

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

KIM YOUNG, RONALD JOHNSON,
WILLIAM JONES, ALLEN GORMAN,
GERRAD LAMOUR, LEE MERCADO,
BRADLEY HYTREK, CARL GRAY, and
MATTHEW LIPTAK, on behalf of
themselves and a class of others similarly
situated,

Plaintiffs,

v.

COUNTY OF COOK and SHERIFF TOM
DART in his capacity as Head of the Cook
County Sheriff's Department,

Defendants.

No. 06-CV-552

JUDGE KENNELLY

DECLARATION OF RICHARD HESS

1. I am a partner and the General Counsel at Susman Godfrey L.L.P. Loevy & Loevy has retained me to provide my expert opinion as to Class Counsel's request for a fee constituting one-third of the class's recovery net of administrative expenses from *Cook County, et al. v. American International Group, et al.*, Case No. 12-L-2765 (Cir. Ct. Cook County, Ill.) (the "Young Insurance" case).

2. I am being compensated for providing this expert opinion at my usual hourly rate of \$550 per hour.

3. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this and related litigations, including the post-trial briefing in the Young Insurance case.

BACKGROUND

4. I am a partner and the first General Counsel at Susman Godfrey L.L.P. I graduated from Emory University in 1995 and the University of Chicago Law School in 2004, with honors.

5. Susman Godfrey is a law firm that specializes in trying high-stakes commercial litigation, class actions, and False Claims Act cases for plaintiffs and defendants. The firm effectively started in 1976 when Steve Susman created a plaintiffs' commercial litigation practice at a small Houston maritime firm. Mr. Susman and his team subsequently broke off and started his own law firm, which became Susman Godfrey.

6. Our firm has recovered billions of dollars for plaintiffs, and has achieved numerous eight and nine figure verdicts and settlements for our clients. Some examples from recent years include:

- a. In 2017, our firm won a \$50.3 million verdict in a patent infringement lawsuit; and a court entered final judgment for over \$48 million in a separate breach of contract case.
- b. In 2016, a court granted final approval of a \$244 million class action settlement in favor of our client consumer packaged goods companies.
- c. In 2015, a pharmaceutical company agreed to a \$390 million false claims act settlement in a case brought by our whistleblower client.

- d. In 2014, a jury awarded our trade secret client \$15 million, which was subsequently affirmed on appeal, and our attorneys achieved a \$19 million antitrust settlement on behalf of a class of New York City bus tour operators.
 - e. In 2013, our firm obtained a \$1.4 billion settlement in the Toyota Unintended Acceleration class action; we also won a trebled \$162 million verdict against Chinese vitamin C manufacturers.
7. Our firm has been recognized for its consistent success, winning numerous awards over the years. A few examples of such awards include: being ranked as the top litigation boutique in the country by well-regarded rankings website Vault.com every year since the inception of the ranking in 2012; being named a “Class Action Group of the Year” by Law360 for 2016, a year in which our firm’s class-action work generated more than a billion dollars of settlements for plaintiffs; and having a \$43 million verdict we won named as one of the National Law Journal’s top 100 verdicts of 2017.
8. Susman Godfrey handles cases for plaintiffs and defendants, in many substantive areas. Of particular relevance for my opinions in this case, Susman Godfrey routinely represents plaintiffs in large commercial cases, including those against insurance companies, and in large False Claims Act cases.
9. In the insurance context, Susman Godfrey LLP has served as lead counsel for insureds, policy owners, and other insurance litigation clients on a

number of high stakes, significant insurance legal matters. The firm is adept at taking on and winning such insurance matters— from precedent-setting class actions against national insurance companies, to noteworthy life insurance settlements, to Director and Officer plaintiff side practice to business interruption coverage. On one recent matter, the firm secured a \$48.5 million settlement for insurance policy owners against Phoenix Life Insurance Company and PHL Variable Insurance Company, a result the court in the Southern District of New York described as “the best settlement pound for pound for the class that I’ve ever seen.”

10. In the False Claims Act context, our firm has represented whistleblowers in matters that resulted in the government recovering hundreds of millions of dollars.

11. Similarly, our firm has recovered billions of dollars for plaintiffs in high-stakes commercial litigation.

12. Susman Godfrey is perhaps best known for our commercial plaintiffs’ contingency and non-hourly work in cases where the potential damages routinely run into the nine figures. We represent, and have represented, numerous commercial entities in their plaintiff-side litigation, including companies such as Amazon, Apache Corp., Chevron, General Electric, Intellectual Ventures, LyondellBasell, Nasdaq, Texas Instruments and Wal-Mart.

13. In fact, Susman Godfrey helped pioneer the use of contingency fees for large commercial cases, where tens or even hundreds of millions of dollars are at stake. It has always been a core belief at our firm that contingent fees are better for both clients and lawyers. Such fee arrangements reward lawyers for effectively and efficiently resolving their client's problem, and sharing the risk and reward of a case aligns the interests of the lawyers with the interests of the client.

14. Today, Susman Godfrey continues to be a leader among law firms using alternative fees, such as contingency fees. Susman Godfrey prides itself on the ability to evaluate and ultimately negotiate contingency agreements for itself and its sophisticated clients in large commercial disputes, based on its decades of experience with such cases.

15. I have worked at Susman Godfrey for more than a decade. I clerked for the Hon. Lee Rosenthal in the United States District Court for the Southern District of Texas after graduating law school in 2004. I then joined Susman Godfrey, where I have practiced ever since. I am admitted to practice in the United States Supreme Court, every U.S. District Court in Texas, the U.S. District Court for the Eastern District of Michigan, the U.S. District Court for the District of Columbia, the Courts of Appeals for the Second, Fifth and Federal Circuits, and every state court in Texas.

16. I currently serve in two roles at Susman Godfrey – as a trial lawyer with a full litigation caseload, and as the firm's General Counsel.

17. In my role as General Counsel, I advise the firm and its more than 100 lawyers on ethical issues and review proposed fee agreements.

18. My litigation practice at Susman Godfrey covers a wide variety of practice areas, including False Claims Act lawsuits, patent infringement, pharmaceutical licensing and manufacturing disputes, embezzlement, defamation, breach of contract, and computer fraud, as well as a variety of business torts, partnership disputes, and stock option disputes.

19. My clients range from the largest corporations to startups, individual entrepreneurs and inventors, business executives and doctors. My clients have in the past included Intellectual Ventures, Wal-Mart, Walmart.com, KBR, Inc., LyondellBasell Industries, NV, Forest Oil Corp., Amegy Bank, Stealth BioTherapeutics, Key Energy, Enterprise Products Operating LP, TMZ, The Hobby Center Foundation, Apache Corp., Clinical Pharmacology of Miami and many others.

20. I have served as lead counsel in multiple cases and at arbitration hearings, and tried cases and evidentiary hearings in state and federal court. I have examined and cross-examined expert and fact witnesses in trials and arbitrations around the country. I advised the board of one of the nation's largest medical device manufacturers as Counsel to its Special Litigation Committee. And I won—in a Texas state court—summary judgment for client TMZ and its host Harvey Levin in a defamation case brought against the entertainment news giant by the mother of

the late model/actress Anna Nicole Smith. In addition to my trial and arbitration hearing work, I have argued all types of court hearings, including motions to dismiss, discovery disputes, *Daubert* hearings, and temporary restraining orders.

21. Through my work at Susman Godfrey, I have become familiar with the market rate for contingency fees in large commercial cases, including insurance-related cases, as well as False Claims Act cases.

THE MARKET RATE FOR PLAINTIFFS' CONTINGENCY FEES IN LARGE COMMERCIAL CASES AND FALSE CLAIMS ACT CASES

22. As noted above, Susman Godfrey has long handled large commercial cases for plaintiffs using contingency fee arrangements. A large percentage of our revenue is generated from contingency fees.

23. I have been deeply involved in the process of deciding whether and on what terms Susman Godfrey accepts contingent-fee cases since I started at the firm.

24. Because contingency fees are such an integral part of our business model, we dedicate a significant amount of time and effort to evaluate potential contingency-fee cases, including negotiating an appropriate fee before taking a case on contingency that takes into account the amount of likely recovery, the time and lawyer effort required to achieve that recovery, and the anticipated risk of a low or no recovery. To that end, we developed a process that we use for every contingency case that comes in the door, to ensure that our firm carefully evaluates which cases to accept on a contingency basis.

25. I will describe that process below, as it provides relevant background regarding my experience in evaluating a reasonable contingency fee.

26. The centerpiece of our firm's process for deciding whether to accept a new contingency-fee case is a weekly meeting at which potential new cases are presented. All of the firm's attorneys are invited to attend each of these weekly meetings, and I conservatively estimate that I have participated in over 400 such meetings during my career at Susman Godfrey and evaluated over 1,000 potential cases.

27. Before the meeting at which a potential new case will be presented, the attorney seeking to represent a contingent-fee client prepares a case evaluation memo describing the legal issues, damages, problems, proposed fee, any co-counsel arrangements and the venue. These memos are distributed to every attorney in the firm, the memos and the potential new cases are then discussed at the weekly meetings described above.

28. Each associate and partner in the firm who attends a given weekly meeting regarding new cases has an equal vote in whether we accept a contingency case discussed at that meeting. Because of the extra risk involved, a two-thirds majority vote is required if the firm is to advance a client's case expenses, like expert fees, court reporters, document vendors and hotel and travel expenses for trial.

29. Among other things, we use the weekly meetings to evaluate thoroughly any potential problems with a proposed new case, as well as the likelihood of success. We also discuss proposed fee agreements during these weekly meetings.

30. Our clients are sophisticated consumers of legal services and therefore have the ability to negotiate the best deal possible for their cases. Frequently, potential clients are comparing our proposed fee terms to those offered by competitor law firms, or are arranging “beauty contests” to assess competing proposals from different law firms. Some of these competitors include national firms like Boies Schiller Flexner, Kecker, Van Nest & Peters, Quinn Emanuel, Bartlit Beck Herman Palenchar & Scott, and top Texas boutiques like Beck Redden, Gibbs & Bruns and Smyser Kaplan & Veselka.

31. To remain competitive, we must continually assess whether our proposed contingent fee agreements reflect the market level for those agreements. In addition, because our firm has a national practice, handling cases in federal and state courts throughout the country, including in Illinois, we must continually assess whether the fee agreements that we propose are consistent with those that our competitor firms are offering the same clients across the country.

32. During my years at Susman Godfrey and before I joined the firm, the firm has handled thousands of contingent-fee cases for Plaintiffs. I have personally participated in weekly meetings discussing hundreds of such cases, and have

personally evaluated and negotiated many contingency-fee agreements. Through my work at the firm, and particularly my participation in the weekly meetings discussed above, I have become deeply familiar with Susman Godfrey's contingent-fee practice, including the specific fee agreements that Susman Godfrey enters into, as well as the market rate for such agreements.

33. Based on my substantial experience with contingent fee arrangements at Susman Godfrey, it is my opinion to a reasonable degree of certainty that the market rate for plaintiffs' contingency litigation in large commercial cases and False Claims Act cases ranges from a low of 33% to a high of 49%. This assumes the fee arrangement does not include any other risk-reducing compensation, such as partial hourly fees or a hybrid fee arrangement with a flat fee component. In our firm's standard contingent fee agreement, these contingent percentages increase as the trial date approaches and after the case is submitted to a jury (or at the conclusion of evidence in a non-jury trial or arbitration).

34. Generally, the only cases where we will accept a 33% contingency are those where the client advances the costs of litigation and the *ex ante* likelihood of success is high.

35. The market rate contingency fee for large commercial cases and False Claims Act cases where the plaintiffs' firm advances the costs of litigation is toward the higher end of the 33%-49% range noted above. If we accept a contingency fee cases at 33% and our firm is advancing the costs of litigation, the fee percentages

will typically escalate to 45 or higher by time of trial and/or there are other factors about the representation that lower its risk of non-recovery.

36. Often, if we accept a 33% contingency, the client will also pay a flat fee on top of that. For example, we represented Forgent Networks, Inc. and its wholly owned subsidiary Compression Labs, Inc. in a patent dispute with hundreds of millions of dollars at stake, our clients agreed to pay us a flat fee of \$116,000 per month, plus 33% of any recovery in the litigation. The clients had the option of reducing the flat fee to \$50,000 per month, in exchange for increasing the contingency fee to 38.5% of any eventual recovery. *See* www.sec.gov/Archives/edgar/data/884144/000119312505212156/dex1032.htm.

37. Finally, contingent fee agreements in large commercial cases and False Claims Act cases are typically a straight percentage of the recovery, and the percentage of the fee does not diminish as the recovery increases absent unusual cases, for example, the firm has a hybrid arrangement or if there are extenuating circumstances that reduce the firm's risk.

**A ONE-THIRD CONTINGENCY FEE FOR THE *YOUNG INSURANCE* CASE
IS AT OR BELOW THE MARKET RATE**

38. Based on my extensive experience with and knowledge of the market for plaintiffs' contingency-fee agreements in large commercial cases and False Claims Act cases, I am confident that the market rate for the *Young Insurance* case

is at least one-third of the total recovery in that case. That is, negotiations between a leading plaintiffs' firm and a sophisticated commercial client or False Claims Act whistleblower before the *Young Insurance* case was filed would have resulted in a fee agreement of at least one-third, and likely more, for the following reasons:

- a. Class Counsel would be advancing all litigation costs. As noted above, that is unusual in large commercial cases since many commercial clients can afford litigation expenses, and typically the contingency fee in such cases by time of trial would be higher than 33%.
- b. The case was risky. Recovering maximum damages depended on winning a complex, novel False Claims Act claim, common-law fraud and tortious interference claims, and punitive damages. The tasks necessary to win such claims are extremely difficult, and recovering punitive damages almost certainly would require a trial, and therefore a substantial commitment of time and expense to get to trial, plus the skill to successfully try the case. In fact, obtaining punitive or treble damages is usually so unlikely that we will discount or ignore the possibility of such a recovery when evaluating a potential case's recovery.
- c. Many defendants including large insurance companies like AIG, Inc. and certain of its subsidiaries are extremely well-funded, sophisticated legal consumers and have a reputation for not settling cases without a

hard fight, making the case even more difficult than it would have been with the same set of facts against a different set of defendants.

39. In addition to the above factors that show a one-third fee or higher is typical and reasonable, my review of briefing filed in the *Young Insurance* case confirms that Class Counsel's work in that case is of the type and quality that my firm would expect in a large commercial contingency case, and more importantly, the type and quality for which a sophisticated client will pay top dollar.

CONCLUSION

40. For the reasons stated above, Class Counsel's request for an award of one-third of the \$32.5 million common fund, net of administrative expenses, is at or below the market rate for handling the type of large, complex litigation that Class Counsel litigated in *Young Insurance*.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: July 28, 2017



Richard Hess

LIST OF DOCUMENTS REVIEWED FROM YOUNG INSURANCE

1. Plaintiffs' post-trial motion, dated 5/11/2016
2. AIG, Inc.'s response to Plaintiffs' post-trial motion, dated 6/10/2016
3. The response to Plaintiffs' post-trial motion by Defendants Illinois National, Insurance Company of the State of Pennsylvania, and Lexington Insurance Company, dated 6/10/2016
4. Plaintiffs' reply in support of their post-trial motion, dated 6/24/2016
5. Defendant AIG, Inc.'s post-trial motion, dated 5/11/2016.
6. Plaintiffs' Response to Defendant AIG, Inc.'s post-trial motion, dated 6/10/2016.
7. Cook County's Response to Defendant AIG, Inc.'s post-trial motion, dated 6/10/2016.
8. Defendant AIG, Inc.'s reply in support of its post-trial motion, dated 6/24/2016
9. Defendant AIG, Inc.'s reply to Cook County's response to its post-trial motion, dated 6/24/2016