DECLARATION OF BRIAN T. FITZPATRICK

I, Brian T. Fitzpatrick, declare as follows:

1.   I am the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School. I hold a J.D. from Harvard Law School and a B.S. in Chemical Engineering from the University of Notre Dame. Among other courses, I have taught Civil Procedure, Complex Litigation, and Federal Courts and the Federal System. I am the author of numerous publications, including *The Conservative Case for Class Actions* (University of Chicago Press 2019) and "An Empirical Study of Class Action Settlements and Their Fee Awards," 7 *Journal of Empirical Legal Studies* 811 (2010). A thorough list of my publications and presentations is included in my curriculum vitae attached as Exhibit A.

2.   I was retained by the United States Attorney's Office for the District of Columbia to research and prepare a matrix of prevailing hourly rates for attorneys of varying experience levels and paralegals/law clerks who are involved in complex civil cases in District of Columbia federal courts. In conducting this research, I was assisted by several of my students. My goal was to develop "a reliable assessment of fees charged for complex federal litigation in the District [of Columbia]," as the United States Court of Appeals for the District of Columbia Circuit has urged. *DL v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). Other fee matrices that had been used in the past to compute hourly rates for complex civil cases in the District of Columbia had become outdated or had flaws.

3.   It was my challenge to assemble relevant, contemporary data and to apply a reliable methodology to determine modern rates for complex federal litigation in the District of Columbia to be applied in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *E.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil

Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b). A reasonable fee is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. One way to determine such fees is to examine fees freely charged and freely paid by market participants.

4. There are substantial advantages to the courts and parties from having a reliable matrix of prevailing hourly rates for complex federal civil matters litigated in the District of Columbia. Under many fee-shifting statutes, prevailing parties bear the burden of establishing the hourly rates to which they are entitled for the services they rendered, but this can be a difficult task without a systematic analysis of reliable, contemporary data. The availability of a well-researched and designed matrix should simplify the determination of hourly rates and minimize litigation about what constitute appropriate hourly rates.

5. I concluded that the most reliable hourly rate data would come from publicly filed fee petitions and resulting court orders in complex civil cases actually litigated in the United States District Court for the District of Columbia. In particular, I endeavored to gather rates that actual lawyers charged actual clients for actual litigation of complex cases in the United States District Court for the District of Columbia. To my knowledge, the resulting analysis has yielded the best available picture of prevailing market rates for complex litigation undertaken in federal courts in the District of Columbia.

6. By assembling data from a substantial number of cases and legal professionals involving a variety of complex litigation contexts, all litigated in the United States District Court for the District of Columbia, the resulting data set diminishes the effect of any unusual or outlier cases.

7.   The cases included in the data set used to generate the hourly rate matrix constitute complex federal litigation, which caselaw establishes as encompassing a broad range of matters tried in federal court. All the cases were tried before federal judges from the same federal court according to common federal rules.

8.   To gather the necessary data, I ran a search in July 2020 in Bloomberg Law, which provides a tool to search multiple dockets based on user-defined criteria. The parameters I defined were: keywords ("motion n/5 fees AND attorney!") + filing type ("brief," "motion," or "order") + date ("May 31, 2013 – May 31, 2020" under "Entries (Docket and Documents)"). This returned a list of 781 cases. These search results are attached as Exhibit B.

9.   Cases were excluded from the data set if there was in fact no motion for fees filed, the motions for fees lacked necessary information, or the motions or resulting court orders involved fees not based on hourly rates. Cases were also excluded if the cases involved rates that did not appear to be free market transactions, including cases explicitly or implicitly based on an existing fee matrix, involved rates explicitly or implicitly subject to statutory fee caps (*e.g.*, cases subject to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)), or cases subject to lower rates prescribed by case law (*see*, *e.g.*, *Eley v. District of Columbia*, 793 F.3d 97, 105 (D.C. Cir. 2015) (Individuals with Disabilities in Education Act cases)). After these excisions, 86 cases, many of which included data for multiple billers (and 2 of which only provided hourly rate data for paralegals), remained.

10.   From these 86 complex federal cases, based on a review of publicly filed motions for fees and supporting documentation, as well as associated court orders, the following information was recorded for attorney work from 2013 and later: the hourly rate, the calendar year the rate was charged, and the number of years the lawyer was out of law school when the

rate was charged (or, if law school graduation year was unavailable, years since bar passage), as defined below. If the graduation or bar passage year was not stated in a motion or its exhibits or the associated court order, then the lawyer's biography was researched on the internet. Although preexisting fee matrices for the District of Columbia provide for mid-year rate changes, very few lawyers in the data submitted rates that changed within a calendar year. For this reason, the matrix was modeled using one rate for each calendar year. On the occasions when a lawyer expressed an hourly rate as a range or indicated the rate had increased during the year, the midpoint of the two rates was recorded for that lawyer-year.

11.   This analysis yielded 675 lawyer-year data points (one data point for each year in which a lawyer charged an hourly rate) from 419 unique lawyers from 84 unique cases. The lawyer-year data points spanned from years 2013 to 2020, from $100 to $1250, and from less than one year of experience to 58 years.

12.   Paralegal/law clerk rates were also recorded for work from 2013 and later. The following titles in the fee motions were included in the paralegal/law clerk data: law clerk, legal assistant, paralegal, senior legal assistant, senior paralegal, and student clerk. The paralegal/law clerk analysis is based on 108 paralegal-year data points from 42 unique cases. They spanned from 2013 to 2019 and from $60 to $290. It is unclear how many unique persons are in the 108 paralegal data points because paralegals were not always identified by name.

13.   The data generated through my analysis has been compiled in a spreadsheet, which has been publicly disseminated by the United States' Attorney's Office via its website. Among other things, the spreadsheet identifies which cases and billers were determined to be suitable for inclusion in the final hourly rate analysis I performed.

14.   To generate a matrix of hourly rates for these legal professionals, I ran separate

regressions for the lawyer data and the paralegal data. For the paralegal data, simple linear least-

squares regression was used with the dependent variable hourly rate and the independent variable

the year the rate was charged subtracted from 2013; years were combined into one variable and

subtracted from 2013 rather than modeled as separate indicator variables to constrain annual

inflation to a constant, positive number. The resulting regression formula was rate = 129.8789 +

9.902107 * (year-2013). For the lawyer data, least-squares regression was used with the

dependent variable hourly rate and independent variables the year the rate was charged and the

number of years of experience of the lawyer when the rate was charged. The year the rate was

charged was subtracted from 2013 and modeled linearly, as with the paralegal data. The number

of years out of law school (or since year of bar passage) was modeled with both linear and

squared terms, as is common in labor economics to account for non-linear wage growth (*e.g.*,

faster growth earlier in one's career than at the end of one's career). *See*, *e.g.*, Jacob Mincer,

Schooling, Experience, and Earnings (1974). The resulting regression formula was rate =

227.319 + 16.54492 * experience - 0.2216217 * experience ^ 2 + 27.97634 * (year-2013).

Regressions were also run with log transformed rates and with a random-effect model (to

account for several lawyers appearing more than once in the data), but both alternatives resulted

in mostly lower rates than those reflected in the matrix ultimately adopted; in order to minimize

fee disputes, these other models were rejected in favor of the more generous untransformed,

fixed-effect model.

15.   Additional decisions were made to minimize fee disputes by erring on the side of

higher rates. For instance, rates from one case comprised 20% of the data; the regression was

also run without that case, but the resulting rates were mostly lower and therefore were rejected to minimize fee disputes.

16.   For all these reasons, the rates included in the data set likely are on the upper range of what the market will bear, but to minimize fee disputes, I concluded that this was the most reasonable and administratively efficient approach.

17.   I placed the results of the regressions into a matrix of hourly rates. That matrix has been dubbed "The Fitzpatrick Matrix," a copy of which is attached as Exhibit C. The years in the column on the left of the matrix refer to an attorney's years of experience practicing law. Normally, an attorney's experience will be calculated based on the number of years since an attorney graduated from law school. If the year of law school graduation was unavailable, the year of bar passage was (and should continue to be) used instead. Thus, an attorney who graduated from law school in the same year as the work for which compensation is sought has 0 years of experience. For all work beginning on January 1 of the calendar year following graduation (or bar admission), the attorney will have 1 year of experience. (For example, an attorney who graduated from law school on May 30 will have 0 years of experience until December 31 of that same calendar year. As of January 1, all work charged will be computed as performed by an attorney with 1 year of experience.) Adjustments may be necessary if an attorney did not follow a typical career progression or was effectively performing law clerk work. The hourly rate matrix I produced is not intended for use in cases in which the hourly rate is limited by statute. *E.g.*, 28 U.S.C. § 2412(d).

18.   The data collected through my analysis runs through 2020. To generate rates in 2021, an inflation adjustment (rounded to the nearest whole dollar) was added. The United States Attorney's Office determined that, because courts and many parties have employed the

legal services index of the Consumer Price Index to adjust attorney hourly rates for inflation, this fee matrix would do likewise. I anticipate that similar inflation adjustments will be made to generate hourly rates applicable to future years.

19.   I did not personally receive any compensation for my work on this study, but I did receive $10,342.97 from the Department of Justice to pay the students who worked with me.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury the foregoing to be true and correct, to the best of my knowledge, information and belief.

Executed this 16th day of March, 2022.

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Brian T. Fitzpatrick