

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

**IN RE TRICOR DIRECT
PURCHASER ANTITRUST
LITIGATION**

**Civil Action No. 05-340 SER
CONSOLIDATED CASE**

THIS DOCUMENT RELATES TO:

Hon. Sue L. Robinson, U.S.D.J.

C.A. No. 05-340, 05-351, 05-358 (SLR)

PROPOSED PLAN OF ALLOCATION FOR DIRECT PURCHASER CLASS

I. INTRODUCTION

Direct Purchaser Class Plaintiffs ("Plaintiffs") propose to allocate the settlement funds, net of Court approved attorneys' fees, named plaintiff incentive awards, and court approved expenses ("Net Settlement Fund") using a modified version of the methodology employed by Plaintiffs' economist Dr. Jeffrey J. Leitzinger to calculate aggregate overcharge damages to the Direct Purchaser Class (the "Class").¹ In this

¹ Pursuant to Paragraph 2 of the Court's Order Preliminarily Approving Direct Purchaser Class Proposed Settlement, Authorizing Notice to the Class, and Setting Final Settlement Schedule and Hearing (the "Preliminary Approval Order"), the Class is defined as:

All persons or entities in the United States who purchased TRICOR® in any form directly from Abbott Laboratories ("Abbott"), Fournier Industrie et Santé, or Laboratoires Fournier S.A. at any time during the period April 9, 2002 through August 18, 2008.

Plan of Allocation, we will: (1) briefly describe the aggregate damages model used by Dr. Leitzinger (the methodology Dr. Leitzinger used prior to settlement to calculate aggregate overcharge damages to the Class, the findings of that analysis, and the contrasting approaches taken by Defendants' and Co-Plaintiffs' experts); and (2) set out Plaintiffs' proposed Plan of Allocation, which, among other things, provides that the Net Settlement Fund will be distributed *pro rata* to each Class member who submits a claim, in proportion to its direct purchases of Tricor during the Class Period (defined in the Preliminary Approval Order as the period from April 9, 2002 through August 18, 2008), as recorded in the transactional sales databases provided in discovery by Abbott. The Plan of Allocation was formulated by the undersigned ("Class Counsel") in conjunction with Dr. Leitzinger and his staff at Econ One Research, Inc.

Notably, Class Counsel and Dr. Leitzinger have successfully employed similar methods of computing damages and allocating settlement funds in several recent analogous cases involving the effects of delayed and/or impeded entry of generic drugs on similarly defined classes of direct purchasers, including the *Cardizem*, *Relafen*, *Platinol*, *Buspar*, *Remeron*, and *Terazosin* cases. See Declaration of Jeffrey J. Leitzinger, Ph.D. Regarding Classwide Damages and the Proposed Plan of Allocation

Excluded from the Class are Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, all federal governmental entities, Ahold a/k/a American Sales Corp., Albertson's Inc., CVS Pharmacy, Inc., CVS Corporation, Eckerd Corporation, Maxi Drug, Inc. d/b/a Brooks Pharmacy, Hy-Vee, Inc., Kroger Co., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Safeway, Inc., Walgreen Co., State of Oregon (all government entities), State of Washington (all government entities), Maryland State Employee and Retiree Health and Welfare Benefits Program and the Maryland Pharmacy Program, Connecticut Department of Social Services, State of New York (all government entities), State of Texas Health and Human Services Commission, Commonwealth of Massachusetts Executive Office of Health and Human Services Office of Medicaid (MassHeath), Pennsylvania Department of Public Works and Department of Aging, and Overman & Stevenson Pharmacists.

("Leitzinger Allocation Decl."), ¶¶ 7-8.² In each of those cases, courts specifically approved methods and practices substantively similar to that described below, and in each of those cases the allocation plans was successfully and efficiently implemented – without any unresolved claimant objections or subsequent appeals.³

II. BACKGROUND REGARDING AGGREGATE DAMAGES ANALYSIS

A. The Model

Aggregate damages to the Class are based solely on the total "overcharge," *i.e.*, (a) the difference between the prices that Class members actually paid for Tricor and the lower prices that Class members would have paid had the entry of AB-rated generic versions of Tricor not been allegedly impeded, multiplied by (b) the quantities of the Tricor Fenofibrate Molecule (branded Tricor plus AB-rated generic versions of Tricor) that Class members purchased or would have purchased had generic entry not been impeded.⁴

To compute aggregate overcharge damages incurred by the Class, Plaintiffs engaged Dr. Leitzinger, an economist with considerable expertise in calculating damages in complex antitrust cases. Prior to the settlement in this case, Dr. Leitzinger

² In the Allocation Decl., Dr. Leitzinger: (a) describes his aggregate damages methodology and its underlying assumptions, (b) reports his computation of the aggregate damages to the Class, and (c) explains the bases for the proposed Plan of Allocation. His experience is summarized in paragraphs 2 through 4 as well as paragraphs 7 through 8 of his Allocation Declaration.

³ See *In re: Cardizem CD Antitrust Litig.*, MDL No. 1278, 99-MD-1278 (E.D. Mich) ("*Cardizem*") (direct purchaser class claims settled for \$110 million); *In re: Buspirone Patent & Antitrust Litig.*, MDL No. 1413, 01-MD-01413 (S.D.N.Y) ("*Buspirone*") (direct purchaser class claims settled for \$220 million); *In re: Relafen Antitrust Litig.*, Civil Action No. 01-CV-12239, Doc. No. (WGY) (D. Mass.) ("*Relafen*") (direct purchaser class claims settled for \$175 million); *North Shore Hematology-Oncology Associates, P.C., v. Bristol-Myers Squibb Co.*, Civil Action No. 04-0248 (D.D.C.) ("*Platinol*") (direct purchaser class claims settled for \$50 million); *In re: Terazosin Hydrochloride Antitrust Litig.*, MDL No. 1317, 99-MD-1317 (S.D. Fla.) ("*Terazosin*") (direct purchaser class claims settled for nearly \$75 million); and *In re: Remeron Direct Purchaser Antitrust Litig.*, Civil Action No. 03-0085 (D. N.J.) ("*Remeron*") (direct purchaser class claims settled for \$75 million in 2005).

⁴ This approach is consistent with methodologies endorsed by the ABA Section of Antitrust Law. See PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 172 (ABA 1996).

submitted a Declaration in support of certification of the Class (dated May 8, 2006), submitted two reports for the Plaintiffs on the merits (dated December 15, 2006 and October 8, 2007), was deposed on two separate occasions (July 13, 2006 and May 13, 2008), appeared on Plaintiffs' witness list for trial, and had prepared for, and was expected to testify at, trial. Leitzinger Alloc. Decl., ¶ 5. In addition to all of his work in this case, Dr. Leitzinger has specific relevant experience in computing damages – and designing and overseeing allocation plans – in several other similar cases alleging delayed and/or impeded entry of generic competition in markets formerly dominated by brand-name drugs. *Id.*, ¶¶ 7-8.

Typically, unimpeded entry of an AB-rated generic competitor has two principal effects in the market: the AB-rated generic drug captures market share from the branded drug; and the average price paid by purchasers for the drug product at issue (brand and generic combined) declines, due to a lower price paid for the generic drug, a decline in the price of the branded drug, or both. In this case, the overcharge is suffered because Defendants allegedly impeded competition from AB-rated generic forms of Tricor, forcing Class members to purchase more of the Tricor Fenofibrate Molecule in its higher-priced branded form (Tricor) and less in its less-expensive AB-rated generic form (generic fenofibrate) than they would have absent the allegedly unlawful conduct. *Id.*, ¶¶ 12, 15. Plaintiffs alleged that Class members were overcharged for each branded unit they bought that would have otherwise been substituted with a less expensive AB-rated generic fenofibrate product. *Id.*

The aggregate damages model calculates this overcharge. The Plaintiffs alleged, *inter alia*, that Abbott and Fournier twice converted the market for Tricor in

advance of generic entry in order to impede competition from those would-be AB-rated generic versions. See Direct Purchaser Class Plaintiffs' First Am. and Cons. Class Action Compl., ¶¶ 1-13 (D.I. 29). First, prior to entry of Teva's 200 mg generic fenofibrate capsule in April of 2002, Abbott and Fournier introduced, in late 2001, a 160 mg branded fenofibrate (Tricor) tablet ("Tricor 160") and removed the 200mg branded fenofibrate (Tricor) capsule ("Tricor 200") from the market. *Id.*, ¶¶ 4-7, 78-95. Next, in anticipation of the entry of a competing 160 mg generic fenofibrate tablet, Abbott and Fournier introduced a 145 mg branded fenofibrate (Tricor) tablet in 2004 ("Tricor 145") and removed Tricor 160 from the market. *Id.*, ¶¶ 8-13, 96-117. Dr. Leitzinger was asked to present damages under several different assumptions regarding alternative but-for worlds that, in general, differed by (a) whether and/or when Defendants introduced and/or withdrew various formulations of Tricor in the but-for world; and (b) the volume of branded Tricor prescriptions that would have been available for AB-rated generic substitution in the but-for world.

First, under what we he calls "Scenario A," Dr. Leitzinger was asked to model a but-for scenario where Abbott and Fournier did not introduce Tricor 160 (which actually launched in September of 2001) or Tricor 145 (which actually launched in November of 2004), and where Teva's 200 mg generic fenofibrate capsule was introduced (as it was in the actual world) on April 9, 2002. See Leitzinger Alloc. Decl., ¶ 13. Second, under what he calls "Scenario B," Dr. Leitzinger was asked to model damages under the assumption that Abbott and Fournier did not introduce Tricor 160, but did launch Tricor 145 when they did in the actual world (November of 2004), and where Teva's 200 mg

generic fenofibrate capsule was introduced as it was in the actual world (April 9, 2002). *Id.*, ¶ 14.

In addition, Dr. Leitzinger made certain assumptions with respect to the impact of unimpeded generic entry on the volume of Tricor Fenofibrate Molecule sales (*i.e.*, Tricor plus AB-rated versions of Tricor). Dr. Leitzinger assumed that total volume of branded Tricor plus AB-rated generics combined following unimpeded generic fenofibrate entry in the but-for world would either (a) plateau at pre-generic-entry levels, or (b) rise commensurate with the increase in volume experienced by the dyslipidemia therapeutic class as a whole subsequent to generic entry. These different volume assumptions generated alternate damages figures corresponding to the differing volumes of purchases on which overcharges would be computed. *Id.*, ¶ 20.⁵ In other words, the lower the sales volume assumed in the but-for world, the lower the Class's aggregate damages, since lower assumed sales volume will result in, *e.g.*, fewer purchases of Tricor that would have switched to less expensive AB-rated generic versions of Tricor in the but-for world. (And, similarly, the higher the assumed sales volumes in the but-for world, the higher the Class's damages would be.)

B. Dr. Leitzinger's Aggregate Damages Methodology

As described above, the aggregate damages model involves a comparison between (a) actual prices paid and quantities purchased on the one hand, and (b) prices that would have been charged (and quantities that would have been purchased) by

⁵ Dr. Leitzinger was also asked to employ a third alternative assumption, namely that total Tricor Fenofibrate Molecule volume in the but-for world would be the same as it was in the actual world, a scenario he was asked to assume premised on the legal conclusion that Class members were legally entitled to recover overcharge damages on all units actually purchased, whether or not Class members would have purchased those units in the but-for world. See Leitzinger Alloc. Decl. at 9 n.5. Plaintiffs expect that at the damages phase of this case, Defendants would have vigorously opposed that approach on legal grounds.

Class members in the “but-for” world (*i.e.*, a world where AB-rated generic fenofibrate competition was not impeded by the challenged conduct), on the other. *Id.*, ¶ 15. Actual prices paid and purchase volumes for Tricor by Class members were available from the electronic sales database provided by Abbott. *Id.* Abbott provided electronic direct sales records for the period April 1998 through August 2007, returns data processed for the period June 1998 through August 2007, and additional national and regional rebates data for January 2002 through September 2006. *Id.* ¶ 16.

While actual prices paid and purchase volumes for Tricor were available from Abbott’s transactional sales database, Dr. Leitzinger was required to estimate prices and purchase volumes in a variety of hypothetical “but for” worlds. *Id.* ¶ 17. For the first 180 days of generic competition in the but-for world, where Teva Pharmaceuticals USA, Inc. (“Teva”) would have enjoyed statutory exclusivity as the only seller of an AB-rated generic version of Tricor, Dr. Leitzinger took Teva’s contemporaneously projected offering price (25% below the price for branded Tricor) as the but-for generic price. *Id.*, ¶ 18. To determine the share of total Tricor sales that would have been captured by AB-rated generic versions of Tricor during this period, Dr. Leitzinger used the same internal forecasting model that Abbott itself used to project the effects of unimpeded AB-rated generic competition. *Id.* ¶ 19. This model, which Abbott refers to as the “generic incursion model,” is based on the experience of a number of branded drugs that experienced normally-operating AB-rated generic competition. *Id.* For the period after multiple generic fenofibrate competitors enter the market following Teva’s 180-day statutory exclusivity period, Dr. Leitzinger used the “yardstick” method to determine a “but-for” price using the experience of three “Yardstick Statins” that previously faced

generic competition: Pravachol, Mevacor, and Zocor (referred to collectively as the “Yardstick Statins”). *Id.*, ¶ 17.

Using that method, Dr. Leitzinger calculated the decline in weighted-average molecule price (*i.e.*, brand plus generics combined) following generic entry for each Yardstick Statin. *Id.* Dr. Leitzinger calculated the simple average of this price decline--measured in each case at the same time relative to the date of first generic entry--across all three drugs, and then calculated the but-for average price of the Tricor Fenofibrate Molecule by applying this average discount to the actual price at which Tricor was being sold in the market. *Id.*

Dr. Leitzinger performed the overcharge calculation separately for each quarter during the damage period, taking the difference between the actual price for Tricor in the marketplace and the but-for price of the Tricor Fenofibrate Molecule during the Class period, and multiplying it by the total sales of the Tricor Fenofibrate Molecule that would have occurred in the but-for world. *Id.*, ¶ 21. The total aggregate overcharge to Class members reflects the sum of the quarterly overcharges calculated within the period in question.

C. Aggregate Class Damages: The Findings

Assuming that fenofibrate volume would have plateaued following entry of Teva's 200 mg generic fenofibrate capsule, Dr. Leitzinger found that, under but-for world Scenario A (where the launches of neither Tricor 160 nor Tricor 145 occurred), direct purchaser Class members were overcharged, in the aggregate, in the amount \$1.6 billion from April of 2002 through November of 2008. For but-for world Scenario B (where Abbott and Fournier do launch Tricor 145 in November of 2004, and where that

launch is not considered part of the anticompetitive scheme), Dr. Leitzinger used the model employed in this case to determine that the Class overcharge would be \$412 million.⁶ *Id.*, ¶ 22.

Dr. Leitzinger also computed damages under the alternative assumption that fenofibrate volume would grow at the same rate as other drugs in the same therapeutic class following entry of Teva's generic 200 mg fenofibrate capsule. Under that assumption, Dr. Leitzinger found that, under Scenario A, the Class was overcharged \$2.3 billion from April of 2002 through November of 2008, and under that Scenario B the corresponding figure was \$1.9 billion. Additionally, Dr. Leitzinger ran his model assuming that Defendants were to succeed in their expected argument at the damages phase of the case that, if Tricor 145 was not considered part of the anticompetitive scheme, damages cannot be incurred on purchases of Tricor 145, and thus Class damages would cease to accrue upon the date of its launch (November of 2004). Under this assumption, Class overcharges for Scenario B would be \$488 million. *Id.*, ¶ 23.

In sum, a reasonable range of Class overcharges based upon Dr. Leitzinger's damages model ranges from \$412 million to \$2.3 billion.

D. Defendants' Alternative "But-For" World Scenarios

Abbott and Fournier, through their experts, disputed the assumptions underlying Dr. Leitzinger's overcharge calculations. Defendants had differing assumptions

⁶ Under the circumstances where launching Tricor 145 is not found to be a legitimate part of an anticompetitive scheme (because, *e.g.*, the jury were to find the 145 to be a substantial improvement and not otherwise part of the overall scheme), Defendants would likely argue that it would be improper to compute damages on Class purchases of Tricor 145. As a result, under this legal formulation of damage accrual, damages could not be incurred on Class purchases of Tricor 145, which was the exclusive version of Tricor being sold after November 2004. This computation employs Dr. Leitzinger's model assuming that Defendants win this argument at the damages phase of the case. Leitzinger Alloc. Decl., ¶ 22 & n.6.

concerning the contours of the but-for world, antitrust impact, and damages that, if accepted by a jury, would profoundly diminish the Class's damages estimates.

Assuming that Plaintiffs were able to prove an antitrust violation at all, Defendants' economic expert calculated overcharges to the Class as approximately six (6) to ten (10) times lower than the amount of the gross \$250 million Settlement Fund. *Id.*, ¶ 24. Specifically, Defendants' economic expert, Margaret E. Guerin-Calvert, calculated overcharges to the Class as follows:

- a. under Scenario A as in the range of \$41 million to \$43 million; and
- b. under Scenario B as in the range of \$24 million to \$25 million.

See Expert Report of Margaret E. Guerin-Calvert (the "Guerin-Calvert Report"), Ex. A.2.

Through Ms. Guerin-Calvert (and elsewhere), Abbott and Fournier argued that the Class's alleged overcharge damages were the product of faulty but-for world assumptions such as: (i) allegedly overstated estimates of the volume of Tricor Fenofibrate Molecule sales that would have occurred following unimpeded generic entry; (ii) allegedly overstated generic supply; (iii) an allegedly overstated generic fenofibrate discount relative to branded Tricor prices; and (iv) allegedly understated but-for Tricor prices. Leitzinger Alloc. Decl., ¶¶ 25-28.

1. **Defendants claim that Dr. Leitzinger used overstated estimates of Tricor Fenofibrate Molecule sales volume following unimpeded generic entry.**

Ms. Guerin-Calvert disputed Dr. Leitzinger's assumptions that sales volumes of the Tricor Fenofibrate Molecule would have, in the but-for world, either plateaued at 2002 volumes or grown at the same average rate as the entire class of dyslipidemia drugs as a whole. Instead, she rendered the opinion that sales volumes of the Tricor

Fenofibrate Molecule would have dropped precipitously following unimpeded generic fenofibrate entry in the but-for world for reasons allegedly unique to Tricor and this case. As a consequence, Ms. Guerin-Calvert opined, total Tricor Fenofibrate Molecule volume following unimpeded entry of Teva's generic fenofibrate capsules on April 9, 2002 in the but-for world would have decreased by nearly 50 percent within a year, and continued to trend precipitously downward thereafter. *Id.*, Ex. A.1. If the jury accepted Ms. Guerin-Calvert's lower volume assumption, the Class's aggregate overcharge damages would have been drastically reduced, because the number of units that would have switched from expensive branded Tricor to the less expensive AB rated generics in the but-for world would have been drastically lower than Dr. Leitzinger assumed in calculating the Class's aggregate overcharges. These differing but-for volume assumptions account for much of the difference between Defendants' overcharge calculations and the Class's calculations.⁷

2. Allegedly overstated generic supply.

Ms. Guerin-Calvert also disputed Dr. Leitzinger's assumption that there would have been sufficient generic supply in the but-for world to meet generic demand. Dr. Leitzinger's damages model assumed that, after Teva entered the market with an AB-rated generic fenofibrate capsule in the but-for world (on April 9, 2002), one or more

⁷ Co-Plaintiffs Teva and Impax Laboratories, Inc. ("Impax") also provided damages calculations that were premised upon assumptions concerning the composition of the but-for world that, if accepted by a jury, could have diminished the Class's damages estimates. To take one example, these Co-Plaintiffs assumed a but-for world where Abbott and Fournier would lawfully introduce Tricor 160 (and not withdraw Tricor 200). Consequently, Teva and Impax took the position that a substantial percentage of branded Tricor 200 prescriptions – up to 25% – would have been permissibly siphoned off in the but-for world and therefore unavailable for substitution by generic fenofibrate 200 mg capsules. If accepted by a jury, Teva and Impax's experts' assumptions about the lawful launch of Tricor 160 in the but-for world would have had the effect of reducing, by up to 25%, the number of units upon which the Class calculated overcharge damages, causing a substantial reduction in the Class's damages.

other generic fenofibrate competitors would have done so 180 days later, and that no generic firm would experience any material capacity constraints. By contrast, Ms. Guerin-Calvert, disputing those assumptions, rendered the opinions that (a) Teva would not have had sufficient manufacturing capacity to meet market demand for its AB-rated generic version of Tricor, *id.*, ¶¶ 85, 91; and (b) Impax lacked the ability to come to market with its generic version of Tricor any sooner than December of 2005, *id.*, ¶ 92. Based on these assertions, Ms. Guerin-Calvert opined that the Class's damages model should be downwardly adjusted to reduce (a) the share of total Tricor Fenofibrate Molecule sales that generic suppliers would have enjoyed during the damage period, and (b) the price differential between branded Tricor and generic fenofibrate during that period. *Id.*, ¶¶ 75, 94-100. If accepted by a jury, such adjustments, either alone or in tandem, would substantially raise the price paid by Class members for the Tricor Fenofibrate Molecule in the but-for world, both because the price of generic fenofibrate would be higher, and because the proportion of generic fenofibrate purchased by the Class over time (relative to branded Tricor) would rise more slowly and reach a lower equilibrium. Such adjustments to the Class's damages computations would substantially lower overcharges paid by the Class and therefore the Class's calculation of damages.

3. **Allegedly overstated generic fenofibrate discount relative to branded Tricor price.**

Ms. Guerin-Calvert also disputed Dr. Leitzinger's assumption that the price differential between branded Tricor and generic fenofibrate in the but-for world would have followed the pricing differentials experienced between the brand and the generic for the Yardstick Statins that Dr. Leitzinger had selected. *Id.*, ¶¶ 128, 131. Ms. Guerin-

Calvert rendered the opinion that (a) unlike the Yardstick Statins, Tricor would have faced relatively fewer generic competitors, buoying the price of generic fenofibrate, *id.*, ¶ 130; and (b) Abbott and Fourier would not have lowered (and may well have raised) the price of branded Tricor in response to unimpeded generic fenofibrate entry, *id.*, ¶ 100. She also opined that distinctive features of Tricor limited the relevance of other drugs. Ms. Guerin-Calvert rendered the opinion that generic fenofibrate would ultimately have fallen to an equilibrium price that was just 50% lower than Abbott's price for branded Tricor, far higher than the equilibrium price the Class had modeled for generic fenofibrate in the but-for world. If accepted by a jury, such assumptions would substantially lower the overcharges paid by the Class.

4. Allegedly understated but-for Tricor prices.

Ms. Guerin-Calvert also disputed the Class's assumption, expressed through Dr. Leitzinger, that Abbott and Fournier would have reduced the price for Tricor given the sales volume loss and consequent pricing pressure unimpeded generic fenofibrate competition would have created for branded Tricor. *Id.*, ¶ 144.

5. Other damages errors asserted by Defendants.

Ms. Guerin-Calvert also asserted that Dr. Leitzinger committed a variety of errors in calculating overcharges, including the following:

(a) that he failed to exclude opt-out retailer assignments, thereby improperly double-counting overcharge damages on certain units of Tricor as to which Ms. Guerin-Calvert asserted Class members were not the real parties in interest, *id.*, ¶¶ 154-55;

(b) that he failed to account for "hundreds of millions of dollars in rebates" that Abbott paid to Class members which, she alleged, would not have been paid by Abbott

in the but-for world, representing a significant setoff against the Class's damages, *id.*, ¶¶ 106-12, 136-37;

(c) that he improperly presumed that the rate at which sales of the fenofibrate molecule would have been captured by the generic, relative to branded Tricor, in the but-for world, would have been as high for Class members as for opt out retailers, *id.*, ¶¶ 157-59; and

(d) that he failed to account for ways in which Class members could purportedly have mitigated their damages, *id.*, ¶¶ 151, 183-91.

Ms. Guerin-Calvert rendered the opinion that the Class's damages estimates should have been adjusted to account for these purported errors. If accepted by the jury, such adjustments would lower the damages available to the Class.

E. Conclusion of Aggregate Damages Assessment

Dr. Leitzinger's main scenarios showed damages ranging from \$1.6 to \$2.3 billion. But, (a) if Plaintiffs were unable to prove that the Tricor 145 launch was part of the anticompetitive scheme, Plaintiffs' aggregate overcharge damages may have dropped by over 75% (*i.e.*, to \$412 or \$488 million); and, (b) Defendants' damages expert computed damages from \$24 to \$43 million based upon several alleged errors she identified in Dr. Leitzinger's assumptions, the most consequential of which was Dr. Leitzinger's alleged error in assuming that but-for unit volume of the Tricor Fenofibrate Molecule would either plateau or grow at the same average rate as the entire class of dyslipidemia drugs as a whole.

While Plaintiffs believe their damages computations were and are correct, and that the errors asserted by Defendants' expert were not errors at all, there was a risk

that the jury would not have accepted Plaintiffs' underlying assumptions and findings, and awarded a far lower Class overcharge figure.

III. **PROPOSED PLAN OF ALLOCATION**

In accordance with the "Notice of Class Action Settlement" (the "Settlement Notice"), and in accordance with Paragraph 8 of the Preliminary Approval Order (D.I. 529), Plaintiffs respectfully submit the following plan setting out the procedures for Class members to make claims and for the Net Settlement Fund to be allocated among Class members (the "Allocation Plan").

The Allocation Plan is supported by the attached Leitzinger Allocation Declaration. Dr. Leitzinger and Plaintiffs propose to use a method of allocation similar to those that have previously been: (a) approved by courts in several prior analogous cases involving impeded and/or delayed generic entry; and (b) repeatedly implemented with a high degree of success and efficiency and without complaint or objection from claimants.

1. **Dissemination of the Notice to Class Members.**

1.1 Class Counsel hired EPIQ Systems, Inc. ("Epiq"), a highly qualified and experienced accounting and claims administration firm, pursuant to Paragraph 5 of the Preliminary Approval Order, to handle administration of the Settlement ("Claims Administrator"). Epiq has assisted in providing notice to the Class, receiving requests for exclusion, and communicating with Class members. Class Counsel have also retained Dr. Leitzinger and his economic consulting firm, Econ One, to provide analytical assistance to Epiq

in connection with claims administration, and specifically, implementation of the calculations and data analysis necessary for allocating damages under this Allocation Plan. Dr. Leitzinger and Econ One have performed this same function in connection with the claims allocation procedures in a number of other analogous cases involving allegations of delayed and/or impeded generic entry, including the *Cardizem*, *Relafen*, *Platinol*, *Buspar*, *Remeron*, and *Terazosin* cases. Leitzinger Allocation Decl. ¶ 8.

- 1.2 All Class members are eligible to receive a claim form (the “Claim Form”).
- 1.3 On January 28, 2009, Epiq caused to be mailed by first-class mail, postage prepaid, to the more than 400 Class members, a copy of the Settlement Notice, the form and substance of which the Court approved in Paragraph 4 of the Preliminary Approval Order. The Settlement Notice informed Class members of, *inter alia*, the terms of the Settlement, and Class members’ rights to object and the procedures for doing so. The Notice also informed the Class about Class Counsel’s intention to request (a) attorneys’ fees in the amount of one-third of the gross settlement fund plus interest, (b) reimbursement of expenses, and (c) proposed incentive awards for the named Plaintiffs. Finally, the Settlement Notice advised Class members of a hearing (the “Fairness Hearing”) scheduled for April 23, 2009 at 3:30 PM, at which time the Court will consider whether

to: (1) approve the Settlement Agreement as fair, reasonable, and adequate; (2) approve this Allocation Plan; (3) award requested attorneys' fees of one-third of the gross settlement amount plus interest and reimbursement of expenses to Class Counsel; (4) approve incentive awards to the named Plaintiffs; and (5) enter final judgment terminating this litigation.

1.4 Class members were offered the opportunity to object the Settlement and/or the fee petition. No objections were received.

2. Dissemination of the Claim Form.

2.1 Epiq, working in conjunction with Econ One and Class Counsel, will create a separate individualized Claim Form for each Class member, based on information contained in Abbott's Tricor sales databases. Epiq, working again with Econ One and Class Counsel, will then distribute each individualized Claim Form to the Class members within forty-five (45) days of the Final Approval of the Settlement and Allocation Plan. The Claim Form will include information identifying each Class member by its name and address, as well as an estimate of each Class member's qualifying purchases of Tricor, and its *pro rata* share in dollars of the Net Settlement Fund, based on the allocation methodology described below.

2.2 The Claim Form will specifically request that each Class member verify the accuracy of the information contained in the Claim Form

and will provide instructions for challenging any of the figures or computations contained in the Claim Form. If a Class member agrees that the initial computation of their estimated *pro rata* share of the total Net Settlement Fund is accurate, it will be asked to sign the Claim Form verifying its accuracy, and timely mail it to the Claims administrator. If a Class member believes that the estimated computation of its *pro rata* share of the Net Settlement Fund contained on its Claim Form is not accurate, that Class member may, *e.g.*, submit its own purchase records in order to dispute the initial computation pursuant to the procedures described below.

- 2.3 The Claim Form will request the entity's full name and mailing address appropriate for correspondence regarding the distribution of the Net Settlement Fund, and the identity and contact information for the person responsible for overseeing the claims process for the Claimant. All entities that timely submit executed Claim Forms are referred to herein as "Claimants." Finally, the Claim Form will include the release language set out in the parties' Settlement Agreement, and will require each Claimant to execute the release as a condition of receiving any distribution from the Net Settlement Fund.
- 2.4 *Timeliness.* The submission of the Claim Form to the Claims Administrator (with any necessary supporting documentation if the

Claimant is disputing its initial *pro rata* distribution amount) will be deemed timely if it is received or postmarked within 90 (ninety) days of the Final Approval of the Settlement and Allocation Plan (*i.e.*, 45 days after the Claim Forms are mailed to all Class members). At Class Counsel's discretion, this deadline may be extended up to another 45 days without approval of the Court. Class Counsel may also seek further extensions of the deadline by order of the Court after any initial extension in the unlikely event that should be deemed necessary.

3. Calculation of the Estimated Overcharge.

3.1 The distribution that each Claimant derives from the Net Settlement Fund will be set in proportion to each Claimant's actual purchases of Tricor during the Class Period. The percentage of the Net Settlement Fund allocable to any given Claimant will be calculated as that Claimant's actual eligible direct purchases of Tricor from April 9, 2002 through August 18, 2008, divided by the total of all Claimants' purchases of Tricor from April 9, 2002 through August 18, 2008. See Leitzinger Alloc. Decl., ¶¶ 29-30. However, because each Claimant's *pro rata* share will be calculated using the sales database provided by Abbott during the course of the litigation and the sales data provided by Abbott ends in August of 2007 (stopping short of the end of the Class period by almost twelve months), the purchase volumes used to allocate the settlement fund will be

drawn from April 9, 2002 through the end of Abbott's sales data (August of 2007). *See id.*

- 3.2 Also as a consequence of Abbott's sales data ending in August of 2007, there are "supplemental" Claimants who first purchased Tricor directly after August of 2007 but before the end of the Class period (August 18, 2008). Abbott has provided Class Counsel with a spreadsheet of these supplemental Claimants and each of their total purchases, which in the aggregate amount to approximately \$50,000 (or approximately 0.001% of total eligible Tricor purchases from April 9, 2002 through August of 2007). The supplemental Claimants will receive allocations from the Net Settlement Fund based upon their respective purchase volumes (as reflected in the supplemental Abbott data) as compared with the total Class purchase volumes during the period of available data.⁸ *See Leitzinger Alloc. Decl., ¶ 30.*

4. Processing of Claims.

- 4.1 All Claims will be reviewed and processed by the Claims Administrator with assistance from Dr. Leitzinger and his staff at Econ One.
- 4.2 *Acceptance and Rejection.* The Claims Administrator shall first determine whether a Claim Form received is timely, properly completed, and signed. If a Claim Form is incomplete, the Claims

⁸ Given the limited size of the supplemental Claimant volumes, the addition of these Claimants to the settlement allocation will have a negligible effect on the allocations received by the other previously identified Class members.

Administrator shall send via Certified Mail a notification to the Claimant describing the deficiency. Claimants will then have 25 days from the date of the mailing of the deficiency notification to cure any deficiency. If any Claimant fails to correct the deficiency within this time, the claim may be rejected and the Claimant shall be notified of such rejection by letter stating the reason for rejection.

4.3 All timely Claim Forms that are properly completed shall be deemed approved by the Claims Administrator (the "Approved Claims"). All late Claims Notices that are otherwise complete will be processed by the Claims Administrator, but segregated as "Late Approved Claims." Class Counsel may decide to accept Late Approved Claims, in which case they will be treated as any other Approved Claim. The Court will determine ultimately whether to accept any Late Approved Claims that are rejected by Class Counsel.

4.4 *The Pro Rata Distribution Calculation.* The Claims Administrator, in conjunction with Dr. Leitzinger and Econ One, will be responsible for determining the total amount each Claimant will receive from the Net Settlement Fund. Once the Claims Administrator has determined the number of Approved Claims, it, with assistance from Dr. Leitzinger and Econ One, will calculate each Claimant's

pro rata share of the Net Settlement Fund as determined by the calculation described in Paragraphs 3.1 and 3.2 above.

5. Processing Challenged Claims.

- 5.1 The Claims Administrator, in conjunction with Econ One and Class Counsel, shall review any and all written challenges by Claimants to the determinations of the Claims Administrator. If upon review of a challenge and supporting documentation, the Claims Administrator decides to amend or modify its determination of the distribution amounts to a Claimant, it shall advise all affected Claimants, if any, in writing and provide those Claimants with a revised Claim Form (“Revised Claim Form”) containing the new distribution amounts that each Claimant should expect to receive. The determinations contained in the Revised Claim Form will be final, subject to the appeals process described in Section 8 below.
- 5.2 Where the Claims Administrator determines that a challenge requires additional information or documentation, it will so advise the Claimant and provide that Claimant an opportunity to cure the deficiency within 25 days. If that Claimant fails to cure the deficiency within that time, the challenge will be rejected and the claimant will be notified of the rejection by mail, which notification shall be deemed final.
- 5.3 If the Claims Administrator concludes that it has enough information to properly evaluate a challenge and maintains that its initial

determinations were correct, it will so inform the Claimant in writing, which notification shall be deemed final.

6. Report to Court Regarding Distribution of Net Settlement Fund.

6.1 After the Claims Administrator determines how much each Claimant is entitled to receive from the Net Settlement Fund, it will prepare a final report and affidavit to the Court for the Court's final review and approval of the Claims Administrator's determinations. The affidavit will explain the tasks and methodologies employed by the Claims Administrator in processing the claims and administering the Allocation Plan. It will also contain a list of each Claimant's final *pro rata* percentage share of the Net Settlement Fund, as well as a list of Class members (if any) who filed Claim Forms which were rejected and the reasons any respective claims were rejected as well as a list of any challenges to the estimated distribution amounts that were rejected and the reasons why they were rejected. Finally, the final report shall contain an accounting of the expenses associated with the Allocation Plan, including bills from Econ One and Epiq, any taxes that are due and owing, and any other fees or expenses associated with maintaining and administering the escrow account.

7. Payment to the Claimants.

7.1 Upon Court approval of the final report and affidavit of the Claims Administrator, the Claims Administrator shall issue a check payable to each Claimant in the amount approved by the Court.

8. Resolution of Disputes.

8.1 In the event of any disputes between Claimants and the Claims Administrator on any subject (e.g., timeliness, or required completeness or documentation of a claims, or the calculation of any amounts payable), the decision of the Claims Administrator shall be final, subject to the Claimant's right to seek review by the Court. In notifying a Claimant of the final rejection of a Claim or a challenge thereto, the Claims Administrator shall notify the Claimant of its right to seek such review by issuing notice to the Claims Administrator and Class Counsel.

8.2 Any such appeal by a Claimant must be submitted in writing to the Court, with copies to the Claims Administrator and Class Counsel, within 20 days of the Claims Administrator's mailing of the final rejection notification letter to the Claimant.

8.3 In the unlikely event that the number or complexity of disputes warrants, Class Counsel may request that the Court appoint a Special Master or Examiner, as appropriate, to resolve any disputes. For the Court's information, in the multiple prior cases in which an Allocation Plan substantially similar to the one proposed

here was effectuated, no disputes requiring resolution by the Court
(or Special Master) have ever arisen.

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