

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE TRICOR DIRECT PURCHASER
ANTITRUST LITIGATION

CASE NO. 05-340 (SLR)
(consolidated)

THIS DOCUMENT RELATES TO:

Louisiana Wholesale Drug Co., Inc. (05-340)
Rochester Drug Co-Operative, Inc. (05-351)
Meijer, Inc., et al. (05-358)

**BRIEF IN SUPPORT OF THE DIRECT PURCHASER
CLASS'S MOTION FOR
FINAL SETTLEMENT APPROVAL**

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INTRODUCTION AND OVERVIEW

Direct Purchaser Class Plaintiffs, Louisiana Wholesale Drug Co., Inc. (“LWD”), Rochester Drug Co-Operative, Inc. (“RDC”), Meijer, Inc. and Meijer Distribution, Inc. (together “Meijer”) and the Class (collectively, “Plaintiffs”),¹ respectfully submit this Brief in Support of the Direct Purchaser Class’s Motion for Final Settlement Approval, pursuant to Fed. R. Civ. P. 23(e). Specifically, Plaintiffs seek final Court approval of the settlement of this antitrust class action (the “Class Action”),² as embodied in the Settlement Agreement dated January 6, 2009 (the “Settlement”).³ As detailed below, and in the Affidavit of Lead Counsel Barry S. Taus, Esq. (the “Taus Aff.”),⁴ the Settlement, which provides for a cash payment of \$250,000,000.00, plus interest, is an outstanding recovery for the Class, and should be approved as fair, reasonable and adequate pursuant to the Third Circuit’s *Girsh* factors. *See Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) (articulating nine-factor test for approval of class settlements); *see also In re Warfarin Sodium*

¹ The certified Class includes all persons or entities in the United States who purchased TRICOR® in any form directly from Abbott Laboratories (“Abbott”), Fournier Industrie et Sante or Laboratories Fournier S.A. (“Fournier”) (collectively, “Defendants”) at any time during the period April 9, 2002 through August 18, 2008, subject to certain exclusions as set forth in the Court’s order preliminarily approving the settlement dated January 8, 2009 (the “Direct Purchaser Class”). *See* D.I. No. 529.

² The Class Action consolidated cases styled *Louisiana Wholesale Drug Co., Inc. v. Abbott Laboratories, et al.*, C.A. No. 05-340; *Rochester Drug Co-Operative, Inc. v. Abbott Laboratories, et al.*, C.A. No. 05-351; and *Meijer Inc., et al. v. Abbott Laboratories, et al.*, C.A. No. 05-340.

³ The Settlement was previously provided to the Court as “Exhibit A” to the Direct Purchaser Plaintiffs’ Brief in Support of their Motion for Preliminary Approval of Settlement, Approval of Form of Notice, and Setting of Final Settlement Schedule Hearing, filed on January 6, 2009. *See* D.I. No. 527.

⁴ The Taus Affidavit (D.I. No. 532) was previously submitted to this Court on March 9, 2009, in conjunction with the Direct Purchaser Class’s Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses and Incentive Awards to the Class Representatives (D.I. No. 531).

Antitrust Litig., 212 F.R.D. 231 (D. Del. 2002), *aff'd*, 391 F.3d 516 (3d Cir. 2004) (same).

The \$250 million Settlement is the largest of any direct purchaser antitrust class action litigated in the Hatch-Waxman context. It represents the culmination of over three-and-one-half years of vigorously contested litigation. Plaintiffs reached their agreement to resolve this litigation with Defendants only after Class Counsel⁵ had, among other things: (a) conducted extensive discovery, including obtaining and reviewing over 1.2 million pages of documents and participating in over 60 depositions; (b) retained and worked with numerous expert witnesses in the areas of cardiology and lipid disorders, biostatistics, pharmacodynamics and pharmacokinetics, the FDA regulatory regime regarding branded and generic prescription drugs, pharmaceutical manufacturing, policy and operation of the Hatch-Waxman Act and state substitution laws, antitrust and pharmaceutical economics, the calculation of damages, and patent law; (c) engaged in significant motion practice, which included the defeat⁵ of Defendants' motions to dismiss and for summary judgment and a successful motion for class certification; (d) conducted comprehensive trial preparations; (e) commenced trial; and (f) engaged in protracted arm's-length negotiations with Defendants. *See Warfarin*, 212 F.R.D. at 255 (stating favorably that "class counsel pursued this litigation for over three years").

The Settlement has received overwhelming support from the Class. The March 23 deadline

⁵ The Court appointed Garwin Gerstein & Fisher, L.L.P., as Lead Counsel and as a member of the Executive Committee, along with the firms of Berger & Montague, P.C., Odom & Des Roches, L.L.P., The Smith Foote Law Firm (formerly Percy, Smith & Foote), and Cohen, Milstein, Hausfeld & Toll (which is now known as Cohen Milstein Sellers & Toll). Kaplan, Fox & Kilsheimer, L.L.P., was substituted for Cohen Milstein midway through the litigation. Additional class counsel that actively participated in the case include Heim Payne & Chorush, L.L.P. (formerly Conley, Rose & Tayon), Vanek, Vickers & Masini, L.L.P., and Delaware counsel Rosenthal, Monhait & Goddess, P.A.

for filing objections to the Settlement, as well as to Class Counsel's request for attorneys' fees, reimbursement of expenses and incentive awards for the named Class representatives, has passed without a single objection having been filed. This is quite significant given that the Class consists of sophisticated business entities, many of whom have participated in numerous Hatch-Waxman antitrust cases as members of the direct purchaser class and have closely monitored these cases, including this one. *See In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, *6 (D.N.J. 2005) ("The absence of objections from the sophisticated Class is particularly significant here because many Class members here have also been members of classes certified in other pharmaceutical antitrust actions...and are therefore well suited to evaluate a proposed settlement in an action of this type");⁶ *Warfarin*, 212 F.R.D. at 254-55 ("The court finds the low number of objections from [third-party payors] particularly significant, because these are sophisticated businesses with, in some cases, large potential claims, and they could be expected to object to a settlement they perceived as unfair or inadequate").

Not only are there no objections, but the Settlement has received *affirmative support* from Class members whose claims cover over 70% of the Class's aggregate purchases of Tricor. For example, each of the "Big 3" national pharmaceutical wholesalers, through their longtime antitrust counsel, has communicated its express support for the Settlement. Cardinal Health, Inc. ("Cardinal"), the Class member with the second largest stake in this case, stated in a letter to this Court through Thomas Long, Esq., of Baker & Hostetler:

The settlement in this case -- \$250 million dollars -- is an excellent result for the direct purchaser class in what was hard-fought, complex, and expensive

⁶ *Remeron* was a Hatch-Waxman direct purchaser antitrust class case litigated by the same class counsel as in this case.

litigation, representing to our knowledge the first-ever successful conclusion of any antitrust case in the pharmaceutical industry alleging that a defendant's "product-hopping" was anticompetitive. Simultaneously, this is the highest-ever recovery for a direct purchaser class in any Hatch Waxman pharmaceutical antitrust class action alleging impeded or delayed generic competition of which we are aware. That juxtaposition speaks to the excellent result the proposed settlement represents.

Affidavit of Adam Steinfeld ("Steinfeld Aff.") at Ex. 5, p. 2.⁷ Another of the largest Class members, AmerisourceBergen Corporation ("Amerisource"), through Steven Bizar, Esq., of Buchanan Ingersoll & Rooney, similarly stated that Amerisource "is satisfied that the proposed settlement is fair and adequate." *Id.* at Ex. 4. And antitrust counsel for McKesson, Inc. ("McKesson") -- the Class member with the single largest claim -- authorized Class Counsel to represent that McKesson strongly supports approval of the Settlement.⁸ *See* Taus Aff. at ¶ 6.

The judgment of these sophisticated entities and their outside antitrust counsel is especially meaningful because these entities have a particular ability to assess the reasonableness of the Settlement, based upon their experience as class members in numerous Hatch-Waxman antitrust class actions, including six such actions that have previously settled. Likewise, antitrust counsel for these entities have monitored this case and communicated with Class Counsel about it and the Settlement. Since these entities have the largest financial stake in the Settlement, they have the greatest incentive to critically assess the Settlement and object if they feel it is unreasonable or inadequate.

Moreover, a group of fourteen regional pharmaceutical wholesalers, all of whom are also

⁷ The Steinfeld Affidavit (D.I. No. 533) was previously submitted to the Court on March 9, 2009, in conjunction with the Direct Purchaser Class's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards to the Class Representatives (D.I. No. 531).

⁸ Together, McKesson, Cardinal, and Amerisource are known in the pharmaceutical industry as the

sophisticated Class members (and two of whom are named Class representatives, LWD and RDC), by and through their trade group, OptiSource, LLC (“OptiSource”), has also affirmatively expressed support for the Settlement. Specifically, OptiSource has stated that its membership unanimously “believes that the proposed settlement constitutes an outstanding recovery,” and therefore “express[es] strong support” for its approval. Steinfeld Aff. at Ex. 6, p. 1 (D.I. No. 533). Each of the three named Class representatives has also filed an individual affidavit supporting the Settlement. *Id.* at Exs. 1-3.⁹

In addition, based on Class Counsel’s experience litigating Hatch-Waxman antitrust cases on behalf of direct purchaser classes for over a decade, we believe this recovery is an outstanding resolution to this complex and novel case. Absent the Settlement, continued litigation would have resulted in enormous additional expenditures of resources over the course of many years, with no assurance that a better recovery -- or any recovery-- would be achieved for the Class. *See Warfarin*, 212 F.R.D. at 254 (discussing complexity, expense and likely duration of litigation absent settlement).

Furthermore, prevailing in the liability and damages jury trials, and subsequent appeals, was by no means assured, as there were many material risks to the Class in litigating this case. *Id.* at 255-56 (discussing risks of establishing liability and damages). The perils of litigating antitrust cases generally have been recognized by many courts over the years. *See, e.g., In re Linerboard Antitrust Litig.*, 2004 WL 1221350, *10 (E.D. Pa. 2004), citing *In re Motorsports Merch. Antitrust Litig.*, 112

“Big 3” because they are the three largest wholesalers of prescription drugs in the United States.

⁹ The Big 3, OptiSource, and the named Class representatives constitute affirmative support from Class members that made over 70% of the Tricor purchases at issue in this case, and who would collectively be entitled to a similar percentage recovery from the Settlement Fund.

F. Supp. 2d 1329, 1337 (N.D. Ga. 2000) (“An antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome”).

These risks were particularly prevalent in this case, where (a) Plaintiffs’ “product hopping” liability theory had not been previously applied in the Hatch-Waxman antitrust context, and (b) the bifurcation of liability and damages meant that, absent the Settlement, Plaintiffs would have to succeed on multiple post-trial motions and appeals -- assuming Plaintiffs were able to obtain favorable jury verdicts on both liability and damages. Class Counsel are very well acquainted with these perils, particularly in the context of litigating Hatch-Waxman antitrust cases.¹⁰

This was a hotly contested case in which the Plaintiffs believed they had a strong case to present, but able counsel for the Defendants presented serious defenses to all aspects of Plaintiffs’ liability and damages case. Several of the liability and damages issues involved complicated fact sets, and were of a highly technical nature which were likely to come down to a “battle of the experts” with no “guarantee whom the jury would believe.” *Warfarin*, 212 F.R.D. at 256. Further, trial coordination with several other plaintiff groups added an additional layer of complexity because some of the theories and themes emphasized by some of these other plaintiff groups were not entirely consistent or compatible with those of the Class.

In light of these complexities and risks, and the fact that continued litigation would have

¹⁰ By way of example, on the same day that trial opened in this case, lawyers from many of the firms constituting Class Counsel were opening another Hatch-Waxman antitrust jury trial on behalf of a direct purchaser class in the Southern District of New York. That case did not settle, but instead returned a defense verdict. *See Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis, et al.*, C.A. No. 07-cv-7343 (S.D.N.Y.) (Baer, J.), D.I. No. 280 (Judgment). Plaintiffs’ motion for a new trial or judgment as a matter of law is pending.

lasted many years at an enormous additional cost, the Settlement represents an outstanding recovery. The Settlement represents a recovery ranging between five and ten times the amount of overcharges calculated by the Defendants' expert, and between eleven and sixty-one percent of the overcharges calculated by the Class's economist (or implied by his model). *See* Declaration of Jeffrey Leitzinger, Ph.D. ("Leitz. Decl.") at ¶¶ 22-24.¹¹ This recovery range is reasonable in the context of complex class actions -- particularly in an antitrust case as novel and complex as this one. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001) (noting that typical recoveries in complex securities class actions range from 1.6%-14% of estimated damages); *Linerboard*, 2004 WL 1221350,*5 (E.D. Pa. 2004) (collecting cases in which courts have approved settlements of 5.35% to 28% of estimated (single) damages in complex antitrust actions); *Warfarin*, 212 F.R.D. at 257-58.

For these reasons, as well as those stated below and in the Taus Affidavit (D.I. No. 532), Plaintiffs and Class Counsel request that the Court approve the Settlement as fair, reasonable and adequate pursuant to Fed. R. Civ. P. 23(e).

THE FORM AND MANNER OF DISSEMINATION OF NOTICE

On August 18, 2008, the Court issued an order and memorandum opinion certifying the Class of Direct Purchasers. *See* D.I. No. 435-36. Thereafter, Class Counsel prepared a notice for Class

¹¹ Dr. Leitzinger's declaration, filed contemporaneously herewith, outlines his experience with antitrust economics and economic damages generally, and in conjunction with Hatch-Waxman direct purchaser class action cases specifically; the range of damages in this case; his methodology of calculating damages; the Defendants' challenges to Dr. Leitzinger's methodology and the competing range of damages calculated by Defendants' expert, Margaret Guerin-Calvert; and the proposed Plan of Allocation.

members that explained the rights and obligations involved in participating in this Class Action (“Certification Notice”) and retained a third-party administrator to communicate with the Class. After negotiations with Defendants and subsequent motion practice regarding the form and content of the notice, on September 16, 2008, the Court approved the Certification Notice. That notice was then (a) mailed to all of the more than 400 potential Class members identified through Defendants’ records, and (b) published in *The Pink Sheet*, an industry publication likely to be seen by potential Class members. *See* D.I. No. 453. Thereafter, only one (1) entity which had not previously brought suit in this Court against Defendants elected to opt out of the Class. *See* Affidavits of Adam M. Steinfeld Regarding Certain Notice Matters (D.I. Nos. 503 & 518).

After commencement of the liability jury trial, the parties advised the Court on November 12, 2008, of the proposed Settlement. On January 6, 2009, Class Counsel submitted a proposed Notice of Class Action Settlement (“Settlement Notice”) and a memorandum in support of preliminary approval of the Settlement describing its terms, setting out a proposed plan and schedule for providing notice of the Settlement to the Class, and setting deadlines for Class members to lodge objections and for Class Counsel to file the various settlement approval papers.¹² *See* D.I. Nos. 526-28. On January 8, 2009, the Court preliminarily approved the proposed Settlement and the form and substance of the Settlement Notice, and directed that the Settlement Notice be sent to the Class. *See* D.I. No. 529.

¹² Although an enforceable Memorandum of Understanding regarding the general terms of the agreement between the Class and Defendants was executed during the early morning hours of November 12, 2008, negotiations ensued for another month-and-a-half before the final terms of the Settlement were reached.

Pursuant to the terms of the Settlement, twelve business days after preliminary approval, Defendants paid \$250 million into an escrow account held in trust at Citizens Bank, which is earning interest for the benefit of the Class.¹³

On January 28, 2008, the Settlement Notice was sent via first class mail to the same entities that had been identified as potential Class members when the Certification Notice had been sent. The Settlement Notice advised Class members of the terms of the Settlement and of their right to object to (a) the Settlement; (b) the Plan of Allocation; and (c) the requested awards of attorneys' fees and expenses, and incentive awards to the named Class representatives.¹⁴ The Settlement Notice also described how to object and that any objection must be received no later than March 23, 2009, and sent to the Court, the Claims Administrator as well as Class Counsel and counsel for Defendants. The Notice further advised Class members that if the proposed Settlement is approved, Defendants would be released from any liability to Class members arising out of conduct alleged in the Complaint.¹⁵ As indicated above, with the objection deadline having now passed, not a single Class member has lodged an objection.

¹³ Due to the economic climate, an interest-bearing escrow arrangement was not available until February 12, 2009. As of the date of this filing, the Settlement proceeds have earned \$110,479.47 in interest.

¹⁴ Defendants' counsel elected to serve notice of the Settlement on state and federal officials pursuant to the Class Action Fairness Act of 2005 ("CAFA"). Codified at 28 U.S.C. § 1715. Such notice was served within ten days of filing of Plaintiffs' motion for preliminary approval of the Settlement. *See* D.I. No. 526. Assuming, *arguendo*, that CAFA applies to the instant case, an order granting final approval of a proposed settlement may be issued, under CAFA, anytime after April 16, 2009 (*i.e.*, 90 days after the last date on which the federal and state officials were notified of the Settlement). *See* 28 U.S.C. § 1715(d).

¹⁵ *See* Affidavit of Faye Hutsell, Exhibit "9" to the Steinfeld Affidavit (D.I. No. 533) (certifying that the Notice was mailed to all potential Class members and attaching a copy of the Notice).

ARGUMENT

I. Settlements of Class Actions are Encouraged

It is well-settled that courts favor and encourage settlements of lawsuits. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *In re General Motors Corp. Pick-Up Truck Fuel Tank Product Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). Courts particularly encourage settlements in complex litigation because they promote the interest of judicial economy. *General Motors*, 55 F.3d at 784 (“The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation”); *Warfarin*, 212 F.R.D. at 254 (“there is an overriding public interest in settling and quieting litigation, particularly in class actions”).

II. The Proposed Settlement Is Fair, Reasonable and Adequate

A. Standards for Court Approval of a Settlement

Federal Rule of Civil Procedure 23(e) provides, in pertinent part:

The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

Fed. R. Civ. P. 23(e). The Third Circuit has interpreted this rule to require courts to “independently and objectively analyze the evidence and circumstances before it in order to determine the settlement is in the best interest of those whose claims will be extinguished.” *General Motors*, 55 F.3d at 785; *Warfarin*, 212 F.R.D. at 254. It has also been recognized that the court’s duty is akin to a fiduciary duty “of ensuring that the settlement is fair and not a product of collusion.” *General Motors*, 55 F.3d at 805. But, “the function of a court reviewing a settlement is neither to rewrite the settlement

agreement reached by the parties nor to try the case by resolving issues left unresolved by the settlement.” *Remeron*, 2005 WL 3008808, *4, citing *Byran v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974).

The Third Circuit has detailed a list of factors a district court should consider in evaluating whether a proposed settlement is fair, adequate and reasonable, including:

(1) the complexity, expense and likely duration of the litigation ...; (2) the reaction of the class to the settlement ...; (3) the stage of the proceedings and the amount of discovery completed ...; (4) the risks of establishing liability ...; (5) the risks of establishing damages ...; (6) the risks of maintaining the class action through trial ...; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery ...; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation...

Girsh, 521 F.2d at 157; *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006); *General Motors*, 55 F.3d at 785. These are known as the “*Girsh* factors.”

The *Girsh* factors are not an exhaustive list of those that can be considered by the Court. As discussed in more detail below at pp. 26-28, the Third Circuit has noted a few additional factors that may be considered by the district court if appropriate given the facts and circumstances of a particular case. See *AT&T*, 455 F.3d at 165, citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 (3d Cir. 1998), *cert denied*, 525 U.S. 1114 (1999).

Whether to grant final approval to a settlement is left to the “sound discretion of the district court.” *Prudential*, 148 F.3d at 317. Due to the district court’s “proximity to the parties and to the nuances of the litigation,” the Third Circuit gives “great weight to the [district] court’s factual findings.” *Id.*, citing *Girsh*, 521 F.2d at 156 and *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1305-06 (3d Cir. 1993); *Warfarin*, 391 F.3d at 535.

An evaluation of the *Girsh* factors (and other potentially relevant factors) demonstrates that the Settlement is clearly fair, reasonable and adequate.

B. This Settlement is Presumptively Fair

The Third Circuit has held that “[a]n initial presumption of fairness for the settlement is established if the court finds that (1) the negotiations occurred at arm’s-length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.” *Warfarin*, 212 F.R.D. at 254; *Cendant*, 264 F.3d at 233 n.18.

As detailed below and in the Taus Affidavit, the Settlement is clearly entitled to this initial presumption of fairness, as (a) the settlement negotiations were hard-fought and arm’s-length (Taus Aff. at ¶¶ 84-86); (b) they concluded only after discovery was complete and the liability jury trial began -- thus the parties were fully aware of the strengths and weaknesses of their respective cases (*id.* at ¶¶ 4, 57-83); (c) counsel on both sides are highly experienced in complex antitrust and pharmaceutical class action cases (*see* D.I. No. 529, Preliminary Approval Order, noting that the Settlement “was arrived at by arm’s-length negotiations by highly experienced counsel after three years of litigation and the commencement of trial”); and (d) as mentioned above, not a single Class member has objected to the Settlement -- to the contrary, the Settlement has received explicit and affirmative support from sophisticated Class members who have an interest in over 70% of the Settlement Fund. As a result, the Settlement is presumptively fair.

C. The *Girsh* Factors Support Final Approval of the Settlement

1. Complexity, expense and likely duration of litigation

“Th[e first *Girsh*] factor captures ‘the probable costs, in both time and money, of continued

litigation.” *Warfarin*, 212 F.R.D. at 254, quoting *Cendant*, 264 F.3d at 233. “Courts must balance a proposed settlement against the enormous time and expense of achieving a potentially more favorable result through further litigation.” *Remeron*, 2005 WL 3008808, *4, citing, *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1332 (S.D. Fla. 2001). Here, in view of the long litigation road already traveled and yet to be traveled absent the Settlement, this factor clearly supports approval of the Settlement. *See, e.g., Warfarin*, 212 F.R.D. at 254.

As detailed in the Taus Affidavit, this complex case has already been long-lived and hard-fought for over three-and-one-half years. *See generally* Taus Affidavit (D.I. No. 532). Through this process, Class Counsel have worked more than 45,000 hours and incurred expenses of more than \$3.5 million. *Id.* at ¶¶ 100-02; Corrected Supplemental Affidavit of Lead Counsel Barry S. Taus, Esq. at ¶ 4, filed contemporaneously herewith.¹⁶

If the case was not resolved through this Settlement, Plaintiffs would have continued the complex liability jury trial to verdict. Regardless of the outcome of that trial (*i.e.*, regardless of a Plaintiffs’ or Defendants’ verdict), a lengthy post-trial motion and appellate process would have ensued. Given the size and complexity of the case, this process likely would have included multiple appeals to the Third Circuit and Supreme Court on multiple issues, including the jury’s verdict, the jury instructions, the rules of law set out in Judge Jordan’s motion to dismiss opinion and this Court’s summary judgment orders, and this Court’s class certification opinion.

Assuming that Plaintiffs’ case still remained intact after all appeals regarding these liability

¹⁶ The correct expense amount of \$3,590,415.82 is reflected in the Corrected Supplemental Affidavit of Lead Counsel Barry S. Taus, Esq. Due to a mathematical calculation error, an incorrect figure was stated in the original Supplemental Affidavit of Barry S. Taus, Esq.

issues (and perhaps others) -- a process which could have taken several years -- Plaintiffs would have then been required to gear up for the damages jury trial, and then proceed through that jury trial and another round of inevitable post-trial motions and appeals.¹⁷ In all, absent the Settlement, continued litigation would have taken many years, and required tens of thousands of additional hours and significant additional costs (in addition to the substantial hours and costs already incurred). *See, e.g., Warfarin*, 391 F.3d at 536 (“Moreover, it was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class”).

In light of the complexities of this case, as well as the enormous additional time and expenses that would be incurred if the litigation continued, this factor strongly supports approval of the Settlement.

2. The reaction of the Class to the Settlement

The overwhelmingly positive response of the Class to the proposed Settlement also strongly supports approval. Not a single Class member -- out of over 400 -- has filed an objection to any aspect of the Settlement.

Moreover, as noted above, the “Big 3” (each a Fortune 20 company), along with the three named Class representatives and OptiSource (composed of fourteen regional wholesalers) have come forward to affirmatively support the Settlement. Together, these Class members made over 70% of the purchases of Tricor at issue in this case, and thus will be entitled to a like percentage of the Settlement Fund. This is overwhelming support from sophisticated Class members with a substantial stake in this case.

¹⁷ It is also conceivable that the Class could have lost at the liability jury trial stage, but prevailed at the appellate court stage, with the case being remanded back to district court for yet another liability

“Such acceptance of the Settlement on the part of the Class is convincing evidence of the proposed Settlement’s fairness and adequacy.” *Remeron*, 2005 WL 3008808, *6, citing, *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (“only” 29 objections in 281 member class “strongly favors settlement”); *Prudential*, 148 F.3d at 318 (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted out and 300 objected).

Furthermore, where, as here, the Class is composed largely of sophisticated business entities with substantial stakes in the case, who can be expected to oppose any settlement they find unreasonable, the absence of objections indicates the adequacy of the Settlement. *Warfarin*, 212 F.R.D. at 254 (“the court finds the low number of objections from [third party payors] particularly significant, because these are sophisticated businesses with, in some cases, large potential claims, and they could be expected to object to a settlement they perceived as unfair or inadequate”); *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, *10 (S.D. Cal. 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”). The absence of objections, and affirmative support, from this sophisticated Class is particularly significant because many Class members have also been members of classes in several other Hatch-Waxman antitrust actions, and are therefore well-situated to evaluate a proposed settlement in an action of this type. *Remeron*, 2005 WL 3008808, * 6, citing, *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2004).

3. *The stage of the proceedings and the amount of discovery completed*

“This factor evaluates whether counsel had an adequate appreciation of the merits of the case

trial followed by more liability-related appeals.

before negotiating.” *Warfarin*, 212 F.R.D. at 255, citing *Cendant*, 264 F.3d at 235. “To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken.” *Id.*, quoting *Prudential*, 148 F.3d at 319.

Given the stage at which the Settlement was negotiated and finalized, this factor strongly supports Court approval. As detailed above and in the Taus Affidavit, this case was settled after commencement of the liability jury trial. Prior to that time, Class Counsel vigorously litigated this case for well over three-and-one-half years and had finished extensive fact and expert discovery. This included the receipt and review of over 1.2 million pages of documents; numerous motions to compel; answering Defendants’ extensive interrogatories, documents requests, and requests for admissions; depositions of more than forty fact witnesses; expert reports from, and depositions of, thirteen experts on behalf of the Class and seven on behalf of the Defendants as relating to the Class’s claims; extensive motion practice relating to Defendants’ motions to dismiss and for summary judgment, and the Class’s motion for class certification; and comprehensive trial preparations. *See generally* Taus Affidavit.¹⁸

As a result of the vast amount of discovery undertaken, along with comprehensive trial preparations and commencement of the liability jury trial, Class Counsel were intimately familiar with the strengths and weaknesses of the Class’s claims and the defenses to those claims that were being advanced (and were likely to be advanced in later stages of the case). *See Bonett v. Educ. Debt Serv., Inc.*, 2003 WL 21658267, *6 (E.D. Pa. 2003) (“the parties certainly [had] a clear view of the strengths and weaknesses of their cases”), *quoting In re Warner Comm. Sec. Litig.*, 618 F. Supp. 735,

¹⁸ Although the trial was bifurcated between liability and damages, discovery was not. Thus, all aspects of this case were subject to extensive discovery, including the quantum of the Class’s

745 (S.D.N.Y. 1985). Class Counsel plainly had a strong basis to negotiate this Settlement. *See Warfarin*, 212 F.R.D. at 255 (finding this factor supported final approval of the settlement since class counsel “pursued this litigation for over three years,” “engaged in substantial discovery and coordinated these efforts with other plaintiffs’ counsel,” “voluminous documents were reviewed and numerous depositions taken and motions filed,” and “an expert was engaged in at least one of the state actions, and experts were consulted by both consumers and [third party payors] in conjunction with settlement negotiations”); *In re Lucent Tech., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 638 (D.N.J. 2004) (noting positively that class counsel had “hired experts to assist them in evaluating the merits of their claims and the risks of litigation”).

4. *The risks of establishing liability*

“This factor considers the potential rewards or risks if class counsel decided to litigate rather than settle.” *Warfarin*, 212 F.R.D. at 255, citing *Cendant*, 264 F.3d at 237. Here, it weighs heavily in favor of the Settlement.

As a general proposition, antitrust class action cases are inherently high risk. *Linerboard*, 2004 WL 1221350, *10. As Class Counsel can personally attest, litigating class action Hatch-Waxman cases is no exception to this general rule, as these cases are quite risky given the inter-play of antitrust law, the Hatch-Waxman Act, state drug substitution laws, and complex economic principles. *See, e.g.*, note 10, *supra*.

Of course, there were no guarantees that Plaintiffs would receive a favorable jury verdict on liability and uphold that verdict in post-trial motions and on appeal. As this Court knows, this case was novel and complex (*see, e.g.*, D.I. No. 130 (motion to dismiss opinion); D.I. Nos. 395, 397, 410,

damages and the defenses to that quantum put forth by Defendants.

411, 424, and 425 (summary judgment briefs)), and predicting its outcome with reasonable certainty simply could not be done. It was the first-ever Hatch-Waxman case in which a “product hopping” theory had been asserted, much less brought to trial. This theory necessarily implicated the complex crossroads (mentioned above) among the policies of the antitrust laws, the Hatch-Waxman Act, state drug substitution laws, and economics.

Defendants presented many defenses to each aspect of liability that would have to be overcome by the Class to prevail before the jury, in post-trial motions, and on appeal. These defenses included Defendants’ claims that: (a) the new versions of Tricor were significant “improvements” over the previous versions; (b) Defendants’ conduct regarding the new versions of Tricor were appropriate and beneficial from a regulatory perspective; (c) Defendants’ conduct did not prevent Teva and Impax from obtaining FDA approval for, or selling, their generic versions of Tricor; (d) Defendants had no monopoly power; and (e) Defendants’ lawsuits were not shams. *See* Taus Aff. at ¶ 12.

Although Class Counsel developed evidence to rebut these defenses, there was significant risk that this case could be lost any number of ways during the liability phase of this case, including: (a) the risk of the jury finding that Defendants’ conduct was not anticompetitive under the rule of reason; (b) the risk of the jury finding that Defendants did not have monopoly power, and/or that the relevant market was broader than “fenofibrates”; (c) the risk of the jury finding that Defendants did not cause the Class to suffer antitrust injury or that the Class had a duty to mitigate any harm, but failed to do so; (d) the risk of the jury finding that the Class did not establish it was impacted by the conduct; and (e) the risk that even if the Direct Purchaser Class obtained a favorable jury verdict on all of these elements of liability, that verdict would be overturned by post-trial motions or on appeal.

This appellate risk included, but was not limited to, the risk that the Court of Appeals (or the United States Supreme Court) would not accept this Court's application of the "rule of reason" analysis to Defendants' product changes, but instead would adopt Defendants' contention that courts should consider product changes like those engaged in by Defendants here to be *per se* procompetitive. *Id.* at ¶ 13.

Additionally, coordinating the Direct Purchaser Class case with cases filed by several other plaintiff groups created another level of complication and risk in establishing liability.¹⁹ While this coordination resulted in certain litigation efficiencies and benefits, it also created significant difficulties throughout the pre-trial phase, which were compounded during trial preparation and presentation, when different groups had to try their respective liability cases together. For instance, each plaintiff group developed and advanced, in conjunction with their experts, somewhat different liability theories during the discovery phase of the case. These differences did not merely arise from differences of opinion, but also stemmed from material differences in the claims and interests of the different plaintiff groups. In particular, not insubstantial differences existed between the liability trial approaches and strategies of the direct purchaser plaintiffs and the generic manufacturer plaintiffs Teva and Impax. Some of the differences included: (a) plaintiffs' respective economists analyzed the anticompetitive harm stemming from Defendants' product hopping, as well as the types of evidence that would best establish Defendants' monopoly power, from distinct (and potentially

¹⁹ These plaintiffs included the "opt out" direct purchaser plaintiffs Walgreen Co., Eckerd Corporation, Kroger Co., Maxi Drug Inc., CVS Pharmacy Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., American Sales Co., Inc. (Case Nos. 05-404, 05-605 & 06-192), the generic drug manufacturers Teva and Impax (Case Nos. 02-1512 & 03-120), and the consolidated indirect purchaser class cases and the "opt out" indirect purchaser cases (Case No. 05-360).

conflicting) economic perspectives;²⁰ and (b) the scope and focus each plaintiff group assigned to the patent-based antitrust claims, resulting in differing plaintiff groups challenging different aspects of the patent cases. *See* Taus Aff. at ¶¶ 15-17. This created potentially fertile ground upon which Defendants attorneys could identify and emphasize inconsistencies in plaintiffs' case.

In conducting settlement negotiations, Class Counsel were cognizant of the numerous and multi-layered risks and complexities facing the Class on the liability issues. Absent the Settlement, these risks and complexities easily could have resulted in no recovery at all for the Class. Thus, this factor strongly supports approval of the Settlement.

5. *The risks of establishing damages*

The fifth factor to be analyzed when considering the fairness of a settlement is “the risks of establishing damages.” *Girsh*, 521 F.2d at 157. Similar to the fourth factor, this factor “attempts to measure the expected value of litigating the action rather than settling it at the current time.” *Cendant*, 264 F.3d at 239; *Warfarin*, 212 F.R.D. at 256. Like the previous *Girsh* factors, this one is strongly supportive of the Settlement.

First, the damages trial likely would have been delayed for years, deferring any recovery for the Class -- assuming, of course, that Plaintiffs were successful in obtaining a favorable jury verdict on liability and upholding that verdict on appeal.

Second, there was substantial risk to the Class in proving the existence of damages and the extent of those damages. Antitrust history is replete with examples of plaintiffs receiving little or no damages after extensive litigation, even if they succeeded in establishing liability. *See, e.g., United*

²⁰ For example, Class Counsel focused on direct evidence of Defendants' monopoly power, while Teva and Impax focused on indirect evidence.

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 has 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*, 417 U.S. 156 (1974) (after two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the putative class recovered nothing).

In the instant case, the parties offered competing expert reports that included significantly different estimates of overcharge damages to which the Class would be entitled, assuming the Class’s case survived the liability phase. It is by no means certain that the opinions of Plaintiffs’ experts would have prevailed through this process. *See Warfarin*, 212 F.R.D. at 256 (“Damages would likely be established at trial through ‘a battle of the experts, with each side presenting its figures to the jury and with no guarantee whom the jury would believe’”), quoting *Cendant*, 264 F.3d at 239; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 539 (D.N.J. 1997) (“a jury’s acceptance of expert testimony is far from certain, regardless of the expert’s credentials”), *aff’d*, 148 F.3d 283 (3d Cir. 1999), *cert. denied*, 525 U.S. 1114 (1999); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 90 (D.N.J. 2001).

In fact, the appropriate measure of damages was hotly contested by Defendants, rendering uncertain any outcome from a damages trial. Measuring damages depends, in large part, on (a) characterizing the “but for” world (*i.e.*, proving what would have happened with regard to the timing and pricing for the competitive entry of various generic competitors absent Defendants’ wrongful conduct), and (b) quantifying the overcharges paid by the Class as a result of that conduct. Significantly, the amount of the Class’s aggregate damages, as calculated by the Class’s economist, Dr. Leitzinger, varied radically depending on whether the jury at a damages trial would have

determined that Defendants would have (in the absence of the wrongful scheme), *inter alia*, (a) launched Tricor 160; (b) launched Tricor 145; (c) kept Tricor 200 on the market in the event of either launch; or (d) continued to promote any of these products.

Moreover, the parties' respective experts had divergent views regarding several factual issues that would have an enormous impact on the amount of overcharge damages that a jury might ultimately award to the Class, such as (a) the volume of sales of Tricor and its AB rated generics that would have occurred in the "but for" world; and (b) whether the jury determined that the second market switch (from Tricor 160 to Tricor 145) was properly considered part of the alleged anticompetitive scheme. Leitz Decl. at ¶¶ 22(b) & n.6, 23(b), 24-28. As detailed further at pp. 24-26, below, if Defendants' (and their experts') views on these and other factual issues prevailed, the Class's damages could have plummeted to as low as \$25 to \$43 million -- five to ten times less than the Settlement amount.

The continued trial consolidation of the Class's damages claims with those of the other plaintiff groups would also have augmented the complexity and risks of recovering damages for the Class. Each plaintiff group had advanced its own damages experts, each with his or her own assumptions regarding the "but for" world. For example, Teva and Impax offered multiple damage scenarios, each premised on a different "but for" world. Notably, certain of Teva and Impax's proposed scenarios assumed the legality of the introduction of Tricor 145, which could have significantly decreased the Class's potential recovery.

In short, even if Class Counsel had been successful in a liability trial and held that liability verdict on appeal -- which is far from certain -- significant complex impediments remained that almost certainly would have delayed, and could have significantly reduced or negated altogether, the

damages recoverable by the Class.

Notwithstanding the Class's confidence in its ability to win a damages jury trial (and sustain that victory through post-trial motions and appeals), the Settlement obviates these litigation risks regarding damages and secures substantial and immediate cash relief.

6. *The risks of maintaining the class action through trial*

On August 8, 2006, this Court issued an order and opinion certifying the Direct Purchaser Class. *See* D.I. Nos. 435-36. Of course, Rule 23(a) "allows a district court to decertify or modify a class at any time during the litigation if it proves to be unmanageable." *Warfarin*, 212 F.R.D. at 256.

Also, it is likely that Defendants would have appealed this Court's certification of the Class.

Class Counsel were confident that the Class would be maintained throughout this case, but as with any contested motion, there was a possibility that the Class could be de-certified by this Court or on appeal. Therefore, this factor favors approval of the Settlement.

7. *The ability of the Defendants to withstand a greater judgment*

The Class does not contend that Defendants could not withstand a judgment larger than the Settlement. But, given that other *Girsh* factors so strongly support approval of the Settlement, this factor does not play a material role here. *See, e.g., Remeron*, 2005 WL 3008808, *9 ("many settlements have been approved where a settling defendant has had the ability to pay greater amounts"); *Warfarin*, 391 F.3d at 538.

8. *The range of reasonableness of the settlement in light of the best possible recovery and all attendant risks of litigation*

"The eighth and ninth *Girsh* factors ask 'whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial.'" *Warfarin*, 212 F.R.D. at 257, quoting *Prudential*, 148 F.3d at 322. Assessment of the reasonableness of a proposed

settlement seeking monetary relief requires analysis of the present value of the damages a plaintiff would likely recover if successful, appropriately discounted for the risk of not prevailing. *Id.*, citing *General Motors*, 55 F.3d at 806. In making this analysis, the potential for treble damages need not be taken into account. *Id.*, citing *Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 376 (D.D.C. 2002); *see also Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

In the instant case, Plaintiffs' expert economist, Dr. Leitzinger, estimates that the Class's single damages range anywhere from \$412 million to \$2.3 billion, depending on certain critical factors and assumptions. *See* Leitz. Decl. at ¶¶ 22-23. The first key factor driving the damages range relates to the total volume of Tricor units upon which Class overcharges should be computed. According to Dr. Leitzinger, damages would fluctuate substantially depending upon whether (a) the overall sales volume of Tricor and its AB rated generic equivalents in the "but for" world would have plateaued in April 2002 upon entry of the first generic version of Tricor by Teva; (b) the volume would have continued to increase at some rate; or (c) the volume would have decreased dramatically after unimpeded generic entry (as Defendants and their expert vigorously asserted). *Id.* at ¶¶ 22-23, 24-28. Another critical factor driving the total aggregate class damages is whether the second switch (to Tricor 145) would have been found to be a part of the anticompetitive scheme. *Id.* at ¶¶ 22(b) & n.6, 23(b).

Defendants hotly contested both of these points in attacking Dr. Leitzinger's damage model. As Dr. Leitzinger explains, Defendants' damages economist, Ms. Guerin-Calvert, contended that the volume of Tricor upon which overcharges should be computed would have effectively dropped rapidly to near *zero* within six months of unimpeded generic competition. While Plaintiffs disputed that argument, if the Court or the jury had accepted it, the Class's "but for" purchase volume, and

thus its damages, would have been drastically reduced. Leitz. Decl. ¶¶ 25-26; *see also* Plan of Allocation at pp. 10-11.

Defendants also argued that the second switch was procompetitive for various reasons, including the fact that, according to its FDA-approved label, Tricor 145 had the same bioavailability whether or not it was taken with meals (whereas it was recommended in the labels for Tricor 200 and Tricor 160 mg that they be taken with meals because the bioavailability of those products differed when taken without meals). Had the Plaintiffs been unable to win the argument during the liability phase of the case that the second switch constituted a part of the anticompetitive scheme, it was entirely possible that Dr. Leitzinger's damages computations would have had to eliminate any damages associated with Class purchases of Tricor 145. As reflected in the Leitzinger Declaration (at ¶¶ 22(b) & n.6, 23(b)) and discussed in the Plan of Allocation (at pp. 8-9 & n.6), this result could have cut the Class's aggregate damages by as much as 75%, to as low as \$412 million.

Of course, the Defendants also contested the entirety of the Plaintiffs' liability and damages case, arguing that the damages were zero. As a back-up position, the Defendants put forth the opinions of Ms. Guerin-Calvert that the Class's damages, at most, ranged between \$25 million and \$43 million. Leitzinger Decl. at ¶ 24. In addition to her view that Tricor volumes would have dropped precipitously in the "but for" world, Ms. Guerin-Calvert opined that the following additional factors would have also greatly diminished damages: (a) based on opinions from Defendants' manufacturing expert, Teva and Impax were not in a position to adequately fill market demand for the less-expensive AB rated generic versions of Tricor; (b) the price differential between branded and generic versions of fenofibrate would have been much less than that calculated by Dr. Leitzinger; and (c) the Defendants would not have lowered the price of Tricor in the face of generic competition.

Id. at ¶¶ 25-28; *see also* Plan of Allocation at pp. 9-14.

Given the above, the \$250 million Settlement represents a recovery equal to 5 to 10 times the overcharges calculated by the Defendants, and between eleven and sixty-one percent of the aggregate Class overcharges calculated by Dr. Leitzinger (or implied by his model). Leitz Decl. at ¶¶ 22-24. These ranges are more than acceptable in the context of high-risk antitrust class action cases such as this one. *See Cendant*, 264 F.3d at 231 (noting that typical recoveries in complex securities class actions range from 1.6%-14% of estimated damages); *Linerboard*, 2004 WL 1221350,*5 (E.D. Pa. 2004) (collecting cases in which courts have approved settlements of 5.35% to 28% of estimated (single) damages in complex antitrust actions); *In re Aetna Sec. Litig.*, 2001 WL 20928, *4 (E.D. Pa. 2001) (approving settlement of approximately 10% of total damages of \$830 million); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926 (E.D. Pa. 2005) (recovery of 11.4% of estimated single damages “compares favorably with the settlements reached in other complex class action lawsuits”); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, *24 (D.N.J. 2005) (“an antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement is reasonable relative to other factors”); *In re Greenwich Pharm. Sec. Litig.*, 1995 WL 251293 (E.D. Pa. 1995) (holding a \$4.3 million settlement within the range of reasonableness where plaintiff’s estimate of damages was \$100 million); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approval of settlement that provided 5.2% of best possible recovery).

9. The additional Prudential factors support approval of the Settlement

In addition to the *Girsh* factors, the Third Circuit has listed additional factors that may be considered in assessing the reasonableness of a class settlement. These factors are:

[T]he maturity of the underlying substantive issues, as measured by the experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; whether class or subclass members are accorded the right to opt-out of the settlement; whether any provisions for attorneys’ fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

AT&T, 455 F.3d at 165, citing *Prudential*, 148 F.3d at 283.

To the extent any of the additional factors apply to the evaluation of the Settlement at issue here, they too are supportive for the following reasons:

- The substantive cause of action was not “mature” in that a “product hopping” theory had never before been applied to the pharmaceutical industry generally, much less to a case specifically involving the Hatch-Waxman Act and state drug substitution laws. The application of that theory in this case was novel, and thus there were no prior decisions in this context that could give the Class assurance that the theory would be upheld on appeal, much less accepted by a jury.
- Extensive discovery was completed prior to reaching this Settlement. *See* pp. 2, 15-17, *supra*.
- The existence and probable outcome of claims by other classes and subclasses is not a relevant factor here, since the Direct Purchaser Class covered by the Settlement is the only class action brought on behalf of reasonably comparable claimants (*i.e.*, direct purchasers). For instance, the Plaintiffs here asserted antitrust causes of action pursuant to the federal antitrust laws, while the class of indirect purchasers asserted state law claims. Also, the economic analysis applicable to this case is materially different than that applicable to the case brought by indirect purchasers.²¹
- All class members were afforded the opportunity to object to any and all aspects of the Settlement and Plan of Allocation, but none has done so. Quite the contrary, the

²¹ The Direct Purchaser Opt-Out Plaintiffs were the only other direct purchasers to assert claims against Defendants under the federal antitrust laws. The terms of their settlement are confidential, but based on public disclosures by Abbott, Class Counsel believe that this factor supports the reasonableness of the Class Settlement.

Settlement has received active support from Class members comprising over 70% of the Tricor purchases at issue in this case.

- The Settlement makes no provision for the payment of attorneys' fees to Class Counsel. That is a matter for this Court to determine.
- As covered below, the procedure for processing individual claims is fair and reasonable.

See Prudential, 148 F.3d at 323 (listing additional potential factors to consider).

* * * * *

In light of (1) the complexity, expense and likely duration of this case absent the Settlement; (2) the overwhelming approval of the Settlement by the Class; (3) the fact that Settlement occurred after discovery and commencement of the liability jury trial; (4) the significant risks in establishing liability and damages that would have been encountered absent the Settlement; and (5) the fact that the Settlement constitutes recovery of five to ten times the damages calculated by Defendants and 11-61% of the overcharges calculated by the Class (or implied by the Class's damages model), it is clear that this Settlement is well suited for final approval.

III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

As set forth more fully in the Plan of Allocation and accompanying Declaration of Dr. Leitzinger, both of which were contemporaneously filed herewith, the Class proposes to allocate the Settlement Fund, net of Court-approved attorneys' fees, expenses, and incentive awards, in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged anticompetitive conduct. Such a method of allocating the Net Settlement Fund is inherently reasonable. *See Remeron*, 2005 WL 3008808, *11 (finding plan to allocate settlement funds in proportion to the overcharge incurred by each class member to be "inherently reasonable"); *Lucent*

Tech., 307 F. Supp. 2d at 649 (“A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable”); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 493 (E.D. Pa. 2003) (same).

The Plan of Allocation provides a fair and reasonable method of determining each Class members’ proportionate share of overcharge damages based on each Class member’s purchases of Tricor during the time period at issue. *See* Leitz. Decl. at ¶¶ 10-11. Very similar plans (designed by Dr. Leitzinger) have been approved and employed successfully in multiple previous Hatch-Waxman direct purchaser class cases, including: *Remeron*, 2005 WL 3008808, *11; *In re Cardizem CD Antitrust Litig.*, Master File No. 99-MD-1278 (E.D. Mich.); *In re Buspirone Antitrust Litig.*, No. 01-cv-7951 (S.D.N.Y.); and *In re Relafen Antitrust Litig.*, Master File No. 01-12239 (D. Mass.). *See id.* at ¶ 11. The use of similar plans in similar cases supports the approval of the proposed Plan of Allocation here. *See, e.g., Nichols v. SmithKline Beecham Corp.*, 2005 WL 950616, *18 (E.D. Pa. 2005) (noting with approval similarity of allocation plan to plans used in similar cases). Significantly, the Claims Administrator here has substantial experience administering settlement funds created through similar actions, using similar allocation plans, and involving substantially the same class members, without serious problems or dispute. Moreover, the Plan proposes that Dr. Leitzinger be retained to assist in the allocation computations under the Plan. *See* Plan of Allocation, pp. 15-16, at ¶ 1.1. Dr. Leitzinger, who helped design the Plan, has played a similar role in prior analogous cases. *Leitz. Decl.* at ¶ 8.

As set out in the Plan of Allocation and the Leitzinger Declaration, Plaintiffs’ proposed Allocation plan provides a method for determining each Class member’s *pro rata* share of the Net Settlement Fund. Specifically, the Plan of Allocation describes: (1) the method of calculating each

Class member's *pro rata* share of the Net Settlement Fund; (2) the contents and method of disseminating a Claims Notice form; (3) the manner in which claims will be initially reviewed and processed; (4) the method of notifying Class members of the amount that each Class member will receive from the Net Settlement Fund; and (5) the process for handling and resolving challenged claims, if any. *See generally*, Plan of Allocation at pp. 15-24.

The Plan of Allocation also includes the deadlines for completing the following tasks related to distributing each Class member's *pro rata* share of the Net Settlement Fund: (1) preparation and dissemination of the Claims Notice forms; (2) receipt by the Claims Administrator of completed Claims Notice forms and supporting documentation; (3) curing deficiencies in any Claims Notice forms or supporting documentation submitted by Class members; and (4) challenging and resolving disputes over the Claims Administrator's determination of each Class member's distribution amount. *Id.*

Accordingly, Plaintiffs respectfully submit that the proposed Plan of Allocation is fair and reasonable, and should be approved.

CONCLUSION

For the reasons detailed above, and in other supporting documents including the Taus Affidavit, the Class and Class Counsel respectfully request that the Court grant final approval to the Settlement pursuant to Fed. R. Civ. P. 23(e), and approve the proposed Plan of Allocation.

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