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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-MDL-1317 - SEITZ/KLEIN

NIGHT BOX
FILED

IN RE TERAZOSIN HYDROCHLORIDE
ANTITRUST LITIGATION

APR 19 2009
CLARENCE W. BRADSHAW
CLERK U.S. DISTRICT COURT S.D. FLA. / MIA

THIS DOCUMENT RELATES TO:

*Louisiana Wholesale Drug Co., Inc. v. Abbott
Laboratories, et al.*

S.D. Fla. Case No. 98-3125

Valley Drug Co. v. Abbott Laboratories, et al.

S.D. Fla. Case No. 99-7143

**SHERMAN ACT CLASS COUNSEL'S JOINT PETITION FOR
ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND
INCENTIVE AWARDS FOR THE NAMED PLAINTIFFS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

FD/DES

TABLE OF CONTENTS

I. INTRODUCTION1

II. SUMMARY OF THE HISTORY OF THE LITIGATION4

III. THE COURT SHOULD APPROVE THE JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AS FAIR AND REASONABLE7

 A. Class Counsel are Entitled to Compensation Based Upon the Benefits Created by the Litigation7

 B. The Requested Fee is Fair and Reasonable Under the Percentage Method Used by the Eleventh Circuit.....8

 1. Consistent with Supreme Court Precedent, Numerous Decisions in this Circuit and Elsewhere have Reaffirmed the Desirability and Appropriateness of Utilizing the Percentage Method.....8

 2. The Requested Fee is Fair and Reasonable.....9

 a. The Contingent Nature of the Fee, the Financial Burden Carried by Class Counsel, and the Economics of Prosecuting a Complex Antitrust Case11

 b. The Requested Fees Reflect the Market Rate in Other Complex, Contingent Litigation13

 c. The Novelty and Difficulty of the Questions at Issue.....14

 d. The Skill, Experience and Reputation of Class Counsel14

 e. The Excellent Result Achieved.....15

 f. The Time and Labor of Counsel16

 g. The Reaction of the Class16

 h. Lodestar Cross-Check.....17

 C. Class Counsel's Expenses Are Reasonable and Were Necessarily Incurred to Achieve the Benefit Obtained18

D. Incentive Awards for the Named Plaintiffs are Appropriate
and Reasonable19

IV. CONCLUSION.....20

TABLE OF AUTHORITIES

Federal Cases

<u>Alpine Pharmacy v. Chas. Pfizer & Co., Inc.</u> , 481 F.2d 1045 (2d Cir.).....	7
<u>Behrens v. Wometco Enter., Inc.</u> , 118 F.R.D. 534 (S.D. Fla. 1988), <u>aff'd</u> , 899 F.2d 21 (11th Cir. 1990).....	11, 12, 15
<u>Bello v. Integrated Resources, Inc.</u> , [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,731 (S.D.N.Y. 1990).....	9
<u>Blum v. Stenson</u> , 465 U.S. 886 (1984).....	8
<u>Boeing Co. v. Van Gemert</u> , 444 U.S. 472 (1980).....	7
<u>Brown v. Pro Football, Inc.</u> , 839 F. Supp. 905 (D.D.C. 1993).....	19
<u>Camden I Condo. Ass'n v. Dunkle</u> , 946 F.2d 768 (11th Cir. 1991)	3, 8, 9, 10, 11
<u>Cimarron Pipeline Construction, Inc. v. Nat'l Council on Compensation Ins.</u> , Nos. Civ. 89-822-T, Civ. 89-1186-T, 1993 WL 355466 (W.D. Okla. June 8, 1993).....	17
<u>Eisen v. Carlisle & Jacquelin</u> , 479 F.2d 1005 (2d Cir. 1973), <u>vacated on other grounds</u> , 417 U.S. 156 (1974)	12
<u>Elkins v. Equitable Life Ins. of Iowa</u> , No. CIV96-296-CIV-7-17B, 1998 WL 133741 (M.D. Fla. Jan. 27, 1998).....	17
<u>Enterprise Energy Corp. v. Columbia Gas Transmission Corp.</u> , 137 F.R.D. 240 (S.D. Ohio 1991).....	20
<u>Faucett Assocs., Inc. v. American Tel & Tel. Co.</u> , No. 81-1804, 1985 WL 5199 (D.D.C. 1985).....	16
<u>Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</u> , 741 F. Supp. 84 (S.D.N.Y. 1990)	19
<u>Goldberger v. Integrated Resources, Inc.</u> , 209 F.3d 43 (2d Cir. 2000).....	9, 11, 15

<u>Gottlieb v. Barry,</u> 43 F.3d 474 (10th Cir. 1994)	9, 18, 19
<u>Gottlieb v. Wiles,</u> 150 F.R.D. 174 (D. Colo. 1993)	18, 19
<u>Gutter v. E.I. DuPont De Nemours,</u> No. 95-2152-CIV-GOLD (S.D. Fla. May 30, 2003)	10, 20
<u>Harris v. Marhoefer,</u> 24 F.3d 16 (9th Cir. 1994)	18
<u>Hawaii v. Standard Oil Co.,</u> 405 U.S. 251 (1972)	7
<u>Hensley v. Eckerhart,</u> 461 U.S. 424 (1983)	15
<u>Howes v. Atkins,</u> 668 F. Supp. 1021 (E.D. Ky. 1987)	9
<u>In re Buspirone Antitrust Litig.,</u> No. 01-CV-7951 (JGK) (S.D.N.Y. April 11, 2003)	10, 14
<u>In re Cardizem CD Antitrust Litig.,</u> No. 99-73259 (E.D. Mich. Nov. 25, 2002)	14
<u>In re Continental Illinois Sec. Litig.,</u> 962 F.2d 566 (7th Cir. 1992)	9
<u>In re Dun & Bradstreet Credit Services Customer Litig.,</u> 130 F.R.D. 366 (S.D. Ohio 1990)	20
<u>In re Franklin Nat'l Bank Sec. Litig.,</u> [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,571 (E.D.N.Y. 1980)	9
<u>In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,</u> 55 F.3d 768 (3d Cir.), <u>cert. denied</u> , 516 U.S. 824 (1995)	9
<u>In re M.D.C. Holdings Sec. Litig.,</u> No. CV89-0090 E(M). 1990 WL 454747 (S.D. Cal. Aug. 30, 1990)	3, 8, 17
<u>In re McDonnell Douglas Equip. Leasing Sec. Litig.,</u> 842 F. Supp. 733 (S.D.N.Y. 1994)	19

<u>In re Pepsico Sec. Litig.</u> , No. 82-Civ-8403 (S.D.N.Y. April 26, 1985)	8
<u>In re Relafen Antitrust Litig.</u> , No. 01-12239-WGY (D. Mass. Apr. 9, 2004)	10, 14
<u>In re RJR Nabisco Sec. Litig.</u> , [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984 (S.D.N.Y. 1992).....	13, 17
<u>In re Sequoia Systems, Inc. Sec. Litig.</u> , Civ. A. No. 93-11331-WD. 1993 WL 616694 (W.D. Mass. Sept. 10, 1993).....	17
<u>In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig.</u> , 56 F.3d 295 (1 st Cir. 1995).....	9
<u>In re Warfarin Sodium Antitrust Litig.</u> , 212 F.R.D. 231 (D. Del. Aug. 30, 2002), <u>aff'd</u> , 391 F.3d 516 (3d Cir. 2004).....	15
<u>Johnson v. Georgia Highway Express, Inc.</u> , 488 F.2d 714 (5th Cir. 1974)	10, 11
<u>Jones v. Diamond</u> , 636 F.2d 1364 (5th Cir. 1981)	11
<u>Kirchoff v. Flynn</u> , 786 F.2d 320 (7th Cir. 1986)	13
<u>Mills v. Elec. Auto-Lite Co.</u> , 396 U.S. 375 (1970), <u>cert. denied</u> , 434 U.S. 922(1977)	18
<u>Miltland Raleigh-Durham v. Myers</u> , 840 F. Supp. 235 (S.D.N.Y. 1993)	18
<u>Missouri v. Jenkins</u> , 491 U.S. 274 (1989).....	19
<u>P.D.Q. Inc. of Miami v. Nissan Motor Corp. in U.S.A.</u> , 61 F.R.D. 372 (S.D. Fla. 1973).....	7
<u>Phemister v. Harcourt Brace Jovanovich, Inc.</u> , 1984-82 Trade Cas. (CCH) ¶ 66,234 (N.D. Ill. 1984)	13
<u>Pillsbury Co. v. Conboy</u> , 459 U.S. 248 (1983).....	7

<u>Rawlings v. Prudential-Bache Properties, Inc.</u> , 9 F.3d 513 (6th Cir. 1993)	9
<u>Reitner v. Sonotone Corp.</u> , 442 U.S. 330 (1979).....	7
<u>Ressler v. Jacobson</u> , 149 F.R.D. 651 (M.D. Fla. 1992).....	9, 12, 15
<u>REVCO Sec. Litig., Arsam Co. v. Salomon Bros., Inc.</u> , [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,956 (N.D. Ohio 1992).....	20
<u>Rosenbaum v. Macallister</u> , 64 F.3d 1439 (10th Cir. 1995)	7
<u>Six (6) Mexican Workers v. Arizona Citrus Growers</u> , 904 F.2d 1301 (9th Cir. 1990)	9
<u>Sprague v. Ticonic Nat'l Bank</u> , 307 U.S. 161 (1939).....	8
<u>Stoetzner v. United States Steel Corp.</u> , 897 F.2d 115 (3d Cir. 1990).....	16
<u>Swedish Hosp. Corp. v. Shalala</u> , 1 F.3d 1261 (D.C. Cir. 1993)	9
<u>Trustees v. Greenbough</u> , 105 U.S. 527 (1882).....	8
<u>United States Football League v. National Football League</u> , 644 F. Supp. 1040 (S.D.N.Y. 1986) <u>aff'd</u> , 842 F.2d 1335 (2d Cir. 1988)	12
<u>Waters v. Int'l Precious Metals Corp.</u> , 190 F.3d 1291 (11th Cir. 1999)	10
<u>Waters v. Int'l Precious Metals Corp.</u> , 190 F.3d 1291 (11th Cir. 1999)	17
<u>Weiss v. Mercedes-Benz of N. Am. Inc.</u> , 899 F. Supp. 1297 (D.N.J. 1995), <u>aff'd</u> , 66 F.3d 314 (3d Cir. 1995)	17
<u>Zinman v. Aemco Corp.</u> , [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,325 (E.D. Pa. 1978)	9

Secondary Authority

DENISE N. MARTIN ET AL.,
*Recent Trends IV: What Explains Filings and Settlements in Shareholder
Class Actions?* (NERA Nov. 1996)10, 13

THOMAS E. WILLGING, LAUREL L. HOOPER, AND ROBERT J. NIEMIC,
*Empirical Study of Class Actions in Four Federal District Courts:
Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center 1996)10

Co-Lead Counsel, Members of the Executive Committee and Liaison Counsel for Plaintiffs and the Sherman Act Class (“Class”)¹ in the above-captioned cases (collectively “Class Counsel”) hereby submit this Joint Petition for Attorneys’ Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs and Memorandum of Points and Authorities in Support Thereof.

I. INTRODUCTION

Class members’ claims against Defendants Abbott Laboratories (“Abbott”) and Geneva Pharmaceuticals, Inc. (“Geneva”) (collectively “Defendants”) in this consolidated action have been settled for \$72,500,000 in cash. The prior \$2 million settlement with defendant IVAX Pharmaceuticals, Inc. (formerly known as Zenith Goldline Pharmaceuticals, Inc.)² raises the total recovery to slightly less than \$75 million. This amount is an exceptional recovery for the Class in light of the circumstances of this case, including: (1) the number and complexity of the issues Class Counsel needed to master in order to achieve the recovery (*e.g.*, issues regarding FDA regulations, the manufacturing, marketing and approval of pharmaceutical products, economics, patent law and the intersection of patent and antitrust law); (2) the regulatory and technical hurdles Plaintiffs needed to overcome to establish that Geneva (and generic manufacturer Mylan Laboratories Inc.) would have and could have come to market earlier “but for” the

¹ The Class consists of all persons who purchased Hytrin, also known by the chemical name terazosin hydrochloride, directly from Abbott Laboratories at any time during the period commencing March 31, 1998 through and including June 30, 2001. Excluded from the Class are: (1) Defendants Abbott Laboratories, Geneva Pharmaceuticals, Inc. (now known as Sandoz Inc.), Zenith Goldline Pharmaceuticals, Inc. (now known as Ivax Pharmaceuticals, Inc.), their officers, directors, management, employees, subsidiaries, and affiliates; and (2) each of the following entities, and any and all claims of each said entity that have been asserted, or could have been asserted, in In re Terazosin Hydrochloride, Case No. 99 MDL 1317, arising out of Hytrin or generic terazosin hydrochloride purchases by said entity: CVS Meridian, Inc., Rite Aid Corp., Walgreen Co., Eckerd Corp., The Kroger Co., Albertson’s Inc., The Stop & Shop Supermarket Co., and Hy-Vee, Inc.; and (3) Kaiser Foundation Health Plan, Inc. and the Kaiser entities on whose behalf it asserted claims in paragraph 8 of its complaint in case No. 99 MDL 1317.

² Plaintiffs entered into a settlement with defendant Zenith Goldline Pharmaceuticals, Inc. (“Zenith”), now known as IVAX Pharmaceuticals, Inc., on February 29, 2002. This settlement was finally approved by the Court on June 13, 2002. Under that settlement, Zenith paid \$2,072,327 into an escrow account.

The Zenith Settlement provided Zenith with the right to terminate the settlement if certain specified conditions occurred. Should the settlement between the Class and Abbott and Geneva become final, and provided that the Court in its final order of approval of the Abbott and Geneva Settlement reaffirms that all of the terms of the Zenith Settlement remain in full force and effect (except for any obligation for Zenith to pay up to \$25,000 in notice costs, which obligation Plaintiffs have excused), then, to the extent Zenith has retained any enforceable rights to terminate the Zenith Settlement (which Plaintiffs dispute), those rights will be forever expunged, the Zenith Settlement funds may be used for the benefit of the Class as the Court may direct, and the Zenith Settlement and all of its terms, including releases given by members of the Class, will remain in full force and effect.

Abbott/Geneva Agreement; (3) the skill and tenacity of Defendants' counsel; and (4) the Eleventh Circuit's rulings on the standards to be applied regarding liability and class certification.

Despite these difficult hurdles, including two adverse decisions by the Eleventh Circuit, Class Counsel never wavered in their commitment to litigate this case zealously on behalf of Plaintiffs and the absent Class members – including sophisticated entities like the national wholesalers, Medco Health Solutions (one of the country's largest mail order pharmacies) and WalMart (the world's largest retailer). None of these sophisticated entities, or any other Class member, has objected to Class Counsel's fee request, which is expressly set forth in the Notice of settlement mailed to Class Members. Moreover, the settlement amount of \$72.5 million, combined with the \$2,072,327 settlement previously reached with defendant Zenith, represents an approximate recovery of approximately 40% to 60% of the aggregate overcharge damages that resulted from Defendants' illegal conduct.³

The settlement achieved for the benefit of Class members is due solely to the skill, perseverance and hard work of Class Counsel over more than six years and is an outstanding result. The extensive efforts of Class Counsel in achieving this result are detailed below and in the attached affidavits. See Co-Lead Counsel Affidavit, attached as Exhibit "A"; Summary of Class Counsel's Total Lodestar and Expenses, attached as Exhibit "B"; Individual Class Counsel Affidavits, attached as Exhibit "C". These efforts include exhaustive factual investigation and discovery, including taking (and defending) over 50 depositions; reviewing and analyzing hundreds of thousands of pages of documents; responding to Defendants' voluminous discovery requests to Plaintiffs; researching, drafting and responding to dozens of motions, including Plaintiffs' successful partial summary judgment motions; appearing and arguing at numerous hearings, including two appeals to the Eleventh Circuit; working with experts and consultants concerning class certification, liability, causation and damages issues; conducting and defending numerous expert depositions; successfully briefing and responding to numerous *Daubert*

³ As explained in Sherman Act Class Plaintiffs' Plan of Allocation, a reasonable range of possible Class damages is \$128 million to \$190 million. See Plan of Allocation for Sherman Act Class Plaintiffs at 7-8. Thus, the \$74,572,327 in total settlements in this case represents a recovery of between approximately 40% and 60% of the Sherman Act Class's overcharge damages. The damage model relied upon by Plaintiffs is highly dependent upon generic entry scenarios that are hotly contested by Defendants. Even if a jury were to determine that Defendants were liable and that fact of injury was established, the jury could still conclude that generic entry would have occurred later than the dates assumed by Plaintiffs' expert, thereby increasing the percentage of recovery.

motions; preparing for an imminent trial date; and successfully negotiating the terms of this settlement with defense counsel over the course of several mediation sessions.

Class Counsel's efforts have been without compensation of any kind for the past six years. Class Counsel have expended tens of thousands of hours and millions of dollars in expenses on behalf of the Class during this period, compensation for which has been wholly contingent upon the result achieved.

As detailed below, the percentage-of-the-fund method is the proper method of compensating Class Counsel. Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991) ("Camden I"). Accordingly, Class Counsel request that the Court award fees equal to 33 1/3% of the settlement proceeds to Co-Lead Counsel for allocation among the various counsel for the Class that have participated in this litigation. This amount is \$24,166,667, plus 33 1/3% of any additional interest that accrues prior to payment of the fees. The percentage requested is squarely within the range approved by decisions in the Eleventh Circuit and in courts involving similar cases (including a number of recent cases involving similar allegations of unlawful delayed generic entry), and is fully justified by the relevant factors identified by this Circuit.

Moreover, not a single Class member has objected to Class Counsel's fee request, which was expressly set forth in the Notice of settlement sent to each Class member. The lack of objection from Class members to a fee request is particularly significant where, as here, the Class includes sophisticated entities (such as the national wholesalers, Medco Health Solutions and WalMart (all Fortune 500 companies)) with their own sophisticated counsel. See, e.g., In re M.D.C. Holdings Sec. Litig., No. CV89-0090 E(M), 1990 WL 454747, at *10 n.5 (S.D. Cal. Aug. 30, 1990) (lack of objections "is significant since the class includes sophisticated financial institutions...who have counsel available to advise and represent them and submit objections to either the settlement or the fees and expenses"), attached as Exhibit "D".

Class Counsel also request reimbursement of \$3,133,070.86 in reasonable out-of-pocket expenses (approximately \$1 million from the proceeds of the settlement with Abbott and

Geneva, with the proceeds from the Zenith Settlement paying the remainder).⁴ and incentive awards of \$75,000 in total to split between the two named Plaintiffs.⁵

For the reasons set forth below, and in the accompanying affidavits, Class Counsel respectfully submit that the attorneys' fees and expenses for which reimbursement is sought (as well as the requested incentive payments for the named Plaintiffs) are fair and reasonable and should be awarded by the Court.

II. SUMMARY OF THE HISTORY OF THE LITIGATION⁶

As the Court is aware, Class Counsel filed class action suits on behalf of Plaintiffs and the Class on December 18, 1998 and August 13, 1999, and immediately began vigorously prosecuting the Class' claims. See Co-Lead Affidavit at ¶ 16, Exhibit "A". These suits were consolidated in this Court by the Judicial Panel on Multidistrict Litigation on December 20, 1999. Id. at ¶ 20. Plaintiffs allege in their complaints that Geneva and Zenith entered into agreements with Abbott not to market competing, generic versions of Hytrin in return for multi-million dollar payments from Abbott. Id. at ¶ 6.

On February 18, 2000, Class Counsel filed a motion for partial summary judgment that the Defendants' agreements constitute *per se* violations of the antitrust laws. Id. at ¶ 35. On April 11, 2000, Class Counsel argued the merits of the motion and on December 13, 2000, the Court granted Plaintiffs' motion for partial summary judgment and held that both the Geneva Agreement and Zenith Agreement were *per se* violations of Section 1 of the Sherman Antitrust Act. Id. at ¶¶ 35-36. On December 22, 2000, Defendants filed a motion asking for permission to appeal this decision to the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). Id. at ¶ 37. The Court denied this request on August 14, 2001. Id. However, Defendants filed a renewed motion for certification of the Court's *per se* decision and the Court granted this motion on February 25, 2002. Id. at ¶ 38. The Eleventh Circuit then granted Defendants' petition for permission to appeal. Id. at ¶ 39. Following additional briefing by the parties on the merits of the appeal, the Eleventh Circuit heard oral argument on January 8, 2003. Id. On September 15,

⁴ Class Counsel seek no attorneys' fees from the Zenith Settlement. Thus, the entire \$2,072,327 payment by Zenith, plus all interest earned on this payment, will be used to reimburse costs and expenses of this litigation, thereby effectively increasing the amount of the net settlement fund available to distribute to the Class.

⁵ The two named Plaintiffs for the Sherman Act Class are Louisiana Wholesale Drug Company, Inc. ("LWD") and Valley Drug Company ("Valley Drug").

⁶ A more detailed history of the litigation is set forth in the Co-Lead Counsel Affidavit (Exhibit "A").

2003, the Eleventh Circuit issued a decision reversing the Court's *per se* ruling and remanded for further proceedings. Id. On November 18, 2003, the Eleventh Circuit denied Plaintiffs' petitions for rehearing *en banc*. Id.

After the Eleventh Circuit decision, Class Counsel worked diligently to revise and refine their theory of liability in light of the standards set forth by the Eleventh Circuit. Based on considerable research of Federal Circuit law regarding patents and preliminary injunctions (and stays), and numerous consultations with Plaintiffs' patent law expert and consultants, Class Counsel filed Plaintiffs' Motion for Partial Summary Judgment Declaring that the Abbott/Geneva Agreement Exceeded the Exclusionary Potential of the '207 Patent and Plaintiffs' Motion for Partial Summary Judgment for a Finding that the Abbott/Geneva Agreement Violates Section One of the Sherman Act Or in the Alternative for a Finding that a Quick-Look Analysis Applies to the Agreement. Id. at ¶ 42. After extensive briefing and argument at two hearings, the Court issued an Omnibus Order on January 5, 2005, holding that "the exclusionary effects of the challenged provision of the Abbott/Geneva Agreement exceeded the exclusionary potential of the '207 patent" and that "the Agreement is *per se* unlawful under Section 1 of the Sherman Act." Id. at ¶ 45. Accordingly, the Court entered summary judgment in favor of Plaintiffs on their Section One claims and denied Defendants' motions for summary judgment. Id.

In addition, Plaintiffs successfully defeated a variety of summary judgment motions by Defendants, including: Defendants' Motion for Summary Judgment on Sherman Act Section One (and Analogous Claims); the Alternative Motion for Partial Summary Judgment as to the Earliest Date of Generic Competition; and Defendants' Motion for Summary Judgment on the Ground that, Even Absent the Abbott/Geneva Agreement, Geneva's Board of Directors Would Have Prevented Earlier Commercialization of its Generic Terazosin Product. Id. at ¶¶ 43-47.

On November 30, 1999, Plaintiffs filed a consolidated motion for class certification. After extensive discovery, briefing and argument, the Court certified the Sherman Act Class on September 20, 2001. Id. at ¶¶ 24-27. On October 5, 2001, Defendants filed a motion with the Eleventh Circuit for interlocutory appeal of the Court's class certification decision pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. Id. at ¶ 28. The Eleventh Circuit granted Defendants' motion on January 19, 2002, and, following briefing by the parties, heard oral argument on January 8, 2003. Id. On November 14, 2003, the Eleventh Circuit vacated the

Court's class certification decision and remanded the case for further proceedings to determine, among other things, whether there were conflicts of interest between Plaintiffs and members of the Sherman Act Class in connection with the prosecution of this litigation. Id. Plaintiffs filed petitions for rehearing and rehearing en banc with the Eleventh Circuit, but these petitions were denied on January 28, 2004. Id.

Plaintiffs filed a renewed motion for class certification on March 19, 2004, and a reply brief in support of that motion on May 3, 2004. Id. at ¶ 32. As the Court knows, in connection with that renewed class motion, Class Counsel expended enormous time and resources assisting Plaintiffs and the 23 Class members who received "downstream discovery" subpoenas in responding to these requests. Id. at ¶ 29. After considering extensive briefing and oral argument, the Court issued an order on June 23, 2004, holding that, although "the evidence indicates there is no class antagonism or conflict," the Sherman Act Class could not be certified because of the possibility of potential unforeseen conflict in the future with regard to the litigation. Id.

Plaintiffs continued to vigorously litigate the case despite the Court's June 23, 2004 denying class certification. In particular, Plaintiffs continued to: (1) cross-examine Defendants' experts and defend Plaintiffs' experts; (2) brief numerous *Daubert* motions; and (3) expend significant time and resources preparing for trial. Id. at ¶¶ 73-80. This trial preparation included: (a) reviewing thousand of pages of deposition transcripts for purposes of identifying the core testimony needed to establish Plaintiffs' claims and refute Defendants' defenses; (b) selecting Plaintiffs' trial exhibits from the hundreds of thousands of documents in the record; (c) preparing objections to Defendants' deposition designations and exhibits, as well as preparing to defend Plaintiffs' designations and exhibits; (d) refining Plaintiffs' trial theories and strategies; (e) preparing motions in limine and responses to Defendants' anticipated motions in limine; and (f) consulting with trial preparation specialists and jury focus groups, in order to make this complex, multi-faceted case manageable for trial and understandable to a jury.

Finally, Plaintiffs engaged in extensive settlement negotiations with Defendants. These settlement negotiations were intense, difficult and protracted, encompassing a period of over four years, and including multiple mediation sessions with Professor Eric Green. Id. at ¶¶ 81-82. On or about February 24, 2005, after more than six years of intense litigation, Class Counsel reached a tentative settlement with Defendants which, subject to final approval by the Court, will settle

all claims that were or could have been asserted in this action against Defendants Abbott and Geneva and related entities and persons in exchange for payment of \$72.5 million in cash. *Id.* at ¶ 83; Settlement Agreement at ¶¶ 6-11.⁷ The Court preliminarily approved the settlement on February 25, 2005 and certified the Sherman Act Class. *Id.* at ¶ 83

III. THE COURT SHOULD APPROVE THE JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AS FAIR AND REASONABLE

A. Class Counsel are Entitled to Compensation Based Upon the Benefits Created by the Litigation

Courts have long recognized that a lawyer who recovers a “common fund” is entitled to a reasonable attorneys’ fee from the fund as a whole. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). The rationale for such awards is that “persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched[.]” *Id.* at 478; Rosenbaum v. Macallister, 64 F.3d 1439, 1444 (10th Cir. 1995).

The Supreme Court has repeatedly recognized the importance of private antitrust litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. See, e.g., Pillsbury Co. v. Conboy, 459 U.S. 248, 262-63 (1983); Reitner v. Sonotone Corp., 442 U.S. 330, 331 (1979); Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972); P.D.Q. Inc. of Miami v. Nissan Motor Corp. in U.S.A., 61 F.R.D. 372, 379-380 (S.D. Fla. 1973). Fee awards similar to that requested here, encourage and support meritorious class actions, and thereby promote private enforcement of, and compliance with, the antitrust laws. As noted by the Second Circuit in Alpine Pharmacy v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir.), “[i]n the absence of adequate attorneys’ fee awards, many antitrust actions would not be commenced[.]”

Fee awards which recognize the success reflected by the recoveries are in the “best interests” of current and future class members:

It unquestionably is true that without able lawyers handling these matters not only do some of them go unprosecuted, but the big difference in my experience is in the amount obtained and you don’t get the highest recovery and when you are paying at the low end of the scale of fee recovery in contingent actions. It seems to me that I as the protector of the class can fairly say, and honestly say, that I believe it is in the class’ best interests – of this

⁷ Plaintiffs and Defendant Geneva had previously entered into a settlement agreement on August 13, 2001. The Court preliminarily approved the settlement on September 20, 2001. On November 29, 2001, however, Geneva withdrew from that settlement.

class and of future classes yet unknown – to pay this kind of money for these kinds of benefits.

In re Pepsico Sec. Litig., No. 82-Civ-8403 (S.D.N.Y. April 26, 1985), Transcript of April 26, 1985 at 17-18, cited in Herbert B. Newberg, Attorney Fee Awards § 1.04, at 6 (1986), and quoted with approval in In re M.D.C. Holdings Sec. Litig., 1990 WL 454747, at *10, Exhibit “D”.

As these courts and others have repeatedly recognized, attorney fee awards that fully reward excellent results encourage the successful prosecution of meritorious cases.

B. The Requested Fee is Fair and Reasonable Under the Percentage Method Used by the Eleventh Circuit

1. Consistent with Supreme Court Precedent, Numerous Decisions in this Circuit and Elsewhere have Reaffirmed the Desirability and Appropriateness of Utilizing the Percentage Method

The Supreme Court consistently has held in decisions involving the computation of a common fund fee award that it is appropriate for the fee to be determined on a percentage-of-the-fund basis. See Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984) (“under the ‘common fund doctrine,’ . . . a reasonable fee [is] based on a percentage of the fund bestowed on the class”); see also Trustees v. Greenbough, 105 U.S. 527, 532 (1882); Sprague v. Ticonic Nat’l Bank, 307 U.S. 161, 165-66 (1939). In a percentage fee award, the fee is measured by the benefit conferred upon the class.

The Eleventh Circuit *requires* that fee awards in common fund cases be made on a percentage-of-the-fund basis. Camden I, 946 F.2d at 774 (11th Cir. 1991) (“attorneys’ fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.”). In Camden I, after weighing the pros and cons of the percentage method and the lodestar/multiplier method, the Eleventh Circuit concluded:

After reviewing Blum, the [Third Circuit] Task Force Report, and the foregoing cases from other circuits, we believe that the percentage of the fund approach is the better reasoned in a common fund case. Henceforth in this circuit, attorneys’ fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.

Id. Thus, the Eleventh Circuit has expressly rejected the lodestar/multiplier approach in favor of the percentage-of-the-fund method.

The use of the percentage method in this Circuit is consistent with decisions nationwide awarding fees in common fund cases. Eight other circuits – the First, Second, Third, Sixth,

Seventh, Ninth, Tenth and D.C. Circuit -- have accepted the percentage-of-the-fund method as an appropriate method for awarding attorneys' fees.⁸

2. The Requested Fee is Fair and Reasonable

The requested fee of 33 1/3% of the settlement fund is fair and reasonable given the success of the litigation, the risks involved and other relevant factors. As the Eleventh Circuit stated in Camden I: "The majority of common fund fee awards fall between 20% to 30% of the fund." 946 F. 2d at 774 (citing 1 Herbert B. Newberg, *Attorney Fee Awards* §2.08, at 51 (1986)). Yet, the Court of Appeals went on to note: "an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded." *Id.* at 774-75. In Ressler v. Jacobson, 149 F.R.D. 651, 655-656 (M.D. Fla. 1992), Judge Nimmons awarded 30% of the gross settlement fund after reviewing fee awards in similar cases citing, among others: Zinman v. Aemco Corp., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,325 (E.D. Pa. 1978) (fee equal to 50% of recovery); Howes v. Atkins, 668 F. Supp. 1021 (E.D. Ky. 1987) (fee equal to 40% of gross recovery); In re Franklin Nat'l Bank Sec. Litig., [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,571 (E.D.N.Y. 1980) (fee equal to 34% of recovery); Bello v. Integrated Resources, Inc., [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,731, at 98,471 (S.D.N.Y. 1990) (stating that the common range of fees is 20-50%). See also Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1297-98 (11th Cir. 1999) (affirming 33 1/3% common fund fee award by this Court); Gutter v. E.I. DuPont De Nemours, No. 95-2152-CIV-GOLD (S.D. Fla. May 30, 2003) (Gold. J.) (awarding 33 1/3% of \$77.5 million settlement), attached as Exhibit "E"; In re Relafen Antitrust Litig., No. 01-12239-WGY (D. Mass. Apr. 9,

⁸ See, e.g., In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 305 (1st Cir. 1995) ("[c]ontrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent"); Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000) (approved the use of percentage method); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir.), cert. denied, 516 U.S. 824 (1995) ("In common fund cases, a district judge can award attorneys' fees as a percentage of the fund recovered," and in prior cases "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 515-16 (6th Cir. 1993) (noting "the recent trend toward adoption of a percentage of the fund method," and permitting use of the "percentage of the fund method" in common fund cases); In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992) (fee award should not be based on "individual hours," but rather on the percentage that counsel "would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client"); Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) ("a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery"); Gottlieb v. Barry, 43 F.3d 474, 484 (10th Cir. 1994) (fee award should be calculated using the percentage method; "use of the lodestar in common fund cases is 'out of fashion'"); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases").

2004) (awarding 33 1/3% of \$175 million settlement fund), attached as Exhibit "F"; In re Buspirone Antitrust Litig., MDL No. 1413 (JGK) (S.D.N.Y. Apr. 11, 2003) (awarding 33 1/3% of \$220 million settlement fund), attached as Exhibit "G".

In 1995 and 1996, National Economic Research Associates, an economics consulting firm, conducted surveys of fee awards in class actions. Using data from 433 class actions, the study found that: "Regardless of case size, fees average approximately 32 percent of the settlement." Denise N. Martin et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* at 12-13 (NERA Nov. 1996) (hereinafter "*Recent Trends IV*"), attached as Exhibit "H". Another study released by the Federal Judicial Center in 1996 focused on class actions in four federal district courts: the Southern District of Florida, the Northern District of California, the Eastern District of Pennsylvania, and the Northern District of Illinois. The Federal Judicial Center study reported findings very similar to the NERA study: "Median rates ranged from 27% to 30%. Most fee awards in the study were between 20% and 40% of the gross monetary settlement." Thomas E. Willging, Laurel L. Hooper, and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* at 69 (Federal Judicial Center 1996), attached as Exhibit "I".

The Eleventh Circuit has observed that "[t]here is no hard fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." Camden I, 946 F.2d at 774. The Eleventh Circuit identified factors that it regarded as "appropriately used" in determining the proper amount of a fee award, including the factors adopted in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974): (1) the time and labor required; (2) the novelty and difficulty of the question involved; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 946 F.2d at 775. The Camden I court also included the time required to reach a settlement, whether there were substantial objections from class members, non-monetary benefits of the settlement, and the

economics involved in prosecuting a class action. Id. An application of these factors to this case confirms that the 33 1/3% fee requested here is clearly reasonable.⁹

a. The Contingent Nature of the Fee, the Financial Burden Carried by Class Counsel, and the Economics of Prosecuting a Complex Antitrust Case

A determination of a fair fee must include consideration of the undesirable characteristics of a contingent antitrust action, including the contingent nature of the fee, the contingent outlay of large out-of-pocket sums by plaintiffs' counsel, and the fact that the risk of failure and nonpayment in an antitrust case is extremely high. Class Counsel have received no compensation during the course of this more than six-year litigation and have also incurred very sizable expenses in litigating this case. As set forth in the attached affidavits, \$3,133,070.86 was collectively advanced by Class Counsel for out-of-pocket expenses. See Exhibits "A", "B" and "C" for a full description of the work performed and financial burdens carried.

Numerous cases recognize that attorneys' risk is "perhaps the foremost factor" in determining an appropriate fee award. Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 54 (2d Cir. 2000) (citation omitted); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result."). In Behrens v. Wometco Enter., Inc., 118 F.R.D. 534, 548 (S.D. Fla. 1988), aff'd, 899 F.2d 21 (11th Cir. 1990), the Court noted that:

Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer....

A contingency fee arrangement often justifies an increase in the award of attorneys' fees. This rule helps assure that the contingency fee arrangement endures. 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.

Id. (citations omitted) at 548. As Judge Nimmons explained in Ressler:

The Court is well aware that there are numerous contingent cases such as this where plaintiff's counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. Numerous cases recognize that

⁹ Where appropriate, Plaintiffs address below multiple, related factors within a specific subsection. Whether addressed in conjunction with other factors or separately, all 12 Johnson factors and the 4 additional factors specified by the Eleventh Circuit are addressed, except for "the nature and length of the professional relationship with the client" and "time limitations imposed by the client or circumstances" which are not applicable to this case.

the attorney's contingent fee risk is an important factor in determining the fee award In evaluating [the contingent fee] factor the Court will not ignore the pecuniary loss suffered by plaintiff's counsel in other actions where counsel received little or no fee.

149 F.R.D. at 656-57 (citations omitted).

Success before a jury in complex litigation is highly unpredictable. The history of antitrust litigation is replete with cases in which plaintiffs succeeded at trial on liability, but recovered no damages or very small damages at trial or after appeal. See, e.g., United States Football League v. National Football League, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only \$1.00 in damages"), aff'd, 842 F.2d 1335 (2d Cir. 1988). Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156 (1974), illustrates the risks faced by Class Counsel. Eisen was brought as an antitrust class action. After two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the putative class and their counsel recovered nothing.

The history of this case amply demonstrates the considerable risk undertaken by Class Counsel. At the time it was filed, there were no other related cases successfully challenging agreements to keep generics off the market like the ones prosecuted here. Moreover, the decisions by the Eleventh Circuit, reversing this Court's initial *per se* and class certification decisions, made the case even more risky and uncertain. Despite these decisions, Class Counsel continued to expend substantial time and out-of-pocket expenses without any guarantee of recovery to litigate against well-financed, determined adversaries who were represented by very able counsel. Even after Class Counsel obtained a ruling from the Court establishing that the Abbott/Geneva Agreement is a *per se* violation of the antitrust laws – a ruling which Defendants undoubtedly would have appealed – Plaintiffs are still required to prove causation and damages, neither of which is a foregone conclusion. See Sherman Act Class Plaintiff's Final Approval Brief at 3-5 (detailing the risks attendant to proving both the fact and amount of damages). The fact is that this case presented substantial risks when filed and still presents risks today.

b. The Requested Fees Reflect the Market Rate in Other Complex, Contingent Litigation

The percentage method of awarding fees in class actions is consistent with, and is intended to mirror, practice in the private marketplace where attorneys typically negotiate percentage fee arrangements with their clients. Courts are encouraged to look to the private marketplace in setting a percentage fee:

What should govern such [fee] awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases.

In re RJR Nabisco Sec. Litig., [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984, at 94,268 (S.D.N.Y. 1992).

In private litigation, attorneys regularly contract for contingent fees between 30% and 40% with their clients. See Phemister v. Harcourt Brace Jovanovich, Inc., 1984-82 Trade Cas. (CCH) ¶ 66,234 at 66,995 (N.D. Ill. 1984) (“Contingent fee arrangements in non-class action damage lawsuits are the simple method of paying the attorney a percentage of what is recovered for the client. The more the recovery, the more the fee. The percentages agreed on vary, with one-third being particularly common.”); Kirchoff v. Flynn, 786 F.2d 320, 323 (7th Cir. 1986) (observing that “40% is the customary fee in tort litigation” and noting, with approval, contract providing for one-third contingent fee if litigation settled prior to trial).

Indeed, Plaintiff LWD entered into a fee contract with several of Class Counsel for a 33 1/3% contingency, and supports Class Counsel’s application for such a fee from the Court. See Affidavit of LWD, attached as Exhibit “J”. In addition, Co-Lead and other Class Counsel regularly contract with their clients for contingent fees of 33 1/3% or greater in non-class cases. See Co-Lead Affidavit at ¶ 85, Exhibit “A”. As discussed above, an analysis by NERA of fee awards in class actions nationwide confirms that fees in class action cases do mirror the private market and “average approximately 32 percent of the settlement.” *Recent Trends IV*, at 12-13.¹⁰

Finally, the requested fee is consistent with awards in other complex direct purchaser antitrust actions involving the pharmaceutical industry and similar claims of delayed generic entry. See In re Relafen Antitrust Litig., No. 01-12239-WGY (D. Mass. April 9, 2004) (awarding 33 1/3% fee of a \$175 million settlement), Exhibit “F”; In re Buspirone Antitrust

¹⁰ Significantly, none of the Class members, which include sophisticated Fortune 500 companies like the national wholesalers, Medco and WalMart, voiced any objections to Class Counsel’s request for a 33 1/3% fee.

Litig., No. 01-CV-7951 (JGK) (S.D.N.Y. April 11, 2003) (awarding a 33 1/3% fee of a \$220 million settlement), Exhibit "G". Cf. In re Cardizem CD Antitrust Litig., No. 99-73259 (E.D. Mich. Nov. 25, 2002) (awarding 30% of a \$110 million settlement), attached as Exhibit "K".

c. The Novelty and Difficulty of the Questions at Issue

Antitrust class actions are inherently complex, and arguably the most complex class action to prosecute because the legal and factual issues are complicated and uncertain in outcome. In this case, Class Counsel were required to navigate the confluence of four highly technical and difficult areas of the law: antitrust law; patent law; the Hatch-Waxman statutes; and FDA regulatory law regarding approved and market entry of drug products. As detailed in the attached Co-Lead Counsel Affidavit, Class Counsel had to become familiar with the pharmaceutical industry, pharmaceutical economics, the Hatch-Waxman Amendments to the Food, Drug And Cosmetics Act, 21 U.S.C. §§ 301-392 (the "Amendments"), the Amendments' relationship to the patent laws, the Noerr-Pennington doctrine and the nature of FDA drug approval, and production and validation of drug products. Exhibit "A" at ¶¶ 73-76.

The complexity of the issues involved in Class Counsel's prosecution of this litigation supports the fees requested.

d. The Skill, Experience and Reputation of Class Counsel

Class Counsel includes some of the preeminent antitrust firms in the country with decades of experience in prosecuting complex actions.¹¹ This experience and skill were demonstrated by Class Counsel's effective prosecution of this action, including the beneficial settlement entered into with Defendants.

Notably, Class Counsel's efforts included: deposing witnesses; successfully asserting numerous motions to compel; working with expert witnesses on class certification, liability, causation and damages issues; coordinating discovery from numerous class members; obtaining, coding and analyzing hundreds of thousands of documents; briefing and arguing two appeals to the Eleventh Circuit; briefing numerous *Daubert* motions; achieving a partial summary judgment ruling that the Abbott/Geneva Agreement exceeded the scope of Abbott's patent rights and is a *per se* violation of the antitrust laws; effectively preparing this case for trial; and successfully negotiating the settlement. Such a *per se* ruling on summary judgment on behalf of Plaintiffs is

¹¹ The background, experience, accomplishments and qualifications of Class Counsel are summarized in the firm resumes and biographies attached to the affidavits submitted herewith as Exhibit "C".

highly unusual and highly significant, since the remaining issues the Class must prove are narrowed to causation and damages. Plaintiffs' counsel in very few antitrust class actions have been able to obtain such results for the Class. Moreover, Class Counsel obtained this result despite the skill and advocacy demonstrated by Defendants' counsel in this litigation.¹²

e. The Excellent Result Achieved

The result achieved is a major factor to consider in making a fee award. Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) ("critical factor is the degree of success obtained"); see also Behrens, 118 F.R.D. at 547-48 ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."); Goldberger, 209 F.3d at 55 ("the quality of representation is best measured by results"). The results achieved in this case fully support the requested fee. The settlements obtained by Class Counsel in this litigation, \$72.5 million in cash from Defendants Abbott and Geneva and \$2,072,327 from Defendant Zenith, are a substantial percentage – 40% to 60% – of the total amount of overcharges suffered by the Class during the Class period, as estimated by the economist Plaintiffs retained to compute damages to the Class.¹³ This recovery exceeds the results achieved in most antitrust actions. See, e.g., In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 258 (D. Del. Aug. 30, 2002), aff'd, 391 F.3d 516 (3d Cir. 2004) (finding that settlement amount which represented 33% of the best possible recovery was "a very reasonable settlement when compared with recovery percentages in other class actions"); Faucett Assocs., Inc. v. American Tel & Tel. Co., No. 81-1804, 1985 WL 5199, *6 (D.D.C. Dec. 16, 1985) (settlement of an antitrust class action that created a fund that was approximately 50% of the potential recovery was "well above the range which many courts have approved as fair, reasonable and adequate."), attached as Exhibit "L".

¹² The Court also should consider the quality of the opposition when assessing the quality of Class Counsel's representation. Ressler, 149 F.R.D. at 654. In this case, Defendants were principally represented by two of the most respected litigation firms in the country: Munger, Tolles & Olson LLP and White & Case.

¹³ As described in Sherman Act Class Plaintiffs' Plan of Allocation, Class Counsel's economist, Dr. Leitzinger, opined that, under the generic entry scenario that Class Counsel believe is the most likely scenario in the "but for" world, aggregate Class overcharge damages range from \$128 million to \$190 million. Thus, the total settlement amount in this case of \$74,572,327 amounts to between approximately 40% to 60% of the Class's overcharge damages. See Plan of Allocation for Sherman Act Class Plaintiffs at 7-8. Of course, if this case proceeded to trial, and Defendants convinced the jury that either Geneva or Mylan would have entered the market later than these dates, the Class's aggregate damages would have been significantly lower than \$128-\$190 million (and the percentage of recovery represented by this settlement would have been significantly higher).

f. The Time and Labor of Counsel

Class Counsel have been litigating this case for over six years. Thousands of hours were spent obtaining admissible testimony from witnesses, obtaining a partial summary judgment establishing that Defendants' Agreement is a *per se* violation of the antitrust laws, pursuing class certification, developing a case against Defendants, obtaining relevant and critical documents from Defendants and third parties, obtaining damages information, working with experts and negotiating and documenting the settlement. As reflected in Exhibit "B", Class Counsel have expended over 51,000 hours, representing \$19,030,686.70, over the course of the litigation. The significant investment of time required by this action necessarily precluded Class Counsel's opportunity to work on other matters.¹⁴

There is no question that the considerable amount of time and effort expended by Class Counsel resulted in a meaningful settlement.

g. The Reaction of the Class

Prior to preliminary approval by this Court of the settlement, Class Counsel contacted some of the largest Class members (including, e.g., the five largest), all of whom expressed support for the settlement. Following preliminary approval of the settlement and the form and manner of notice to the Class, individual notice was mailed to Class members and posted on Class Counsel's websites. The notice informed potential Class members that Class Counsel would be seeking fees of up to 33 1/3% of the settlement fund, plus interest, and incentive awards for each of the two named Plaintiffs.

Class Counsel have received no objections from the Class to date, thus indicating the overwhelming support of the Class for the award of fees and expenses requested. This is a strong factor supporting approval of the settlement. See *Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (even when 29 members of a 281 person class (i.e., 10% of the class) objected, the response of the class as a whole "strongly favors [the] settlement"); *Elkins v. Equitable Life Ins. of Iowa*, No. CIV96-296-CIV-7-17B, 1998 WL 133741, at *28 (M.D. Fla. Jan. 27, 1998) ("[t]here have been only six objections received from a Class of approximately 109,000 policy owners, which is a *de minimus* number" relative to the size of the class), attached as Exhibit "N".

¹⁴ Although Class Counsel spent a considerable amount of time prosecuting this litigation, Class Counsel were very efficient and utilized weekly conference calls to ensure there was no duplication of efforts. An example of Class Counsel's weekly agendas for these calls is attached as Exhibit "M".

The support of the fee request by Class members here is even more significant. Where, as here, the Class is comprised of many large, sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of such objections "indicates the appropriateness of the [fee] request." Cimarron Pipeline Construction, Inc. v. Nat'l Council on Compensation Ins., Nos. Civ. 89-822-T, Civ. 89-1186-T, 1993 WL 355466, at *1-2 (W.D. Okla. June 8, 1993), attached as Exhibit "O". See also In re M.D.C. Holdings Sec. Litig., 1990 WL 454747, at *10 n.5 (lack of objections "is significant since the class includes sophisticated financial institutions...who have counsel available to advise and represent them and submit objections to either the settlement or the fees and expenses"), Exhibit "D"; In re Sequoia Systems, Inc. Sec. Litig., Civ. A. No. 93-11331-WD, 1993 WL 616694, at *1 (W.D. Mass. Sept. 10, 1993) (finding "influential" the fact that no class member had objected to the fee request of one-third), attached as Exhibit "P".

h. Lodestar Cross-Check

Class Counsel's requested fee award is also highly reasonable when analyzed in light of a lodestar crosscheck. See Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1298 (11th Cir. 1999) ("[W]hile we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison."). Class Counsel have collectively expended \$19,030,686.70 in time in their hard-fought prosecution of this litigation over the past six years. See Summary of Class Counsel's Total Lodestar and Expenses, Exhibit "B". A 33 1/3% fee award would equate to a lodestar multiplier of approximately 1.27. Much higher multipliers have been accepted as fair and reasonable in complex matters such as this one. See, e.g., Weiss v. Mercedes-Benz of N. Am. Inc., 899 F. Supp. 1297, 1304 (D.N.J. 1995), aff'd, 66 F.3d 314 (3d Cir. 1995) (awarding a multiplier of 9.3); In re RJR Nabisco, Inc. Sec. Litig., 88 Civ. 7905 (MBM), 1992 WL 210138 at *5, 8 (S.D.N.Y. Aug. 24, 1992) (awarding a percentage-based fee representing 6 times lodestar), attached hereto as Exhibit "Q".

C. Class Counsel's Expenses Are Reasonable and Were Necessarily Incurred to Achieve the Benefit Obtained

As described below, substantial out-of-pocket expenses have been incurred in prosecuting this litigation. See Summary of Class Counsel's Total Lodestar and Expenses, attached as Exhibit "B". (Class Counsel's expenses are categorized in Class Counsel's individual firm affidavits, attached hereto as Exhibit "C").

It is well-settled that counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses reasonably incurred in creating the fund. See, e.g., Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 389-98 (1970), cert. denied, 434 U.S. 922(1977); Gottlieb v. Wiles, 150 F.R.D. 174, 185 (D. Colo. 1993), rev'd on other grounds sub nom., Gottlieb v. Barry, 43 F.3d 474 (10th Cir. 1994) ("An award of expenses is warranted to class counsel under the common fund doctrine."). The appropriate analysis to apply in deciding whether expenses are compensable in a common fund case is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); Miltland Raleigh-Durham v. Myers, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted). The categories of expenses for which Class Counsel seek reimbursement here are the type of expenses routinely charged to hourly fee-paying clients and, therefore, should be reimbursed out of the common fund.

A large component of these expenses consists of fees paid to experts and consultants who were instrumental in, among other things, helping Plaintiffs seek class certification, establish causation, calculate damages, refute Defendants' purported pro-competitive justifications for the Agreement (prior to the Court's latest *per se* opinion), refute Defendants' technical defenses regarding pharmaceutical manufacturing and validation, and negotiate this favorable settlement for the Class. These expert expenses are reasonable and were necessarily incurred in obtaining this result for the Class.

Other expenses include the costs of computerized research. These are the actual charges for computerized factual and legal research services such as LEXIS/NEXIS and Westlaw. It is standard practice for attorneys to use LEXIS and Westlaw to assist them in researching legal issues. Indeed, courts recognize that these tools create efficiencies in litigation and, ultimately, save clients money. In approving expenses for computerized research, the court in Gottlieb v. Wiles, 150 F.R.D. 174, 186 (D. Colo. 1993), rev'd on other grounds sub nom., Gottlieb v. Barry, 43 F.3d 474 (10th Cir. 1994), underscored the time-saving attributes of computerized research as

a reason reimbursement should be encouraged. The court also noted that hourly fee-paying clients reimburse counsel for such computerized legal research. *Id.*

In addition, Class Counsel were required to travel in connection with this litigation for depositions, hearings and meetings with witnesses and consultants, and thus incurred costs for meals and lodging. The expenses in this category are reasonable in amount and are properly charged against the fund created. See *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 842 F. Supp. 733, 746 (S.D.N.Y. 1994); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F. Supp. 84, 86 (S.D.N.Y. 1990).

Other expenses for which Class Counsel are seeking reimbursement (i.e., copying costs, postage, secretarial overtime) are also customarily charged to paying clients. See *Brown v. Pro Football, Inc.*, 839 F. Supp. 905, 916 (D.D.C. 1993) (citing *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989), for the proposition that “[p]laintiffs’ out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, Westlaw research, secretarial overtime, and counsels’ travel expenses are routinely billed to fee-paying clients, and thus are all compensable as part of a reasonable attorneys’ fee”).¹⁵

The expenses incurred in this litigation are described in detail in the accompanying affidavits, Exhibits “A”-“C”. Class Counsel believe that the expenses were all reasonably incurred, are reasonable in amount and should be reimbursed in full.

D. Incentive Awards for the Named Plaintiffs are Appropriate and Reasonable

Class Counsel requests approval of incentive awards in the amount of \$75,000, in total, for the two named Plaintiffs, Valley Drug and LWD. The Notice to the Class advised Class members that Class Counsel would apply for incentive awards for the named Plaintiffs. To date, no objections to such awards (or any other terms of the settlement) have been received.

The named Plaintiffs diligently and completely fulfilled their obligations as representatives for the Class. They stepped forward and pursued the Class’s interests by filing suit on behalf of the members of the Class and undertaking the responsibilities attendant upon

¹⁵ In the affidavits of Class Counsel, attached hereto as Exhibit “C”, Class Counsel list “contribution to the litigation fund” as an expense. Class Counsel made individual contributions to this fund, which was in turn used to pay such reasonable expenses as expert fees, scanning and copying costs for Defendants’ document productions, filing fees and court reporting fees. The total amount of the “contributions to the litigation fund” for which Class Counsel seek reimbursement, as set forth in Exhibit “B”, have been used in payment for such expenses.

serving as a named plaintiff, including being deposed (LWD was deposed twice) and responding to numerous document requests and interrogatories.¹⁶

Numerous courts have found it appropriate to specially reward named class plaintiffs for the benefits they have conferred. See REVCO Sec. Litig., Arsam Co. v. Salomon Bros., Inc., [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,956 (N.D. Ohio 1992) (\$200,000 to the named plaintiff); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) (\$50,000 each to 6 named plaintiffs); In re Dun & Bradstreet Credit Services Customer Litig., 130 F.R.D. 366 (S.D. Ohio 1990) (two incentive awards of \$55,000 and three incentive awards of \$35,000); Gutter v. E.I. DuPont De Nemours, No. 95-2152-CIV-GOLD (S.D. Fla. May 30, 2003) (Gold, J.) (incentive award of \$35,000), Exhibit "E".

For these reasons, Class Counsel submit that the requested incentive awards for the two named Plaintiffs are both appropriate and reasonable in amount.

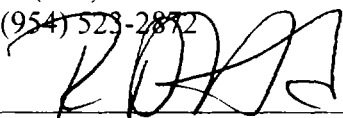
IV. CONCLUSION

For the reasons set forth above, Class Counsel respectfully request that the Court approve this fee and expense application and enter an order awarding Co-Lead Counsel a fee of \$24,166,667 (33 1/3% of the settlement) plus accrued interest, for allocation among the various counsel for the Class that have participated in this litigation, and \$3,133,070.86 in out-of-pocket expenses. Class Counsel also request that the two named Plaintiffs be awarded \$75,000.00, in total, for their participation in the prosecution of this action.

April 5, 2005

Respectfully submitted,

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¹⁶ Moreover, the named Plaintiffs worked closely with Class Counsel in our efforts to learn the intricacies of the pharmaceutical industry, refute Defendants' arguments, establish Plaintiffs' claims, and negotiate the settlement (e.g., Gayle White, CEO of Plaintiff LWD, attended and participated in the mediation sessions).

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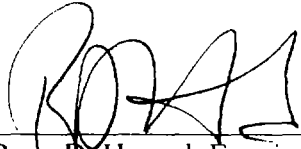
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail (with attachments) and Electronic Mail (without attachments) to all Counsel of Record on the 6th day of April, 2005.

By: _____


Rene D. Harrod, Esquire
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