, *The Need for a National Civil Justice Survey of Incidence and Claiming Behavior*, presented at Bureau

of Justice Statistics Users Meeting, February 12, 2008, in Washington, D.C., and published this year in the FORDHAM URBAN LAW JOURNAL. In connection with the pending revision of the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, I was invited to speak on statistical issues to the Committee on the Evaluation of the Reference Manual on Scientific Evidence. Committee on Science, Technology, and Law, The National Academies (presentation in December 2006).

15. In my capacity as a faculty member at Cornell University, I regularly provide statistical expertise to law professors with and without social science training. These professors include those with doctoral degrees in economics, policy, and psychology.

16. I have been asked by attorneys for plaintiffs in the litigation referred to collectively as *In re: TV Writers Cases*, Case No. BC 268 836, Los Angeles Superior Court, Central Civil West to opine about: (1) the reasonableness of the attorney fees requested in the *Notice of Motion and Motion for an Award of Attorneys' Fees and Expenses; Memorandum of Points and Authorities in Support Thereof* (filed April 14, 2010) (the "Fee Motion"), and (2) the reliance on my scholarship in the *Submission of Comments and Objections and Authorities in Support Thereof*, dated April 23, 2010, filed by David Charles Barrow (the "Barrow Objection").

II. Documents Reviewed

17. In preparing this Declaration, I have reviewed: (1) the Class Action Complaint filed in *Tracey Keenan Wynn et al. v. National Broadcasting Company, Inc. et al.*, Case No. BC 268842, Los Angeles Superior Court, Central District (filed 2/25/2002); (2) the Third

Amended Complaint [Class Action] filed in *Tracey Keenan Wynn et al. v. National Broadcasting Company, Inc. et al.*, Case No. BC 268842, Los Angeles Superior Court, Central District (dated 2/4/2005); **(3)** the Class Action Complaint filed in *Hindi Brooks et al. v. William Morris Agency, Inc.*, Case No. BC 268843, Los Angeles Superior Court, Central District (filed 2/25/2002); **(4)** the Fourth Amended Complaint [Class Action] filed in *Hindi Brooks et al. v. William Morris Agency, Inc.*, Case No. BC 268843, Los Angeles Superior Court, Central District (dated 10/11/2005); **(5)** the Complaint for Damages, Restitution, Declaratory and Injunctive Relief filed in *Tracey Keenan Wynn et al. v. National Broadcasting Company, Inc. et al.*, No. 2:00-cv-11248-SVW-RZ, United States District Court, Central District of California, Western Division (filed 10/23/2000); **(6)** the Settlement Agreement, Subject to Order of Final Approval, *In re: TV Writers Cases*, Case No. BC 268836 (filed 1/22/2010); **(7)** the Notice of Motion and Motion for an Award of Attorneys' Fees and Expenses; Memorandum of Points and Authorities in Support Thereof; Declarations of Barry Goldstein, Roger Warin Paul C. Sprenger, Steven M. Sprenger, Maia Caplan, Daniel Wolf, Henry M. Willis, Thomas W. Osborne, Daniel B. Edelman, and William T. Payne, Los Angeles Superior Court, Central Civil West, *In re Writers Cases*, Los Angeles Superior Court, Central Civil West (as of 4/26/2010) (dated 4/14/2010); **(8)** the Declaration of Maia R. Caplan Re: Fees and Costs, *In re: TV Writers Cases*, Case No. BC 268836, Los Angeles Superior Court, Central Civil West (executed 4/14/2010); **(9)** the Declaration of Barry Goldstein in Support of Final Approval of Settlements and Petition for Fees, *In re: TV Writers Cases*, Case No. BC 268 836, Los Angeles Superior Court, Central Civil West (dated 4/14/2010); **(10)** the Supplementary Declaration of Barry Goldstein in

Support of Final Approval of Settlements and Petition for Fees, *In re: TV Writers Cases*, Case No. BC 268 836, Los Angeles Superior Court, Central Civil West; **(11)** the Declaration of Daniel B. Edelman Verifying Out-of-Pocket Expenses, Hourly Rates and Hours Expended Pursuant to Order Preliminarily Approving Settlement, January 22, 2010, Para. 13 and Stating Qualifications (executed 3/30/2010); **(12)** the Declaration of Thomas W. Osborne Verifying Expenses Incurred, Hourly Rates and Hours Expended Pursuant to Order Preliminarily Approving Settlement, January 22, 2010, Para. 13 and Stating Qualifications (executed 3/13/2010); **(13)** the Declaration of William T. Payne Verifying Expenses Incurred, Hourly Rates and Hours Expended Pursuant to Order Preliminarily Approving Settlement, January 22, 2010, Para. 13 and Stating Qualifications (executed 3/26/2010); **(14)** the Declaration of Paul Sprenger Stating Qualifications and Verifying Hourly Rates and Hours Recorded Pursuant to Order Preliminarily Approving Settlement, *In re: TV Writers Cases*, Case No. BC 268 836, Los Angeles Superior Court, Central Civil West (executed 4/14/2010); **(15)** the Declaration of Steven M. Sprenger in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Expenses, *In re: TV Writers Cases*, Case No. BC 268836, Los Angeles Superior Court, Central Civil West; **(16)** the Declaration of Roger E. Warin, *In re: TV Writers Cases*, Case No. BC 268836, Los Angeles Superior Court, Central Civil West (dated March 30, 2010); **(17)** the Declaration of Henry M. Willis Re: Fees and Costs, *In re: TV Writers Cases*, Case No. BC 268836, Los Angeles Superior Court, Central Civil West (executed 4/13/2010); **(18)** the Declaration of Daniel Wolf Verifying Out-of-Pocket Expenses, Hourly Rates and Hours Expended Pursuant to Order Preliminarily [sic] Approving Settlement (executed 4/14/2010); **(19)** the docket sheet styled "Case

Number: BC268836 - *In re Writers Cases*” Los Angeles Superior Court, Central Civil West (as of 4/26/2010); **(20)** the docket sheet in *Tracey Keenan Wynn et al. v. National Broadcasting Company, Inc. et al.*, No. 2:00-cv-11248-SVW-RZ, United States District Court, Central District of California, Western Division (filed 10/23/2000); **(21)** the Memorandum in Support of Class Counsel’s Motion for an Award of Attorneys’ Fees and Expenses, *In re: TV Writers Cases*, Document Relating to *Edwards et al. v. International Creative Management, Inc.*, No. BC 268846, and *Mintz et al. v. Broder Kurland Webb Agency, Inc.*, No. BC 268850 (filed 10/6/2008); **(22)** the Order Finally Approving Consent Decree, Settlement Class, and Class Counsel’s Fees and Expenses and Amending Administrative Order No. 1, *In re: TV Writers Cases*, Document Relating to *Edwards et al. v. International Creative Management, Inc.*, No. BC 268846, and *Mintz et al. v. Broder Kurland Webb Agency, Inc.*, No. BC 268850 (filed 1/6/2009); **(23)** David Charles Barrow, Submission of Comments and Objections And Authorities in Support Thereof, *In re: TV Writers Cases*, Case No. BC 268 836 (dated 4/23/2010), and Appendices A and B thereto; **(24)** the Answer of Defendant CBS Broadcasting, Inc. to Plaintiffs’ Unverified Third Amended Complaint, *Bob Shayne et al. v. Viacom Inc. CBS Broadcasting, Inc.*, Case No. BC 268882, Los Angeles Superior Court (filed 9/23/2005); **(25)** the Answer of Defendant Viacom Inc. to Plaintiffs’ Unverified Third Complaint, *Bob Shayne et al. v. Viacom Inc. CBS Broadcasting, Inc.*, Case No. BC 268882, Los Angeles Superior Court (filed 9/23/2005); **(26)** Administrative Order No. 3: Qualified Settlement Fund No. 3, *In re: TV Writers Cases*, Case No. BC 268 836.