

representatives, namely, Louisiana Wholesale Drug Company, Inc. (“LWD”), Rochester Drug Co-Operative, Inc. (“RDC”), and Meijer, Inc./Meijer Distribution, Inc. (“Meijer”) (collectively “Class Plaintiffs”).

2. As Lead Counsel, I have been responsible for overseeing the litigation of the Direct Purchaser Class Actions and the negotiation of the Settlement, and have engaged in these activities along with other members of the Direct Purchaser Class Executive Committee and other class counsel (“Class Counsel”).² I have actively participated in all material aspects of this litigation. Therefore, I am fully familiar with the facts set forth herein.

A. The Case and the Settlement

3. The Settlement, which provides for an up front \$250 million cash payment for the benefit of the Direct Purchaser Class,³ was achieved directly as a result of the aggressive,

² The Court appointed Garwin Gerstein as Lead Counsel for the Direct Purchaser Class, and as a member of the Executive Committee, along with the firms of Berger & Montague, P.C., Odom & Des Roches, LLP, 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, LLP, was substituted for Cohen Milstein midway through the litigation. Additional class counsel that actively participated in the case include, Heim Payne & Chorush, LLP (formerly Conley, Rose & Tayon), and Rosenthal, Monhait & Goddess, P.A., Delaware counsel for the Direct Purchaser Class.

³ The Direct Purchaser 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”) (Abbott and Fournier collectively are “Defendants”) at any time during the period April 9, 2002 through August 18, 2008. Excluded from the Class are Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, all federal governmental entities, and the following entities that opted out of the Class: 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

efficient, and effective work of Class Counsel.⁴ To date, to my knowledge, this is the largest settlement of any direct purchaser class case alleging impeded generic competition in the Hatch-Waxman antitrust context. This significant recovery was achieved even though the liability theories the Class Plaintiffs asserted in this case were novel in pharmaceutical antitrust cases, complex, and fraught with risk. Prior to this case, to my knowledge, no case had ever asserted what has become known as a “product hopping” claim in the Hatch-Waxman context – *i.e.*, where a branded drug manufacturer converts the market from one version of a branded drug to another version before AB-rated generic versions of the prior branded drug could obtain FDA approval to come to market. In addition to succeeding in advancing the viability of this theory from a legal perspective, Class Counsel, in conjunction with other plaintiff groups, had to prepare to prove it to a jury from a factual perspective.

4. The Settlement in this case was reached only after the opening of trial and after Class Counsel had, among other things: (a) conducted extensive discovery, including the review of over 1.2 million pages of documents and taking the lead or actively participating in over 60 depositions; (b) retained and prepared numerous expert witnesses in the areas of cardiology and treatment of lipid disorders, biostatistics, pharmacodynamics and pharmacokinetics, the FDA

Massachusetts Executive Office of Health and Human Services Office of Medicaid (MassHealth), Pennsylvania Department of Public Works and Department of Aging, and Overman & Stevenson Pharmacists. *See* Order Preliminarily Approving Direct Purchaser Class’ Proposed Settlement, Authorizing Notice to the Class and Setting Final Settlement Schedule, D.I. No. 529, *In re Tricor Antitrust Litig.*, Case No. 05-340 (SLR) (D. Del).

All but one of these opt-outs either brought their own independent suits, or are governmental agencies. Moreover, the opt-outs other than the CVS and Walgreens Plaintiffs had a very small amount of direct purchases.

⁴ The Settlement Agreement was submitted to the Court as Exhibit A to Class Plaintiffs’ opening brief in support of their motion for preliminary approval. *See* D.I. No. 527.

regulatory regime regarding approval and manufacturing of branded and generic prescription drugs, pharmaceutical manufacturing plant capacities, the policy and operation of the Hatch-Waxman Act and state substitution laws, the operation of the pharmaceutical industry generally, antitrust economics, the calculation of damages, and patent law; (c) defeated Defendants' motions to dismiss and for summary judgment; (d) obtained certification of the Direct Purchaser Class; (e) obtained significant pre-trial rulings; and (f) conducted comprehensive trial preparations, including two mock jury presentations that permitted Class Counsel to test and hone their themes and strategies.

B. Favorable Response of the Class

5. The response of the Direct Purchaser Class to the Settlement, and requested incentive awards, attorneys' fees and expenses, has been overwhelmingly favorable. While the period for lodging objections does not expire until March 23, 2009, not a single objection has been received to date. Moreover, the Settlement and the requested attorneys' fees of one-third the gross settlement amount have received overwhelming *affirmative* support from members of the Class – sophisticated entities which Class Counsel have represented in numerous prior Hatch-Waxman cases. Indeed, Class members representing nearly 70% of Class purchases of Tricor, have come forward to affirmatively support the Settlement and the fee request. Specifically, in addition to each of the three named class representatives, each of the “Big 3” national pharmaceutical wholesalers – Cardinal Health Inc. (“Cardinal Health”), McKesson Corp. (“McKesson”), and AmerisourceBergen Co. (“Amerisource”) – have expressed unreserved support for the Settlement and the fee request.

6. For example, counsel for Amerisource, which expects to recover “one of the four largest claims made to any class member,” has represented to the Court that it “is satisfied that

the proposed settlement is fair and adequate, and that the proposed attorneys' fee award of one third the settlement amount is appropriate in this case." *See* Affidavit of Adam Steinfeld ("Steinfeld Aff."), filed contemporaneously herewith, at Ex. 4. As concerns the requested attorneys' fee, Amerisource states that "this award is justified by the enormous amount of time and expense that class counsel put into prosecuting this complex and hard fought litigation." *Id.* Similarly, counsel for Cardinal Health, the second largest Class member by purchase volume, calls this settlement "an excellent result for the direct purchaser class in what was hard-fought, complex, and expensive 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." *Id.* at Ex. 5, p. 2. He also states that Class Counsel "efficiently provided legal services of the highest quality to the direct purchaser class in this complex case which was not without substantial risk. The benefit conferred upon this large class of direct purchasers, including my client, by the settlement negotiated by class counsel is substantial." *Id.* at 3. "For these reasons, Cardinal Health is supportive of the final approval of the proposed settlement and has no objection to class counsel's application for attorneys' fees and reimbursement of costs." *Id.* Moreover, McKesson, the largest Class member, has authorized Class Counsel to inform the Court that McKesson also supports approval of the Settlement, as well as the requested attorneys' fees of one-third of the gross Settlement amount (plus interest) and reimbursement of expenses.

7. Furthermore, fourteen regional wholesalers, all of which are Class Members (and two of which, LWD and RDC, are class representatives), have, through their trade association, unanimously expressed their support for the Settlement and the requested fee. Rick Meehan, President and Chief Operating Officer of OptiSource, LLC, writes that the Optisource

membership “believes that the proposed settlement constitutes an outstanding recovery,” and therefore “express[es] strong support for” approval of the Settlement and the requested attorneys’ fees and expenses. *Id.* at Ex. 6. p.1.

8. Finally, each of the class representatives have submitted affidavits affirmatively supporting the Settlement, praising the performance (and results) of Class Counsel, and supporting the requested fee. *See, id.*, at Exs. 1-3.

C. Litigation Activities of Class Counsel and Litigation Risk

9. The proposed Settlement was achieved after three and one-half years of intense litigation against very formidable opposing counsel who are well-recognized in the field of antitrust litigation.⁵ In litigating this case, Class Counsel drew from a decade of experience jointly litigating numerous other Hatch-Waxman antitrust cases on behalf of classes of direct purchasers of prescription drugs. This experience enabled each Class Counsel to specialize in particular areas in these Hatch-Waxman cases, giving our team the ability to quickly and efficiently coordinate, organize, and implement litigation strategies in this case. For instance, Garwin Gerstein has developed particular depth of experience in running cases as Lead Counsel,

⁵ Lead counsel for Abbott was Bill Cavanaugh of Patterson Belknap Webb & Tyler. Mr. Cavanaugh is co-chair of his firm and is listed in The Best Lawyers in America 2009 for Antitrust and has been inducted as a Fellow of the American College of Trial Lawyers. Lead counsel for Fournier was Bill Baer, who is head of Arnold & Porter’s antitrust group, and was formerly the Director of the Bureau of Competition at the Federal Trade Commission. Like Mr. Cavanaugh, Mr. Baer is listed in The Best Lawyers in America 2009 for Antitrust, and received the *Chambers USA’s* Award for Excellence 2008 for Antitrust. Both have received various other awards and distinctions as antitrust lawyers. Abbott’s Delaware counsel was Mary Graham of Morris, Nichols, Arsht & Tunnell, who has been recognized for legal excellence and expertise in intellectual property litigation by *Chambers USA* and *The Best Lawyers in America*, and as a Delaware "Super Lawyer" by *Law and Business Media*. Fournier’s Delaware counsel was Frederick Cottrell, III of Richards, Layton & Finger, PA, who is director of the firm’s litigation department and serves as co-chair of the Delaware District Court's Intellectual Property Law Advisory Committee.

and analyzing core liability and causation issues; Berger & Montague has a particular expertise in litigating class certification and issues involving economics, monopoly power, relevant market, and quantum of damages; and, Odom & Des Roches has vast experience regarding the policies and procedures of the Hatch-Waxman Act and construction of “but for” worlds relating to the regulatory approval, manufacturing and market entry of generic pharmaceutical manufacturers. Similarly, Smith Foote has significant knowledge and insight into the workings of the wholesale drug industry and in conducting discovery in pharmaceutical antitrust cases; Kaplan Fox has substantial experience in both the government regulation of pharmaceuticals and the economic impact of anticompetitive conduct in this field; and Heim Payne & Chorush are noted patent lawyers, with a wealth of experience in evaluating patent issues as well as scientific issues involving chemistry and the pharmaceutical sciences.

10. Moreover, and significantly, Delaware counsel for the Class, Rosenthal Monhait & Goddess, PA, played an integral role throughout this litigation, providing critical advice and assistance to the Hatch-Waxman team regarding the merits of the Direct Purchaser Class’s pleadings, briefs and arguments, while navigating Class Counsel through the procedural requirements of this Court.

11. The skills and experience developed by Class Counsel in the antitrust and Hatch-Waxman arenas were vital to the successful resolution of this case. But experience from prior cases alone was insufficient to succeed in this case, due to the unique and multi-faceted nature of Defendants’ conduct here. This case was different from other Hatch-Waxman cases in many respects, and required Class Counsel to develop expertise in new areas such as cardiology and the treatment of various lipid disorders (“dyslipidemia”), pharmacokinetics, pharmacodynamics and biostatistics. Moreover, the breadth and scope of the “product hopping” scheme alleged here

– including the development of new formulations of Tricor; converting Tricor’s prescription base to the new versions of Tricor before generic versions of the prior versions could get to market; “bleeding down” the supply of the prior versions from the distribution chain before generic entry; and filing sham patent litigations to buy time to complete these market conversions – made this case a unique and significant challenge for Class Counsel.

12. While Class Counsel believed their case was strong, Defendants and their very able counsel responded vigorously, proffering a myriad of defenses. These included Defendants’ claims that: (a) the new versions of Tricor (*i.e.*, Tricor 160 and Tricor 145) were significant “improvements” over Tricor 200; (b) Defendants’ withdrawal of the prior forms of Tricor after the new versions were launched was appropriate from a regulatory perspective, and beneficial because it eliminated the possibility of physician and patient confusion if multiple versions of Tricor were available at the same time; (c) Defendants’ conduct did not prevent Teva and Impax from obtaining FDA approval for their generic versions of Tricor, or from competing with Tricor by promoting those generic products; (d) Defendants’ conduct had no anticompetitive effect because, *inter alia*, Tricor had only a small (5%) share of what Defendants claimed to be the relevant market (*e.g.*, the crowded “dyslipidemia class”, which included statins, niacins and other fibrates); and (e) Defendants’ lawsuits were not shams based on a variety of theories, each of which was founded on the notion that patent cases are complex and unpredictable.

13. Although Class Counsel developed evidence to rebut these defenses, there was significant risk that this case could be lost at various stages, including, *e.g.*, the risk that the Court would have granted Defendants’ motion to dismiss; denied Class certification; granted summary judgment; and/or excluded important evidence or experts. After having overcome all of those risks and begun the trial, substantial threats to ultimate success remained. These risks

included the following:

- 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 Class Plaintiffs' antitrust injury or that Class Plaintiffs had a duty to mitigate the harm;
- d. the risk of the jury finding that the Direct Purchaser Class did not establish class-wide impact;
- 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 on appeal. This risk included, but was not limited to, the risk that the Court of Appeals (or the United States Supreme Court) would not accept the 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 Defendants' to be *per se* procompetitive;
- f. the risk that even if the Direct Purchaser Class obtained a liability verdict that was upheld on appeal, the Class would obtain an unfavorable jury verdict on damages or one that substantially reduced damages; and
- g. the risk that even if a favorable damage verdict were obtained, that verdict would be overturned on appeal.

In conducting settlement negotiations, Class Counsel were cognizant of the above numerous and multi-layered risks facing the Direct Purchaser Class. Absent the Settlement, each of these risks

easily could have resulted in no recovery at all for the Class, or very significant delays in achieving the same or a lesser recovery.

14. In light of the number and magnitude of these risks, Class Counsel, based on our extensive experience in class actions in general, and pharmaceutical antitrust class actions in particular, believe that the \$250 million recovery obtained in this case is an outstanding result. This is true both because of the magnitude and certainty of the recovery, as well as the timing – an immediate recovery, as opposed to the many years, at a minimum, that the Class would have had to wait to receive any recovery absent the Settlement. Given the size of the case and the importance of the issues raised, as well as the bifurcation of liability and damages, it is inevitable that any favorable jury verdict for the Class would be subject to multiple appeals, *en banc* petitions and/or *certiorari* petitions. The almost unprecedented affirmative support from this class of sophisticated business entities for the Settlement and the requested fee of one-third of the gross settlement amount reflects the excellence of the achievement and reasonableness of the motion for settlement approval and requested fee.

D. The Challenges of Coordinating the Class’s Case with Other Plaintiff Groups

15. As the Court is aware, the Direct Purchaser Class case was coordinated by Judge Jordan for pre-trial purposes, with cases filed by several other plaintiff groups.⁶ From the outset, Class Counsel worked closely and efficiently with counsel for the CVS and Walgreens Plaintiffs,

⁶ 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) (collectively “the CVS and Walgreens Plaintiffs”), the generic drug manufacturers Teva Pharmaceuticals (“Teva”) and Impax Laboratories, Inc. (“Impax”) (Case Nos. 02-1512 & 03-120), the consolidated indirect purchaser class cases and the “opt out” indirect purchaser cases (Case No. 05-360).

in particular Richard Arnold, Scott Perwin and Lauren Ravkind (counsel for Walgreens), and Steve Shadowen and Joseph T. Lukens (counsel for CVS and Rite Aid). Notably, both Mr. Arnold and Mr. Lukens have offered affidavits, submitted herewith, praising the work of Class Counsel in this case. *See* Steinfeld Aff. at Exs. 7 and 8.

16. Coordination with other plaintiff groups resulted in certain litigation efficiencies and benefits, including access to the excellent lawyers representing the other plaintiff groups. However, this coordination also created significant complications throughout the pre-trial phase, which were compounded during trial preparation, when different groups had to face trying their respective cases jointly.

17. For instance, each plaintiff group developed and advanced, in conjunction with their experts, somewhat different liability and damages theories. 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 litigation approaches and strategies of the direct purchaser plaintiffs and the generic manufacturer plaintiffs Teva and Impax. Some of the differences included: (a) the direct purchasers' damages were based on overcharges, whereas the damages of Teva and Impax were based on lost profits; (b) plaintiffs' economists analyzed the anticompetitive harm stemming from Defendants' product hopping, as well as the types of evidence that would best establish Defendants' monopoly power,⁷ from distinct (and potentially conflicting) economic perspectives; and (c) there were significant differences in the scope and focus of the patent-based antitrust claims, resulting in differing plaintiff groups challenging different aspects of the patent cases.

⁷ For example, Class Counsel focused largely on direct evidence of Defendants' monopoly power, while Teva and Impax focused on indirect evidence.

As a result, in the pre-trial phase of the case, Class Counsel spent a great deal of time coordinating with the other plaintiff groups and their experts to minimize differences as much as possible and not allow Defendants to “divide and conquer”.

E. Trial Preparation and Conduct of Trial

18. The challenges posed by the need to coordinate with other plaintiff groups intensified significantly during the trial preparation stage of the case. In particular, it was the firm belief of Class Counsel that the core theme of this case should revolve around the policies and procedures of the Hatch-Waxman Act – *i.e.*, that the plaintiffs would have to clearly explain the procedural interworkings and underlying policies of the Hatch-Waxman Act, and convince the Court and the jury that this system provided the optimal mode of competition between branded and generics drugs in order to prevail.

19. Additionally, while Class Counsel ultimately commenced the trial together with other plaintiff groups (the CVS and Walgreens Plaintiffs, Teva and Impax), we had to be prepared to present this case to the jury by ourselves in the event that one or more of the other plaintiff groups settled. As a result, we created a trial team that was prepared to try this case with or without any of the other plaintiff groups.

20. Trial preparation required that Class Counsel polish, refine and focus a complex case which plaintiffs would have to present to a jury using just 28 hours. Class Counsel also had to contend with the significant practical issues of moving a trial team to Wilmington from various cities around the country, and merging the various separate trial teams of the different plaintiff groups.

21. In order to narrow and refine the issues to be tried before the Court, Class Counsel, along with counsel for the CVS and Walgreens Plaintiffs, (a) retained and worked with

trial consultants (Decision Analysis) to run multiple mock jury presentations in Wilmington in which we exhaustively tested the strengths and weaknesses of the case; (b) carefully reviewed hundreds of hours of deposition testimony, distilling from that an essential few hours to be presented to the jury; (c) reviewed over 1.2 million pages of discovery to determine the handful of critical documents necessary for presentation of the case; and (d) retained and worked with graphic artists and our trial consultants to prepare demonstrative aids to most effectively communicate our core themes and evidence to the jury.

22. At the same time, Class Counsel expended enormous effort coordinating with counsel for the other plaintiff groups in an effort to address critical aspects of how the case would be presented to the jury, including drafting and negotiating the Pre-Trial Order, jury instructions, voir dire for the selection of jurors, and the verdict form. Then, of course, Class Counsel battled with Defendants' counsel in order to obtain favorable jury instructions, evidentiary rulings, and a simple and comprehensible (but legally sufficient) verdict form.

23. In early November, Class Counsel moved a team of attorneys and staff to a hotel in downtown Wilmington, to put the finishing touches on trial preparation and to conduct the trial. Doing so involved obtaining and setting up offices, conference and living space for round-the-clock use.

24. On November 7, 2008, the parties selected a jury. On November 10, 2008, the parties opened to the jury, and plaintiffs proceeded to present live witness testimony from, among others, the CEO of RDC, one of the class representatives, as well as taped deposition testimony of Defendants' employees.

25. Significantly, counsel for the Direct Purchaser Class -- Stuart Des Roches -- was selected by all of the plaintiff groups to make the first portion of the opening statement to

introduce the jury to the case generally and the parties, to explain the basic operating framework of the pharmaceutical industry, and to introduce what we believed to be the single most fundamental aspect and theme of this case – *i.e.*, that the “switch scheme” was an antitrust violation because it directly interfered with the normal price competition between brand name drugs and AB-rated generics drugs as provided for in the policies and procedures of the Hatch-Waxman Act and state substitution laws found in all 50 states. This was the core theme that Class Counsel pushed from the very beginning of this case until its resolution.

26. Because of our thorough pre-trial work and trial preparation, which culminated in a successful first day of trial, Class Counsel were in a position to negotiate the \$250 million Settlement with Defendants.

F. Class Counsel’s Time and Expenses

27. The Settlement was accomplished only after Class Counsel expended a great deal of time and effort, and had made a huge investment of resources – all with no guarantee of any recovery at all. In sum, Class Counsel spent a total of 45,174.75 hours prosecuting the case, representing a total lodestar of \$21,186,298.50. In addition, Class Counsel incurred \$3,330,791.79 million in out of pocket expenses.

28. As detailed further below, this time and these expenses were non-duplicative and directly related to the Settlement achieved for the benefit of the Class. By no stretch of the imagination was a recovery guaranteed in this complex Hatch-Waxman monopolization case that was defended by top-notch antitrust defense firms and lawyers. This case proceeded to trial under Section 2 of the Sherman Act, and thus required plaintiffs to prove not only the underlying scheme, but also show that that scheme amounted to an antitrust violation under the “rule of reason,” and prove monopoly power in a relevant market, causation, injury and damages. As

Class Counsel have learned all too well from past experiences in representing similar direct purchaser classes in other Hatch-Waxman cases (involving similar numbers of hours, lodestars, and expenses), these antitrust cases can be (and have been) lost or can drag on for many years without any recovery for the Class or compensation for Class Counsel. *See* Steinfeld Aff. at Ex. 1 at ¶13; Ex. 5, at 2; Ex. 6 at 2.

29. For these reasons, as discussed in more detail below and in the accompanying memoranda and declarations, Class Counsel respectfully request that the Court grant Final Approval to the \$250,000,000 Settlement⁸ and approve Class Counsel's request for attorneys' fees of one-third the gross settlement amount plus interest, reimbursement of expenses, and incentive awards of \$50,000 to each of the three certified class representatives.

II. SUMMARY OF THE DIRECT PURCHASER CLASS PLAINTIFFS' CLAIMS

30. The Class Plaintiffs alleged that Defendants executed a multifaceted scheme to maintain and extend their monopoly power in the fenofibrate market by improperly preventing generic manufacturers from effectively competing with Tricor. The Class Plaintiffs alleged that Defendants' scheme was executed through a manipulation of the complex distribution system for pharmaceutical products in the U.S., the Hatch-Waxman amendments to the Federal Food, Drug, and Cosmetics Act (21 U.S.C. § 301-392), the state drug substitution laws, as well as the courts, and the patent laws.

A. The First Conversion

31. In the face of the imminent threat of generic competition, on November 10, 1999,

⁸ Pursuant to the schedule approved by the Court in the Preliminary Approval Order, the class representatives' motion for final approval of the Settlement will be filed on April 10, 2009.

Defendants applied to the U.S. Food and Drug Administration (“FDA”) for approval to market a tablet version of Tricor (“Tricor 160”), which was therapeutically equivalent and bioequivalent to the Tricor capsules that Defendants were marketing at the time (“Tricor 200”). Class Plaintiffs alleged that this tablet formulation offered no medical/clinical benefits over the existing capsules. Defendants nonetheless expended significant resources developing and seeking FDA approval for their tablet formulation as part of their scheme to impede effective generic competition. Specifically, Defendants formulated Tricor 160 so that it would not be AB rated to Tricor 200 – *i.e.*, it was a different dosage strength (160mg vs. 200mg) and a different dosage form (tablet vs. capsule). This was significant because, under FDA regulations, generic versions of Tricor 200 were not AB rated to Tricor 160, and therefore could not be automatically substituted for Tricor 160 at the pharmacy level, which is the main means by which less expensive generics get in the hands of consumers. As a result, the Class Plaintiffs alleged, Defendants converted demand for Tricor 200 to Tricor 160 before generic versions of Tricor 200 could get to market. This prevented generics from gaining access to the best and most cost-efficient mechanism for distributing their generic products – automatic substitution of AB rated drugs at the pharmacy level.

32. In order to give themselves time to carry out this conversion process, Defendants brought sham patent infringement suits in the Illinois District Court against the generic manufacturers (the “Illinois Patent Litigation”). Defendants thereby took advantage of the Hatch-Waxman regulatory framework governing the marketing of generic drugs, which requires the FDA to stay approval of such drugs for up to 30 months when such patent suits are asserted, regardless of the objective and subjective baselessness of such suits.

33. Defendants almost completely shifted the demand for fenofibrate from Tricor 200

to Tricor 160 before April 2002, when the first generic fenofibrate capsules came to market. This conduct, the Class Plaintiffs alleged, prevented the generic manufacturers from effectively competing with Defendants and bringing low prices to purchasers. In fact, even though generic equivalents typically capture from 50% to 90% of the sales of their branded counterpart in their first year on the market, Defendants' scheme resulted in Teva, the first manufacturer of generic fenofibrate capsules to come to market, capturing only 2% of the fenofibrate market.

B. The Second Conversion

34. After Defendants converted the market to Tricor 160, Teva and Impax began developing generic versions of that formulation. As a result, Defendants took active steps to once again change the formulation of Tricor, and again convert the demand for fenofibrate before the generic manufacturers could obtain FDA approval to sell generic versions of the first tablet formulation – this time to a second tablet formulation (“Tricor 145”).

35. Defendants again improperly converted the market before generics could launch their versions of Tricor 160, this time from Tricor 160 to Tricor 145. Class Plaintiffs alleged that the second tablet formulation (a) offered minimal (if any) benefits over Tricor 200 or Tricor 160, and (b) any supposed benefits from the second tablet formulation were far outweighed by the increased cost of the new branded product relative to the prospective generic competitors. However, because Tricor 145 was a different dosage strength than Tricor 160, and therefore was not AB-rated to (and not substitutable for) the first tablet formulation, this new formulation insulated Defendants from effective competition from generic versions of Tricor 160. Furthermore, upon receiving notice of Teva's and Impax's tablet ANDAs, Defendants again blocked the generic competitors by reflexively filing patent infringement suits, this time before this Court, without regard to whether those suits had any merit.

36. The Class Plaintiffs contended that as a result of this illegal scheme, Defendants: (a) illegally maintained and enhanced monopoly power with respect to fenofibrates in the United States; (b) fixed, raised, maintained, and/or stabilized the price of fenofibrates at supra-competitive levels; and (c) overcharged all direct purchasers of Tricor by depriving them of the benefits of efficient and effective competition from less-expensive AB-rated generic versions of Tricor.

37. The first complaint by a direct purchaser class representative was filed on May 27, 2005, and assigned to the Honorable Judge Kent A. Jordan. The Class Plaintiffs filed a consolidated Amended Complaint on September 26, 2005. During the course of the litigation, Judge Jordan was elevated to the Third Circuit, leaving the coordinated antitrust actions unassigned as of December 8, 2006. During this period, litigation of the case continued under the supervision of Magistrate Judge Thygne. This case, and the coordinated actions, were subsequently assigned to the Honorable Sue L. Robinson on February 1, 2008.

III. LITIGATION OF THE CASE

A. Dispositive and Class Motion Practice

1. Defendants' Motion to Dismiss

38. The Class Plaintiffs' case was premised on a novel legal theory: that, in the particular context of the pharmaceutical industry, the introduction of a new branded product and withdrawal of an older branded bioequivalent product constituted illegal monopolization in violation of Section 2 of the Sherman Act. While Class Counsel believed this theory had a sound basis in existing antitrust precedent, it had never been tested in any pharmaceutical case.

39. Not surprisingly, Defendants filed a motion to dismiss on October 19, 2005, squarely aimed at the very core of the plaintiffs' case. Defendants' motion to dismiss mounted a

three-pronged attack, arguing that: (a) antitrust claims involving product changes are actionable only if the new product was no “improvement” at all over the prior version; (b) plaintiffs had alleged facts implicitly establishing that that the new versions of Tricor were “improvements” over the prior versions, and thus were *per se* legal; and (c) as a legal matter, because Defendants’ conduct did not prevent Teva and Impax from obtaining FDA approval to sell and market their products in competition with Tricor, Defendants did not foreclose generic competition, and thus did not violate the antitrust laws. Any of these arguments, if successful, would have eviscerated plaintiffs’ case.

40. Class Counsel, in conjunction with the CVS and Walgreens Plaintiffs, took a leading role in researching and developing responsive legal arguments, and in drafting the responsive brief which was filed on December 2, 2005, on behalf of all direct purchaser plaintiffs. The motion was fully briefed on December 23, 2005, and Class Counsel participated in oral argument before Judge Jordan on March 15, 2006. In preparation for this hearing, Class Counsel worked closely with counsel for the other plaintiff groups, through multiple teleconferences and in-person meetings, in order to develop a consistent and compelling presentation.

41. On May 26, 2006, the Court issued an omnibus order denying Defendants’ motions to dismiss. In that opinion, the Court held that: (1) plaintiffs adequately alleged that the new versions of Tricor were not material improvements over the prior versions; (2) any claimed “improvements” in the new Tricor formulations are to be balanced by the jury against the anti-competitive effect of Defendants’ conduct (if any) in impeding generic competition; and (3) the generic competitors need not have been completely foreclosed from marketing and selling their products in order to trigger antitrust liability. *See In re Tricor Direct Purchaser Antitrust Litig.*,

432 F. Supp. 2d 408 (D. Del. 2006). Judge Jordan held that Plaintiffs had adequately alleged an antitrust violation by alleging that Defendants' acts barred generics from the most "cost-efficient means of competing in the pharmaceutical market" – *i.e.*, AB rated generic substitution at the pharmacy level. *Id.* (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 64 (D.C. Cir. 2001)). Judge Jordan also ruled that the existence of antitrust injury must be evaluated based on Defendants' alleged conduct taken as a whole, and that the injury resulting from Defendants' alleged scheme to suppress generic competition in fact constitutes antitrust injury. *See, id.*, 432 F. Supp. 2d at 430-31. Notably, subsequent to the motion to dismiss opinion, Class Counsel had to fend off Defendants' attempts to have this Court revisit, and overturn, Judge Jordan's opinion.

2. Class Certification

42. On May 8, 2006, Class Counsel moved for certification of a class of all direct purchasers of Tricor during a defined period. Eric Cramer and Peter Kohn of Berger & Montague with help from me, worked closely with Dr. Jeffrey J. Leitzinger, an economist with considerable experience in assessing antitrust impact and calculating damages in complex antitrust actions, in formulating his expert report in support of class certification. Class Counsel also conducted extensive document and deposition discovery to support Class Plaintiffs' claims of class-wide impact, and to rebut the defenses to class certification raised by Defendants and their two experts in opposition to class certification, namely, Edward F. Sherry, Esq., and Robert Navarro, Pharm. D. Class Counsel deposed both of these experts.

43. Additionally, Class Counsel demanded, and received from Abbott, the equivalent of thousands of pages of electronic sales records upon which to construct Direct Purchaser Class Plaintiffs' class-wide damage methodology and analysis.

44. The motion for class certification was fully briefed on October 4, 2006, and

remained *sub judice* at the time of Judge Jordan's departure. Upon being assigned the case in February 2008, this Court promptly took up consideration of the motion, and gave the parties an opportunity to submit supplemental briefing regarding any new factual or legal issues that might have arisen during the pendency of the motion. Defendants used this opportunity to reassert and revise their arguments against class certification, which included attacks on Class Counsel's proposed methods for measuring overcharge damages and their common impact on the Class. In response, Class Counsel not only rebutted these arguments factually, but brought to the Court's attention new case law supporting certification of the Class, and distinguished the new authority cited by Defendants.

45. On May 9, 2008, the Court heard oral argument on the class certification motion. I argued for the Class Plaintiffs. On August 18, 2008, the Court issued a memorandum opinion certifying the Class.

46. Thereafter, Class Counsel prepared a notice for Class members that explained their rights and obligations in connection with this class action, and retained a third-party administrator to effectively communicate with the Class. After motion practice regarding the form and content of the notice, on September 16, 2008, the Court approved Class Counsel's proposed notice, and this notice was mailed to all Class members identified through Defendants' records. A summary notice was also published in *The Pink Sheet*, an industry publication likely to be seen by potential Class members. Thereafter, only 21 entities elected to opt out of the Class, all but one of which were private companies or State entities which were already represented in antitrust cases coordinated with this action. *See* D.I. Nos. 503 & 518. As discussed in more detail below, Class Counsel subsequently issued a second class notice to announce preliminary approval of the Settlement. *See, infra*, at ¶¶94-99.

3. Motions for Summary Judgment

47. At a status conference held on April 3, 2008, the Court determined that summary judgment practice would be limited to motions aimed at (a) plaintiffs' sham litigation allegations, and (b) whether Defendants had monopoly power in an appropriately defined relevant market. Defendants filed lengthy motions on both subjects. In addition, notwithstanding the Court's instructions limiting the issues subject to summary judgment, on April 18, 2008, the Defendants also petitioned the Court for leave to file an additional motion for summary judgment on what they called "antitrust injury," but what we believed was really an effort to reargue and undermine the basic holdings of Judge Jordan's motion to dismiss opinion. *See*, D.I. No. 385.

a. Summary Judgment on Monopoly Power in a Relevant Market

48. On May 6, 2008, Defendants filed a motion for summary judgment, arguing that Defendants did not have monopoly power in a relevant market. Defendants claimed that the relevant product market must include an entire class of prescription drugs that treat a wide variety of different conditions caused by abnormal blood lipid levels - namely all "dyslipidemia" drugs. This drug class includes disparate types of drugs such as statins (like Lipitor, Zocor, and Pravachol), niacins (Niacor), and fibrates (Lopid), as well as fenofibrates (Tricor). Defendants asserted that these different drugs were each available to doctors writing prescriptions for dyslipidemia, and were often used interchangeably. Moreover, Defendants argued, since these drugs compete on the basis of efficacy and side-effects, rather than price, the lack of substantial price competition, and low cross elasticity, between non-fenofibrate dyslipidemia drugs and Tricor was irrelevant. Based on the foregoing, Defendants asserted that, because they control only a small share (about 5%) of this broad "dyslipidemia class" of drugs, which they argued was the relevant market for this case, the conduct challenged in this case could not have involved

maintenance of monopoly power.

49. Since proof of monopoly power is an essential element of any Sherman Act Section 2 claim, Defendants' motion, if successful, would have completely defeated Plaintiffs' claims. Class Counsel took the lead in researching and drafting a responsive brief, to be filed on behalf of all the direct purchaser plaintiffs, and worked closely with counsel for Teva and Impax to ensure consistency between their responsive brief and ours. In particular, to fully refute Defendants' motion, Class Counsel marshaled legal and factual evidence, and expert testimony demonstrating that:

a. Under Third Circuit law, any analysis of monopoly power must focus on an alleged monopolist's ability to raise prices above those that would be charged in a competitive market. Therefore, a court must consider the presence or absence of cross elasticity even when decision-makers (such as doctors) are not cost conscious, and even if functionally similar products would thereby be excluded from the relevant market;

b. In the instant case, the economic evidence showed that the relevant market should be limited to Tricor and its AB-rated equivalents because, (1) Tricor exhibits none of the indicia of significant, positive cross elasticity with non-fenofibrate dyslipidemia drugs, and (2) AB-rated generic versions of Tricor (had they entered unimpeded by Defendants' conduct) would have exhibited substantial, positive cross elasticity with branded Tricor; and

c. other dyslipidemia drugs are not in the same relevant market as fenofibrate because they are not in fact functionally interchangeable, but instead are distinguished by medical professionals based on their safety and efficacy for treating distinct conditions within the "dyslipidemia" umbrella.

50. In preparation for the oral argument on this motion, Class Counsel repeatedly met

with counsel for all plaintiff groups to ensure an efficient and effective presentation of the argument to the Court. All plaintiff groups ultimately decided to split up the argument into two parts, with Class Counsel (Mr. Cramer) leading off by focusing on the proper legal and economic framework for assessing monopoly power, and counsel for Teva following with a presentation focusing on the economic and factual evidence. The Court heard oral argument on Defendants' motions for summary judgment on August 4, 2008. On August 18, 2008, the Court denied Defendants' motion.

b. Summary Judgment on Patent Issues

51. On May 5, 2008, Defendants filed a motion for summary judgment aimed at the plaintiffs' antitrust claims that were based on sham patent litigation and/or *Walker Process* fraud. Defendants' motion was comprehensive and voluminous, asserting myriad legal and factual arguments as to why each of their patents was properly obtained, and each of their patent cases had a reasonable objective basis.

52. Among the sham and *Walker Process* antitrust theories asserted by the various parties, Class Plaintiffs (together with the CVS and Walgreens Plaintiffs) were the first to recognize and assert a theory based on the Illinois Patent Litigation, where Defendants claimed infringement of their '726 patent on Tricor 200. *See See In re Tricor Direct Purchaser Antitrust Litig.*, 432 F. Supp. at 428. Subsequently, Impax and the indirect purchaser class added this theory to their cases, while Teva elected not to do so. During discovery, Class Counsel focused on the Illinois Patent Litigation, and opted to submit experts reports relating to these infringement suits only (and not to submit expert reports on the tablet patent litigation).

53. Accordingly, Class Counsel took the lead in deposing Defendants' technical expert relating to the Illinois Patent Litigation. When Defendants later moved for summary

judgment regarding the patent claims, Class Counsel researched and drafted a targeted responsive brief focusing solely on the sham nature of the Illinois Patent Litigation, which the CVS and Walgreens Plaintiffs, as well as the indirect purchaser plaintiff class joined. Class Counsel's response was not only supported by the testimony of expert witnesses, but also by the cross-examination of Defendants' expert witnesses by Class Counsel, namely Dr. Russell Chorush, a patent lawyer with a Ph.D. in Chemistry, who had obtained key admissions regarding the appropriate interpretation of the '726 patent.

54. While Class Counsel believed we had strong evidence demonstrating the objective baselessness of the Illinois Patent Litigation, we were also cognizant of the need to focus the trial on the core issues of the case (*i.e.*, Defendants' product hopping, and how that conduct impeded the type of AB-rated generic substitution contemplated and promoted by the Hatch-Waxman Act and state substitution laws). In our view, the need for this narrow focus became even more critical as we began to marshal the potential trial evidence and witnesses to be identified in the Pre-Trial Order. Since even this core conduct was complex and multi-faceted – and plaintiffs had only a limited time to present their claims at trial -- Class Counsel, in conjunction with other plaintiffs, decided not to pursue the patent claims at trial. The plaintiffs collectively informed the Court of this decision by letter on September 2, 2008.

55. On October 2, 2008, the Court granted in part and denied in part Defendants' motion for summary judgment on patent issues. Notably, the patent-related claims that survived summary judgment included the claims regarding the '726 patent that Class Counsel had focused on and championed from the outset of the case. *See* Revised Memorandum Opinion (D.I. No. 470), *In Re Tricor Direct Purchaser Antitrust Litig.*, Case No. 05-340 (SLR) (D. Del.). The Court granted summary judgment as to the *Walker Process* claims that Class Counsel had opted

not to pursue in expert reports. Subsequently, at the pretrial conference on October 6, 2008, the Court ruled that “the issue of sham litigation is going to be separated for trial at another time.” Tr. of October 6, 2008 Hearing at 9:23-10:7.

c. Summary Judgment on Antitrust Injury

56. Citing a decision that came down after the motion to dismiss had been decided, the *Nexium* case, Defendants claimed that no antitrust liability could flow from Defendants’ product hopping scheme because Teva and Impax were not completely foreclosed from the market, and because plaintiffs’ injury flowed from the FDA regulatory scheme rather than from Defendants’ conduct. While Defendants styled their motion regarding the overall scheme and antitrust injury as a motion for leave to file a summary judgment motion, Defendants’ supporting brief was effectively a summary judgment brief. As a result, and because, if heard, Defendants’ motion could have disposed of Class Plaintiffs’ entire case, Class Counsel put a significant amount of time and effort into our response. In that response, dated May 1, 2008, Class Counsel cited voluminous law demonstrating that Defendants’ legal arguments, as well as their basic assumptions regarding the nature of antitrust injury, were incorrect. In the Court’s omnibus summary judgment opinion dated August 18, 2008, Defendants’ request for leave to file a motion on antitrust injury was denied.

B. The Discovery Process

1. Overview of Discovery

57. Class Counsel engaged in substantial discovery in this case, in coordination with the other plaintiff groups. During three and one-half years of aggressive litigation, Class Counsel took the lead in composing and propounding three sets of document requests and interrogatories which, as ordered by the Court, were served on behalf of various coordinated

direct and indirect purchaser plaintiffs. Such extensive requests were necessitated by the breadth of Defendants' conduct in this case, and the rigor with which Class Counsel investigated that conduct. Therefore, the requests and investigation covered a wide array of subject areas, including, *inter alia*: (1) the scope, duration and intent behind Defendants' scheme to forestall generic competition; (2) the generic manufacturers' ability and willingness to come to market but for the Defendants' conduct; (3) the impact Defendants' alleged scheme had in delaying generic versions of Tricor from coming to market; (4) the impact of Defendants' conduct on the prices paid by direct purchasers of Tricor could be proven on a classwide basis; (5) the aggregate amount of overcharges incurred by the Class; (6) the pharmacokinetic, pharmacodynamic, and clinical similarities and differences among the various formulations of Tricor; (7) the manner in which dyslipidemia drugs compete with each other; and (8) the circumstances surrounding the prosecution and listing of the '726 patent.

58. As a result, Class Counsel were faced with a daunting amount of document discovery that needed to be reviewed and analyzed expeditiously. In the course of this litigation, Defendants and third parties produced over 1.2 million pages of documents, many of which had to be evaluated and reviewed in just a few months, so that Class Counsel could begin taking depositions in a timely manner. In light of the complexity and volume of discovery in this litigation, Class Counsel pursued various strategies to efficiently gather and evaluate the maximum amount of relevant information.

59. First, Class Counsel constructed a computerized database, which contained advanced searching capabilities to allow ease of access to the discovery materials. This entailed a detailed review of every document produced in the case and the entering of certain information in a searchable database. The end result was a highly sophisticated database that contained

images of each document produced and the capability to search for documents according to, for example, substantive search terms related to the issues in this case.

60. Class Counsel also assembled teams of attorneys to perform extensive legal research on each element of Class Plaintiffs' claims. Based on this research, these teams combed Class Counsel's extensive electronic database of documents, gathering those documents both helpful and harmful to the Class Plaintiffs' claims. This database and attendant detailed review put Class Counsel in position to identify necessary deponents, and to thoroughly evaluate the strengths and weaknesses of claims and defenses, and thereby better position ourselves for trial presentation and settlement discussions.

61. Despite the above efficiencies, discovery in this case remained a monumental undertaking. Even after the Court upheld Class Plaintiffs' novel "product hopping" theory, Class Counsel faced multiple defenses which required a substantial amount of effort in discovery to overcome. *See, supra* at ¶12 (listing defenses). Further, Class Counsel marshaled the testimony of numerous expert witnesses, both to rebut Defendants' defenses and affirmatively prove our claims. These experts included, among others:

a. Dr. Arthur Schwartzbard, M.D., F.A.C.C., who evaluated clinical information relating to Defendants' Tricor products and concluded that, from a physician's perspective, the follow on versions of Tricor did not offer material improvements to patients, and that Defendants' claims of improvement were not supported by clinical evidence. Dr. Schwartzbard also opined on the significant clinical differences between fenofibrates and other dyslipidemia drugs (including statins, niacins and fibrates);

b. Cheryl Zimmerman, Ph.D., who opined that the follow on versions of Tricor were not improvements from a pharmacokinetic perspective, and that there was no

scientific or clinical evidence that the follow on versions demonstrated a lower incidence of adverse events, *i.e.*, were any “safer,” than the initial version of Tricor;

c. Michael Hamrell, Ph.D., who discussed FDA guidelines for drug manufacturer claims that a new product is superior to an existing product and opined, based on the regulatory history of Defendants’ Tricor products, that FDA did not deem the follow on versions of Tricor to be improvements, and that discontinuance of the prior version of Tricor was not required by FDA to prevent physician or patient confusion;

d. Jeffrey J. Leitzinger, Ph.D., who analyzed various economic issues and opined that, by successfully achieving their anticompetitive objective of impeding generic competition, Defendants artificially maintained monopoly power in the United States market for fenofibrate, causing consumer harm and overcharge damages to the Class in excess of \$1 billion;

e. Paul O’Connell, who opined that Teva was ready, willing and able to manufacture all of the AB-rated generic fenofibrate capsules that would have been required to fully satisfy the marketplace demand that would have existed in 2002 “but for” Defendants’ conduct, and, if required, would have been similarly ready, willing and able to supplement production capacity in 2002 and beyond;

f. Arvin P. Shroff, Ph.D., who discussed FDA guidelines for manufacturing and commercialization of drug products and opined that Impax’s facilities and methods of commercial production for generic fenofibrate were acceptable and compliant with FDA regulations. Dr. Shroff also opined that the alleged issues raised by Defendants with respect to Impax’s facilities and methods of commercial production would not have impeded or impaired Impax’s receipt of final approval for its generic fenofibrate product, nor its commercial manufacturing and launch of such;

g. George Seaback, who opined that Impax had the capacity and capability to manufacture both generic fenofibrate capsules for commercial launch in 2002 as well as generic fenofibrate tablets for commercial launch in 2004, that Impax's facilities were in compliance with FDA's Good Manufacturing Practices from July 2002 forward and that, from an operations perspective, there were no regulatory problems that would have impeded Impax's ability to manufacture generic fenofibrate;

h. Stephen Schondelmeyer, Pharm.D, Ph.D., who discussed the legal, regulatory and economic aspects of generic competition in the pharmaceutical industry, and opined that Defendants impeded generic competition through manipulation of the Hatch-Waxman Act and state substitution laws to the economic detriment of consumers. Dr. Schondelmeyer also opined that the relevant product market was the U.S. market for Tricor and its AB-rated equivalents;

i. Eldon Nyhart, Ph.D., who evaluated various regulatory and scientific materials, and concluded that, as a matter of science, the follow on versions of Tricor did not offer material benefits to patients and were not improvements over one another from a pharmacodynamic perspective (*i.e.*, each version had essentially the same effect on the body);

j. Philip Lavin, Ph. D., who opined about the differences between prospective clinical studies and retrospective reviews, the fundamental limitations on the meaningful information that can be derived from retrospective reviews, and the flaws associated with Defendants retrospective reviews that rendered them incapable of demonstrating the existence of statistically significant improvements among the various Tricor formulations;

k. Dr. Ed Elder, who opined that the proper definitions of several terms in the '726 patent were not reasonably subject to dispute, and that Defendants lacked any

reasonable infringement theories against Teva and Impax based on those definitions;

l. Jack Goldstein, who evaluated the prosecution history of the '726 patent and concluded, based upon the prosecution history and the technical opinions of Dr. Elder, that the '726 capsule lawsuits were a sham; and

m. Dr. John Abramson, who rebutted Defendants' assertion that Tricor sales would have dropped in the "but-for" world (due to Abbott's ceasing marketing support for Tricor upon generic entry) by analyzing the significant recent changes in the standard of care for dyslipidemia which have driven demand for fenofibrate, and would have done so even in the absence of Tricor promotion.

62. Class Counsel also had to respond to numerous experts retained by Defendants in a variety of subjects. As part of that effort, Class Counsel took the lead, or significantly participated in, the depositions of the following defense experts:

a. Dr. Richard Gilbert, Defendants' primary liability economist, who opined on plaintiffs' allegations of anticompetitive conduct; the marketing, development, introduction, and discontinuation of various Tricor formulations; the relevant product market; and whether the new formulations were improvements;

b. Margaret Guerin Calvert, Defendants' primary damages expert, who opined on the economic bases and assumptions underlying plaintiffs' damage claims and methodologies;

c. Lawrence Goldkind, M.D., who opined on FDA processes and policies in connection with the approval of applications by pharmaceutical manufacturers; and whether the formulation, dosage and labeling of the new Tricor formulations were improvements over prior formulations;

d. Arthur H. Goldberg, Ph.D, who opined on whether Defendants had a reasonable basis to file and maintain the Illinois Patent Litigation;

e. Edward F. Sherry, Esq., who opined on the nature of the “but-for world;” the alleged economic fungibility of certain drugs; and the damages model Defendants’ claimed should be applied in this case;

f. Sally Look, Ph. D., who opined on the ability of Teva and Impax to enter the fenofibrate market, and meet demand, in the “but for world”; and

g. Robert Navarro, Pharm. D., who opined on factors that bear on the amounts that patients, managed care organizations, employers and others pay for prescription drugs.

2. Discovery Disputes

63. The foregoing discovery effort engendered significant disputes adjudicated before Judge Jordan, because Defendants continually resisted producing various types of information. This resulted in numerous meet-and-confer sessions and the exchange of correspondence with Defendants in an attempt to resolve disputes, and ultimately resulted in the submission of numerous letter-briefs to the Court designed to compel Defendants to produce all evidence relevant to the Class Plaintiffs’ claims and, of equal importance, to Defendants’ defenses.

64. For example, Class Counsel moved to compel Defendants to produce documents relating to another Abbott product, Hytrin, which Abbott launched in a new *capsule* form of drug, after originally launching it in a *tablet* formulation. Class Counsel argued that this evidence of a switch from tablets to capsules – the opposite of Defendants’ switch from capsules to tablets in this case – was probative of both Defendants’ intent and Defendants’ claim that the tablet formulations of Tricor were superior to the capsule formulation. Letter briefs on the Hytrin issue

were submitted to the Court, and oral argument via telephone conference was held on March 3, 2006, with Class Counsel – Stuart Des Roches – presenting plaintiffs’ arguments. Judge Jordan granted Class Counsel’s motion to compel, ruling that Abbott must produce material relevant to its Hytrin market switch.

65. Likewise, Class Counsel pushed hard for discovery regarding Fournier’s treatment of fenofibrate in other countries. In a letter brief to the Court dated September 22, 2006, Class Counsel laid out evidence from Fournier’s own documents showing that it had changed the formulation of fenofibrate in other countries for the purpose of avoiding generic competition, and in some instances, had moved from lower dosage strengths to higher dosage strengths, unlike what occurred in the U.S., where Defendants touted their switch to lower dosages of Tricor as improvements. Stuart Des Roches argued this motion in a telephonic conference before Judge Jordan held on September 26, 2006. Judge Jordan ruled that significant discovery relating to the international practices of Fournier with fenofibrate should be produced.

66. These two successful discovery motions provided Class Counsel, and all other plaintiffs’ counsel, with significant evidence contradicting the Defendants’ purported rationale for their switching behavior regarding Tricor.

3. Deposition Discovery Conducted By Class Counsel

67. In addition to Class Counsel’s document discovery efforts, Class Counsel took a leading role in identifying the fact witnesses from Defendants, Teva and Impax, and non-parties that needed to be deposed. Class Counsel also took a leading role in the time-consuming task of coordinating the logistics of the depositions among the various plaintiff groups and the Defendants. In addition, Class Counsel took the lead in conducting many of these fact depositions, and actively participated in nearly all of the others. Class Counsel took a leading or

substantial role in the following forty (40) fact depositions:

Cathy Ackerman, Abbott Director of Retail Trade and Distribution, who was knowledgeable about the development and marketing of Tricor 145;

Timothy Ackerman, Abbott's Sales Forecasting Director, who was knowledgeable about planning models, pricing assumptions and sales forecasts for Tricor, including analysis of the effects of generic entry on Tricor sales;

Robert Altman, Abbott's VP and General Manager of the Cardiovascular Franchise from 1998 to 2004, who was knowledgeable about the development and marketing of Tricor 160 and Tricor 145;

Jean Claude Ansquer, Fournier's Coordinator of Fenofibrate Medical and Scientific Studies, who was knowledgeable about the design, conduct and results of clinical trials and pharmacokinetic studies of fenofibrate products;

Robert Bennett, assistant controller for Abbott's Global Pharmaceutical Operation, who was knowledgeable about Tricor sales and pricing;

Robert Lance Boyett, Fournier's Director of Clinical Development, who was involved in launching Tricor 200 in the U.S.;

Greg Bradley, Abbott's Tricor Product Manager, whose responsibilities included management and training of the Tricor sales force, and the creation of advertising and detail material;

Laurence Brugere, Fournier's Project Manager for International Regulatory Affairs, who was knowledgeable about Tricor's introduction in the U.S., and the second market conversion;

Lester Busby, Teva's National Sales Director, who was knowledgeable about Teva's sales and marketing practices;

Joseph Camargo, Impax's Vice President of Manufacturing and Materials Management, who was knowledgeable about planning, purchasing active ingredients, manufacturing and warehousing activities for the product development and commercial manufacturing of Impax's generic fenofibrate products;

Lisa Castaneda, general manager of Abbott's dyslipidemia franchise, who was knowledgeable regarding the development and marketing of Tricor 145;

Gene Cioschi, Teva's Marketing Manager, who was knowledgeable about the pricing of Teva's generic fenofibrate products;

Jodi Devlin, Abbott's Director of Marketing, Primary Care, who was knowledgeable regarding the development and marketing of Tricor 160;

David Doll, Impax's Executive Vice President of Commercial Operations, who was knowledgeable of sales and marketing for Impax's generic fenofibrate products;

Inga Feiter, Director of National Accounts for Abbott, who was knowledgeable regarding Tricor's marketing to national MCOs and national PBMs;

Edward Fiorentino, Abbott's Vice President of Marketing in the Pharmaceutical Division responsible for U.S. marketed pharmaceutical products from 1994 to 1998;

Joseph Fiske, Abbott's Director of Pricing and Contracting and Director of Pricing and Planning, who had knowledge of Tricor pricing, contracting, demand planning and pricing accounting;

Robert Giordano, Associate Director of Marketing Research for third party Research By Design, who was knowledgeable of a project for Abbott's involving interviewing doctors on their perceptions of potential new formulations of Tricor;

Joseph Grotzinger, senior manager for Teva, who was knowledgeable about Teva's sales and pricing practices, and the market for fenofibrate products;

Deborah Jaskot, Teva's Executive Director of Regulatory Affairs, who was knowledgeable about Teva's development, regulatory approval, and preparedness to market its generic fenofibrate products;

Michael Jones, General Manager of Abbott's Dyslipidemia Franchise, who had overall responsibility for the Tricor brand including strategy and tactics and to pursue licensing opportunities;

Jennifer King, Associate Director for Forecasting and Analysis at Teva;

Klaus Kirchgassler, Fournier's Medical Director of the German affiliate, who was knowledgeable of clinical trials, medical information, pharmacovigilance and evaluating reports of physicians or patients on the potential side effects of fenofibrate products, and subsequently as Lipids Line Manager in the Global Marketing Department, was knowledgeable about product strategies for fenofibrate products;

Ronald Lloyd, Senior Product Manager for Hytrin at Abbott Laboratories from June 1991 to August 1994, who was knowledgeable about Abbott's prior Hytrin market switch;

Kathy McFarland, Abbott's Vice President of Lifecycle Management, who was knowledgeable about the second market conversion;

Guillaume Leprieur: Controller for Fournier's U.S. Operations, who was knowledgeable about the second market conversion;

William Marth, Teva's President and CEO and formerly Executive Vice President of Sales and Marketing, who was knowledgeable about the decision to enter the market, costs of sales and profits on Teva's generic fenofibrate products;

Gary John Mohr, President of Fournier U.S., who was knowledgeable about the first market conversion;

George Morabito, Teva's Director of Market Planning, who was knowledgeable about capacity planning and production volumes for Teva's generic fenofibrate products;

Theresa Parker, Abbott's Manager of Trade Relations, who was knowledgeable about communications to the trade and associations representing trade customer classes on both market conversions of Tricor and the Hytrin conversion;

Marilou Reed, Abbott's Director of Regulatory Affairs, who was knowledgeable about the first market conversion, and Abbott's understanding of the regulatory system which was critical for the market switch strategy to succeed;

Philippe Reginault, former Director of Pharmaceutical Development of Fournier, who was knowledgeable about the research and development of the formulations of the traditional 100 mg, 300 mg, and 250 mg capsules, and the 67mg and 200 mg comiconized gel capsules of fenofibrate;

Mark Shaw, Director of Regulatory Affairs for Impax;

Robert Simko, Abbott's Assistant Director of the Health Economics Outcomes and Research Group (HEOR), who was knowledgeable about the retrospective chart reviews Abbott sponsored in an attempt to demonstrate the superiority of Tricor 145;

Ted Smolenski, Impax's Associate Director of Market Planning, who was knowledgeable about Impax's development of generic fenofibrate products;

Douglas L. Sporn, Abbott's Divisional Vice President for Regulatory Intelligence in the FDA Liaison Office, who was knowledgeable about the regulatory filings made in connection with Tricor 160 and 145;

James Stolzenbach, Abbott's Vice President for Dyslipidemia, who was responsible for overseeing Tricor clinical activities;

Agnes Westelink, Fournier's Director of Regulatory Affairs, who was knowledgeable about Fournier's understanding of the regulatory system which was critical for the market switch strategy to succeed;

John Wodarczyk, Teva's Director of Customer Operations, who was knowledgeable about

incentives, credits, rebates, discounts, chargeback processing to customers, pricing to the government (Public Health Service, VA, Medicaid), contract terms and conditions, product returns, and monitoring wholesaler inventory levels in connection with Teva's sales of generic fenofibrate products; and

Daniel Yannicelli, former Abbott Franchise Medical Director for Cardiovascular/ Urology and subsequently Global Medical Director for Tricor, who was knowledgeable about medical affairs and clinical development, the design and conduct of clinical studies required by the FDA, and life cycle management for Tricor.

68. In addition, as detailed in paragraph 61 above, Class Counsel took a leading or substantial role in preparing for and defending the depositions of the twelve experts we retained (often in conjunction with the CVS and Walgreens Plaintiffs) to support Class Plaintiffs' claims and refute Defendants' defenses, and in deposing seven defense experts.

69. In total, Class Counsel took a leading or substantial role in 60 depositions in this case.

4. Defending Against Discovery Conducted By Defendants

70. Defendants also engaged in substantial discovery and served extensive and numerous document requests and interrogatories on the class representatives. Reviewing and responding appropriately to these discovery requests required a substantial effort on the part of the class representatives and Class Counsel.

71. Class Counsel prepared Gayle R. White, President and General Manager of LWD, Larry Doud, General Manager and CEO of RDC, and Jacqueline DeBruler, Pharmacy OTC Buyer for Meijer, Inc., for their depositions in response to 30(b)(6) deposition notices. Class Counsel also defended these depositions.

72. In addition, Defendants served discovery requests which sought, among other things, documents and information regarding the prices that certain direct purchasers charged in

reselling Tricor (“downstream discovery”). Class Counsel viewed the discovery of such downstream re-sale information to be both irrelevant and unduly burdensome and, therefore, resisted the production of such information.

73. Subsequently, Class Counsel and Defendants engaged in a heated and lengthy dispute in connection with Defendants’ requests for so-called “downstream discovery,” requiring significant efforts and resources. Defendants had sought discovery relating to the resale practices of the class representatives (thus the term, “downstream”) and also from three large absent class members, the “Big 3” national wholesalers (Cardinal Health, Amerisource and McKesson). Defendants argued vigorously that this downstream discovery was relevant to antitrust injury and to whether or not there were “intra-class conflicts” because some class members, they argued, may have benefitted from the challenged conduct while others were harmed. Class Counsel argued that such downstream discovery, in addition to being highly burdensome, is irrelevant in a direct purchaser case where the plaintiffs are seeking overcharges as damages. Class Counsel argued that because Defendants were precluded as a matter of law from raising a “pass-on” defense to challenge the Class Plaintiffs’ overcharge claims, Defendants should be precluded from taking discovery related to an inapplicable defense.

74. Ultimately, Defendants moved to compel the requested downstream discovery in a letter brief addressed to Judge Jordan on February 27, 2006. Judge Jordan heard the parties’ arguments in a March 3, 2006 telephonic conference, and denied Defendants’ “downstream discovery” requests as irrelevant. This important discovery ruling blocked Defendants from pursuing costly and expensive discovery from the class representatives and from the national wholesalers, thereby gutting many of Defendants’ arguments in opposition to class certification. Eric Cramer handled the briefing and arguments for Class Counsel regarding this issue.

75. Class Counsel also took a leading role in defending against Defendants' efforts to obtain discovery in other courts for use against Plaintiffs in this case. In June 2006, Defendants filed an order to show cause seeking to amend the protective order in *In re Brand Name Prescription Drug Litig.*, Case. No. 94-0897 (MDL 997), to permit discovery of documents that, Defendants claimed, had been produced by absent members of the Class in that case. Defendants claimed that these documents were probative of issues relevant to class certification and mitigation of damages in this case -- in particular, whether certain class members could have affirmatively switched to less expensive versions of fenofibrate even though those versions were not AB-rated. Acting quickly, Class Counsel filed a responsive letter before Judge Korcoras of the Northern District of Illinois, not only strenuously objecting to Defendants' tactics, but also explaining why Abbott's position before the Illinois court conflicted with positions it had already taken in the Tricor action, and that the discovery it sought would be wholly irrelevant to issues of class certification. On July 13, 2006, Judge Korcoras denied Defendants' order to show cause, holding that Abbott's request was improper. Class Counsel also successfully fought off a similar attempt by Abbott to attack the *Brand Name* protective order in the Eastern District of New York.

C. Preparation for and Conduct of Trial

1. Preparation for Trial

76. At a status conference held on April 3, 2008, shortly after the assignment of this case to Judge Robinson, the Court set an opening trial date of November 3, 2008 (later pushed to November 10, 2008, by the Court). Immediately thereafter, Class Counsel, in coordination with the CVS and Walgreens Plaintiffs, appointed "trial counsel" and selected various "trial teams" who were assigned responsibility for preparing and presenting the different aspects and

components of the case. The trial teams then dedicated themselves to the task of preparing the case for trial. *See* Steinfeld Aff. at Ex. 7, ¶¶11-12 (Affidavit of Joseph Lukens) and Ex. 8, ¶¶6-9 (Affidavit of Richard Arnold).

77. The prospect of trying the case to a jury was particularly challenging in light of the complexity of the legal and factual issues regarding the pharmaceutical industry, the Hatch-Waxman Act and state substitution laws, the purpose and effect of Defendants' formulation changes, monopoly power and relevant market, pharmaceutical innovation, damages, and patent law. This case was further complicated in that the theories and approaches of Class Counsel were often different than, and sometimes in conflict with, those of counsel for other plaintiff groups.

78. In order to prove that Defendants had engaged in a scheme designed to forestall generic competition, Class Counsel were determined to convince the jury that:

a. Defendants undertook their market switch strategy in a manner designed to exploit the particular and complex system of regulations governing the approval and marketing of generic drugs. This would require Class Counsel to not only inform the jury about this complex area of regulatory law, but also give them a wider understanding of how pharmaceutical products are priced, marketed and sold in the United States;

b. the changes Defendants made in switching from Tricor 200 to 160, and then from Tricor 160 to 145, were not sufficient improvements to outweigh the harm to competition wrought by the switches. To do this, Class Counsel would be compelled to engage Defendants on the fundamental question of what it means to "improve" a pharmaceutical product, and from whose perspective such improvement should be measured. To convince the jury that the new Tricor formulations offered no clinical benefit to patients over Tricor 200,

Class Counsel marshaled medical, pharmacodynamic, pharmacokinetic, statistical, regulatory, and economic evidence demonstrating that there was no discernable difference in clinical outcomes between the different Tricor formulations;

c. absent Defendants' wrongful scheme and anticompetitive conduct, generic manufacturers would have been ready, willing and able to launch generic versions of Tricor 200 and Tricor 160 earlier and/or in greater quantities than they actually launched; and

d. through this scheme, Defendants exercised unlawful monopoly power over fenofibrate and that Defendants were not merely one of many small sellers in a crowded "dyslipidemia market."

79. Preparing each of these complex factual issues for presentation to a jury required full-time (and sometimes round-the-clock) work by the respective trial teams. Accordingly, Class Counsel took a number of steps over the months leading up to trial, both independently and in coordination with other plaintiff groups, including:

a. working closely with the other plaintiff groups to refine and streamline the "story of the case" -- the thematic roadmap that would define which fact and expert witnesses would testify, what documents and exhibits would be used, and the best manner in which this evidence could be presented to the jury in the limited trial time we had;

b. retaining (with the CVS and Walgreens Plaintiffs) Decision Analysis, a third party provider of trial consulting services. With their assistance, we conducted two separate jury focus sessions in the Wilmington area. At these sessions, Class Counsel and counsel for the CVS and Walgreens Plaintiffs presented mock opening statements, targeted statements on specific issues, draft demonstratives, and expert witnesses to dozens of mock jurors carefully selected to reflect the likely pool of potential jurors at trial. Class Counsel used

these opportunities to carefully test both the strengths and weaknesses of their case, and gain insight that would shape trial preparations in the months to come;

c. spending hundreds of hours reviewing deposition testimony and exhibits, in order to select the best evidence in support of the case. These efforts were the very first steps in the selection of witnesses and documents for use at trial. Class Counsel's effort would later be refined and combined with the designations of other counsel, through numerous in-person meetings, teleconferences and email exchanges, as the coordinated plaintiffs built a cohesive presentation of the case. Likewise, Class Counsel identified the fact and expert witnesses who would testify live at trial, and began working with them, often through many more hours of preparation;

d. developing, researching, and drafting a proposed set of jury instructions. These proposed instructions were comprehensive, covering the entire conduct of the trial, from initial instructions on the conduct of jurors, to the substantive standard for each count to be charged to the jury. Thereafter, Class Counsel worked closely with counsel from other plaintiff groups to craft a combined, unified set of jury instructions to present to Defendants and the Court. As expected, plaintiffs' proposed jury instructions were substantially different from those produced by Defendants, requiring that Class Counsel participate in a series of conferences with Defendants and, eventually, present areas of dispute (such as the appropriate balance of harms under applicable law) to the Court for resolution. Notably, the Court adopted substantial portions of plaintiffs' joint proposed jury instructions and rejected material proposals of the Defendants, including critical instructions regarding the balancing of harms, how improvement was to be assessed, and the fundamental premises of the Hatch-Waxman Act;

e. working closely with other plaintiff groups to draft and assemble the Joint Pretrial Order (“PTO”), a comprehensive document which sets out, *inter alia*, a statement of the case, contested issues of fact and law, a list of witnesses (both fact and expert) to be called, a list of exhibits to be introduced without objection and a list of exhibits objected to and the basis for the objections, and issues to be addressed by the Court. Included in the PTO were “evidentiary issues,” *i.e.*, disputes regarding how and to what extent the parties would be permitted to make certain legal arguments, and/or present certain evidence;

f. spearheading the evidentiary issue regarding the admissibility of Defendants’ “retrospective chart reviews,” a particular type of study which Defendants intended to present as proof on improvement of the Tricor 145 formulation. Class Counsel had previously retained experts to analyze and critique the reviews at issue, and conducted extensive factual and legal research on the propriety of admitting such reviews as proof of product improvement. Class Counsel drafted the briefing on this issue (which was combined with the work of other plaintiffs’ counsel and submitted to the Court on October 20, 2008), and, at the October 28, 2008 pre-trial conference, Class Counsel – Stuart Des Roches – argued this issue before the Court. As a result of these efforts, the Court ruled that the retrospective chart reviews were inadmissible as proof of improvement. This was a substantial victory that shaped the trial strategy of all parties throughout the trial;

g. leading plaintiffs’ opposition to Defendants’ attempts to characterize generic manufacturers as “free riders,” and argue that the prevention of free riding was a legitimate business justification for anticompetitive conduct. Class Counsel pushed hard to address this issue in the PTO, recognizing that this argument could shape the entire trial, prejudicing the jury against generic drug manufacturers and providing Defendants an affirmative

defense that would be extremely difficult to rebut. Stuart Des Roches argued this matter to the Court. The issue was resolved successfully for the plaintiffs, with the Court's ruling that plaintiffs would be granted a favorable jury instruction should Defendants assert a "free rider" argument. Class Counsel, in coordination with the other plaintiff groups, also successfully rebuffed Defendants' attempt to move for reconsideration on this same issue, shortly before trial began;

h. arguing successfully against Defendants' attempts to establish that the Hatch-Waxman Act was irrelevant to this trial. If Defendants had been successful, then Class Counsel's core trial strategy of focusing on the Hatch-Waxman Act and state substitution laws would have suffered severely; and

i. coordinating closely with other plaintiff groups to negotiate and complete proposed juror questionnaires and verdict sheets, each important as the first and last communications jurors might have regarding the case. As with the jury instructions, the verdict sheet was critical as it necessarily framed the legal issues critical to Plaintiffs' success (or failure) at verdict, including the very nature of improvement and the balance between consumer benefit and competitive harm.

80. On November 3, 2008, the Class Counsel trial team (and support staff) took up residence in Wilmington in order to finalize trial preparation and commence the process of working virtually 24 hours per day on this matter.

2. Conduct of Trial

81. On November 7, 2008, Class Counsel appeared before the Court to participate in jury selection. In preparation for this, Class Counsel met extensively with counsel for the other plaintiff groups, Decision Analysis, and consultants retained by the other plaintiff groups, to

better inform ourselves regarding the demographics of the Delaware jury pool. Building on the experience gained over the two prior mock jury trials, Class Counsel positioned themselves to be as knowledgeable as possible regarding how the background, education, employment, geographic location, and experience of potential jurors might affect their analysis of the case.

82. On November 10, 2008, trial opened with a representative of Class Counsel, Stuart Des Roches, making the first opening statement for the coordinated plaintiff groups. Later that morning, Mr. Des Roches presented one of the first live witnesses to the jury, Mr. Larry Doud, Jr., General Manager and CEO of class representative RDC. Mr. Doud explained to the jury the role of distributors in the pharmaceutical industry, and the impact Defendants' conduct had on that industry and on RDC in particular.

83. Outside of the courtroom, Class Counsel continued to work diligently, in coordination with the other parties, *inter alia*, to prepare fact and expert witnesses for trial testimony, to prepare videotaped deposition testimony for presentation and to prepare documents and demonstratives for use in the courtroom. Notably, per the terms of the PTO, the parties were required to meet and confer regarding objections to exhibits, demonstratives and designated testimony, and throughout the trial Class Counsel actively participated in negotiations with Defendants (often late into the night) to resolve objections or define disputes to be brought to the Court's attention.

D. The Settlement Negotiations

84. In the midst of their trial preparation, Class Counsel engaged in settlement discussions with counsel for Defendants. Those discussions heated up as trial approached, but as the Court is aware, the Settlement was achieved only after overcoming Defendants' multiple pre-trial efforts to derail the case and the trial, and even then, only after plaintiffs had successfully

opened their case to the jury and proved that they had the ability and will to try the case. Class Counsel and Defendants used the national holiday after the first day of trial, over the course of many hours and in consultation with the Class's economist, and members of the Class, to finally consummate the \$250 million settlement.

85. In the early morning of Wednesday, November 12th, the Direct Purchaser Class entered into a written Memorandum of Understanding with Counsel for Defendants to settle the case. Simultaneously, the CVS and Walgreens Plaintiffs reached agreements in principle to settle their actions. Accordingly, the direct purchaser plaintiffs promptly advised the Court of the settlements at the reopening of trial on November 12, 2008, and the Court consented to stay those actions pending the approval of the Settlement.

86. From November 12, 2008, through January 8, 2009, when the formal Settlement was presented to the Court for preliminary approval, Class Counsel engaged in intensive and lengthy negotiations with counsel for Defendants over the final terms of the Settlement. During this time, Class Counsel also negotiated the terms of an escrow agreement – a process made substantially more difficult due by the unfolding economic crisis and the need to assure the safety of the Settlement Funds during the settlement and allocation process.

E. The Numerous and Substantial Risks of Obtaining No Recovery for the Class Absent the Proposed Settlement

87. As this Court knows, within less than a week of the direct purchaser plaintiffs' settlements, Impax and then Teva also reached negotiated settlements, and the trial was suspended. Accordingly, the jury was excused and no verdict was reached. While Class Counsel was confident in the strength of the trial's opening day, the Defendants had mounted strong responses in their opening, and the ultimate verdict remained in doubt. The instant

Settlement was an excellent way to manage this risk. Moreover, even if the liability trial had gone to verdict, the ultimate quantum (if any) of damages that the Class would recover was far from assured.

88. First, the trial was limited to liability. Moreover, the Court indicated that, should plaintiffs obtain a favorable liability verdict, any damages trial would not begin until after any appeals regarding liability were resolved. As a result, a positive liability verdict would only win for the Class the opportunity to begin a new trial to determine the appropriate measure of damages. Unquestionably, Defendants would have challenged the basic findings of Judge Jordan's motion to dismiss opinion on appeal, and reasserted questions of antitrust injury that Defendants had consistently pursued throughout the case. Moreover, given the size of the case and the novel questions of fact and law it presents, it is likely that such appeal would not have stopped at the first panel of the Third Circuit, but would be pressed through reconsideration, rehearing *en banc*, and/or *certiorari* to the U.S. Supreme Court.

89. Thus, the opening of a damages trial likely would have been delayed by years, deferring any recovery for the Class – assuming, of course, that Class Counsel were successful in obtaining a favorable jury verdict on liability and upholding that verdict on appeal.

90. Second, the appropriate measure of damages was hotly contested, 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. The jury would also have had to assess the impact of external forces that had radically reshaped demand for cardiovascular drugs (a topic which had also been the subject of expert testimony during discovery). Furthermore, the quantification of damages would have varied depending on whether the jury at a damages trial determined that the second market switch (from Tricor 160 to Tricor 145) was properly considered part of the alleged anticompetitive scheme.⁹

91. As a result of these variables, while Dr. Leitzinger calculated aggregate class-wide damages of approximately \$1.4 billion under Class Plaintiffs' primary scenario, Defendants' damages expert, Ms. Guerin-Calvert, asserted that the Class's damages, if any, were at most approximately \$40 million, based largely upon her conclusions that, (a) the introduction of Tricor 145 was not anticompetitive, and therefore should not be considered part of Defendants' wrongful scheme, and (b) in the but-for world, the volume of fenofibrate sold to direct purchasers would have dropped precipitously as a result of Defendants' presumed ceasing of Tricor promotion after the launch of generic competition. Moreover, Defendants had contended that Class members were obligated to attempt to "mitigate" their damages by choosing to switch to the non-AB-rated versions of fenofibrate that had been launched during this period.

⁹ If Defendants prevailed in demonstrating that the second switch was not anticompetitive, this factor alone would have reduced the Class's damages by as much as 75% (bringing Classwide overcharges down below \$500 million). Class Counsel will be submitting a declaration from Dr. Leitzinger as part of the motion for final approval of the Settlement and Allocation Plan that will explain his analysis.

92. The consolidation of the Class's claims with other plaintiff groups also augmented the risks of recovering damages for the Class. Notably, 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 (combined), each premised on a different "but-for" world. Notably, certain of these proposed scenarios assumed the permissibility of the introduction of Tricor 145 which, as described above, would have significantly decreased the Class's potential recovery.

93. Thus, in a damages trial, all of these factors discussed above would have been in dispute, not just between Class Plaintiffs and Defendants, but possibly between other plaintiff groups as well. In short, even if Class Counsel had been successful in a liability trial, and upheld that liability verdict on appeal, significant impediments remained that almost certainly would have delayed, and could have significantly reduced, the damages recoverable by the Class. Particularly in light of this significant risk and uncertainty, the \$250 million Settlement (over six times Defendants' expert's damage calculation and more than 50% of damages according to Dr. Leitzinger if Defendants' launch of Tricor 145 was not properly considered part of the anticompetitive scheme) represents an excellent outcome for the Class.

F. Preliminary Approval of the Settlement and Notice to the Class

94. On November 12, 2008, the parties formally advised the Court of the proposed Settlement. On January 6, 2009, Class Counsel submitted a proposed Notice of Class Action Settlement and a memorandum in support of preliminary approval of the Settlement describing its terms, setting out a proposed plan and schedule for providing notice to the class, and setting deadlines for Class members to lodge objections and for Class Counsel to file the various settlement approval papers.

95. On January 8, 2009, the Court preliminarily approved the proposed Settlement and the form and substance of the proposed Notice of Class Action Settlement, and directed that the Notice of Settlement be sent to the Class.

96. Pursuant to the terms of the Settlement Agreement, on January 27, 2009, twelve business days after preliminary approval of the Settlement -- Defendants paid \$250 million into an escrow account held in trust at Citizens Bank for the benefit of the Class.

97. On January 28, 2008, a “Notice of Proposed Settlement of Class Action, Class Counsel’s Motion for Attorneys’ Fees, and Hearing Regarding Settlement” (“Notice”) was sent via mail to approximately 522 entities that had been identified as potential Class members when the notice of class certification had been sent. The Notice advised putative Class members of the terms of the Settlement and their right to object. The Notice described how to object, and that any objection must be received no later than March 23, 2009. The Notice further advised Class members that if the proposed Settlement is approved, Defendants will be released from any liability to Class members arising out of conduct alleged or which could have been alleged in the Direct Purchaser Class Actions.

98. Finally, the Notice further advised all Class members that Class Counsel intended to ask this Court for an award of attorneys’ fees amounting to one-third of the gross settlement amount plus interest, reimbursement of out-of-pocket expenses, and incentive awards for each of the three class representatives. The Notice also informed Class members that Class Counsel would file its motion seeking fees and expenses and incentive awards on March 9, 2009, and that such motion papers would be available from Class Counsel for inspection at the request of any Class member, and made available on the firm websites of certain Class Counsel.

99. As of the date of this affidavit, no objections to the Settlement or any of its terms have been received. Quite to the contrary, the Settlement has received affirmative support from the class representatives and significant class members.

H. Class Counsel's Lodestar and Expenses

100. Class Counsel expended an aggregate of 45,174.75 hours prosecuting this complex, contingent litigation for nearly 3.5 years, resulting in a lodestar of \$21,186,298.50. As detailed above, and in the accompanying memorandum of law, this time was necessary to effectively develop, prosecute and try this case. Furthermore, these figures do not include the substantial amount of time that will be expended in administering the Settlement and overseeing the plan of allocation of the net settlement fund to members of the Class, or the time spent in association with Class Counsel's request for an award of fees and reimbursement of expenses.

101. Class Counsel also collectively incurred out-of-pocket expenses in the amount of \$3,330,791.79. The major expenses Class Counsel incurred fell into the following categories: (a) the effective coordination and management of discovery, including the creation of a computerized database that permitted Class Counsel to identify documents and deponents critical to developing the case; (b) extensive traveling for the purpose of conducting fact and expert depositions; (c) the retention of numerous expert witnesses without whose evidence Class Counsel would not have been prepared to bring this case to trial nor would so favorable a result have been reached; (d) the retention of jury consultants, who facilitated Class Counsel's mock jury presentations and trial preparations; (e) the retention of trial consultants who aided in the processing of documents and testimony, and the creation of demonstratives to most effectively present the case at trial; and (f) facilities and resources necessary for the trial team in Wilmington to perform their work, including hotel rooms, work space and office equipment. Each of these

types of expenses was necessary and directly connected to Class Counsel’s coordinated effort to prosecute and prepare this case for trial.

102. The following chart summarizes the aggregate time and expenses of all Class Counsel, as set forth in more detail in the Firm Affidavits/Declarations of Class Counsel, submitted herewith as Exhibits 1-10 to this Affidavit:

FIRM NAME	HOURS	LODESTAR	EXPENSES
Berger & Montague, P.C. (Ex. 1) ¹⁰	12,589.1	\$5,346,452.00	\$647,700.32
Cohen, Milstein, Sellers & Toll, PLLC (Ex. 2)	1712.55	\$620,986.00	\$108,277.53
Conley, Rose & Tayon, P.C. (Ex. 3)	273.40	\$115,850.00	\$21,294.72
Garwin Gerstein & Fisher, LLP (Ex. 4)	11472.70	\$6,341,450.00	\$965,697.20
Heim Payne & Chorush, LLP (Ex. 5)	1619.90	\$668,305.50	\$234,793.81
Kaplan, Fox & Kilsheimer, LLP (Ex. 6)	1672.25	\$754,413.75	\$212,798.34
Odom & Des Roches, LLP (Ex. 7)	7632.75	\$4,581,460.75	\$598,345.00
Rosenthal, Monhait & Goddess, P.A. (Ex. 8)	214.1	\$84,553.50	\$10,214.89
The Smith Foote Law Firm, LLP (Ex 9)	7721	\$2,550,442.50	\$525,659.25
Vanek, Vickers & Masini, LLP (Ex. 10)	267	\$122,384.50	\$6,010.73
TOTAL	45,174.75	\$21,186,298.50	\$3,330,791.79

103. Based upon the lodestar set forth above, the requested one-third fee results in a multiplier of 3.93. An examination of recently approved multipliers in Hatch-Waxman antitrust cases reveals that the multiplier requested here is on par with (or lower than) fees commonly awarded. *See, e.g., Nichols v. Smithkline Beecham Corp.*, 2005 U.S. Dist. LEXIS 7061, *78 (E.D. Pa. Apr. 22, 2005) (noting that “[t]he fee awarded in [the Buspar antitrust litigation] resulted in a multiplier of 8.46”); *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp.*, No. 03-4578, 2005 U.S. Dist. LEXIS 9705, at *60 (E.D. Pa. May 19, 2005) (approving multiplier of 15.6 in Paxil antitrust litigation); *Oncology & Radiation Associates, P.A. v. Bristol-Myers*

¹⁰ The firm totals for Berger Montague, P.C. shown here reflect the additional lodestar of Professor Joshua P. Davis, Esq (12.4 hours at \$525/hour, for a total of \$6,510). Professor Davis teaches at the University of San Francisco School of Law and is director of the school’s Center for Law and Ethics. Professor Davis consulted with Class Counsel Eric Cramer in preparation for the deposition of Defendants’ primary economist, Richard Gilbert.

Squibb Co. et al., No. 01-02313 (D.D.C. Sept. 3, 2004) (9.77 multiplier awarded in Taxol antitrust litigation); *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass. Apr 9, 2004) (4.88 multiplier awarded); *North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.*, No.04-248 (D.D.C. Nov. 30, 2004) (8.1 multiplier awarded in Platinol antitrust litigation). Where not available in published opinions, Class Counsel have calculated these multiplier based upon fee petition filings made in the above-cited cases. These supporting documents will be made available for review at the Court's request.

104. Additionally, detailed time records and expense vouchers/receipts are available to the Court for *in camera* should the Court wish to examine them.

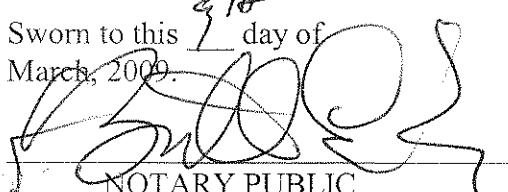
I. The Work of the Class Representatives

105. The class representatives have each expended significant effort in prosecuting the Direct Purchaser Class Action for the benefit of the Class members. As described in their individual affidavits (appended to the Steinfeld Aff. as Exhibits 1-3) LWD, RDC and Meijer actively pursued the Class's interests by filing suit on behalf of the Class and undertaking the responsibilities attendant upon serving as a named plaintiff, including responding to several detailed document requests and interrogatories, and keeping themselves apprised of the progress of the case. As class representatives, each took on the added burden of being deposed. Furthermore, the President and CEO of RDC, Larry Doud, traveled from Rochester, NY to Wilmington in order to prepare and testify before this Court at trial.

106. In recognition of their time and effort expended for the benefit of the Class, Class Counsel have requested an incentive award of \$50,000 for each class representative.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of March, 2009.

Sworn to this 9th day of
March, 2009.


NOTARY PUBLIC



BARRY S. TAUS

BRETT GERLACH
Notary Public, New York
No. 022, 901, 000
Qualified in New York County
Commission Expires March 25, 2010