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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re K-Dur Antitrust Litigation This document relates to: All Direct Purchaser Class Actions	Civil Action No. 01-cv-1652(SRC)(CLW) MDL Docket No. 1419

JOINT DECLARATION OF BRUCE E. GERSTEIN AND DAVID F. SORENSEN IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND INCENTIVE AWARD TO THE CLASS REPRESENTATIVE

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I. INTRODUCTION

We, Bruce E. Gerstein, managing partner at Garwin Gerstein & Fisher, L.L.P. ("GGF"), and David F. Sorensen, managing shareholder at Berger & Montague, P.C. ("B&M"), the law firms appointed by the Court as Co-Lead Counsel for the Direct Purchaser Class Plaintiffs ("DPCPs"), respectfully submit this declaration in support of Class Counsel's application for:

(1) an award of attorneys' fees totaling 33⅓% of DPCPs' settlement with the Defendants[1] ("the Settlement");

(2) reimbursement of expenses that were incurred in the prosecution of DPCPs' claims against Defendants; and

(3) an incentive award to the named class representative, Louisiana Wholesale Drug Co., Inc. ("LWD").

GGF and B&M have been involved in all material aspects of this litigation from the pre-complaint investigation and filing of DPCPs' initial complaint in June 2001 through the time of DPCPs' settlement with the Defendants in May 2017 (and continuing), and are therefore fully familiar with the history of the litigation. Because this case is more than 16 years old and involves complex legal issues that have necessitated extensive briefing and appellate review, we outline below the most significant aspects of the litigation for the Court's convenience.

II. COMMENCEMENT OF THE CASE AND INITIAL PROCEEDINGS

1. On June 15, 2001, Class Counsel,[2] on behalf of DPCPs, filed the first antitrust lawsuit on behalf of a putative class of direct purchasers challenging Defendants' conduct

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[1] Defendants are Merck & Co. Inc. (formerly known as Schering-Plough Corporation (hereinafter "Schering")) and Upsher-Smith Laboratories, Inc. (hereinafter "Upsher"). Wyeth (formerly known as American Home Products Corporation or "AHP") was initially also a named defendant; DPCP and Wyeth entered into a settlement resolving DPCPs' claims against Wyeth in 2004, and that settlement was granted final approval by the Court on January 26, 2005. *See* Dkt No. 226. That settlement ($2.1 million) was used to pay litigation expenses (mostly for experts). Class Counsel took no fee from it, and do not seek a fee regarding that settlement now.

regarding the prescription pharmaceutical product K-Dur as violative of the antitrust laws. *See* Civil Action No. 2:01-cv-02869-JAG (Dkt No. 1).[3] DPCPs' complaint was one of the earliest cases to challenge reverse payment settlement agreements, and the law concerning the legality of such agreements was just beginning to develop.

2. Broadly, DPCPs alleged that Schering settled the patent infringement litigation it had brought against Upsher and AHP concerning K-Dur through unlawful "reverse payment" settlement agreements, by which Schering compensated Upsher and AHP in exchange for their agreements to delay entering the market with their competing, less-expensive generic versions of K-Dur. As to Upsher specifically, DPCPs contended that the unlawful $60M payment for delay, which was contained in the Schering/Upsher settlement agreement, was disguised as being a purported payment for licenses to certain Upsher products that were of little value to Schering. *See, e.g.*, Civil Action No. 2:01-cv-02869-JAG (Dkt No. 1). The primary licensed product in question was Upsher's Niacor-SR product, which at the time of the Schering/Upsher settlement agreement was still in development.

3. In August 2001, the Judicial Panel for Multidistrict Litigation directed that all related private actions filed in other jurisdictions be transferred to the District of New Jersey for further proceedings, and in October 2001, this Court consolidated all such actions, including

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[2] In December 2001 and March 2003, respectively, the Court made appointments concerning the organization of Co-Lead Counsel for the direct purchaser class. *See* Civil Action No. 2:01-cv-02869-JAG (Dkt Nos. 57, 127). Class Counsel refers to Co-Lead Counsel for the direct purchaser class (GGF and B&M), and the other law firms that participated in the litigation: Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP; Odom & Des Roches, LLP; The Smith Foote Law Firm (now Smith Segura & Raphael, LLP); and Heim Payne & Chorush, LLP.

[3] Previously, in March 2001, the Federal Trade Commission ("FTC") had filed an administrative complaint containing similar allegations against Defendants. Additionally, various "opt-out" plaintiff (*i.e.*, "Retailer Plaintiff") complaints were filed in 2001. DPCPs' claims were, in large part, litigated in conjunction with those of the Retailer Plaintiffs.

DPCPs' action, into the current docket for all further proceedings. *See* Civil Action No. 2:01-cv-1652 (Dkt No. 22).[4]

4. On March 15, 2002, Defendants moved for judgment on the pleadings. Defendants disputed that the $60 million payment in the Schering/Upsher settlement agreement was a payment for delay. Defendants contended that the date upon which Upsher was permitted to enter the market was a valid compromise date, and that the $60 million payment was an independent, *bona fide* payment made to Upsher for the product licenses. Defendants also argued, *inter alia*, Schering's patent on K-Dur entitled it to exclude Upsher from the market for the length of the patent term, and that absent allegations that Schering had no right to exclude Upsher to begin with, *i.e.*, the patent was invalid or not infringed by Upsher's product, the settlement agreement was immune from antitrust attack. Defendants' argument that, absent an allegation of patent invalidity or non-infringement, a patent holder was entitled to exclude competition for the duration of the patent term, would eventually become known as the "scope of the patent" approach, although it came to mean that a reverse payment was immune from antitrust scrutiny absent proof the brand's patent was obtained by fraud or its infringement suit was a sham.

5. On May 24, 2002, DPCPs' filed their opposition. DPCPs disputed that Upsher's entry date was a valid compromise, and argued that absent the payment Upsher would have entered the market earlier than provided for in the settlement. DPCPs also argued, consistent with long-standing precedent, that Schering's patent's rights were not absolute (*i.e.*, that the

[4] All references to docket numbers are to the current docket unless otherwise indicated. Some of the documents described herein were not docketed on the Court's CM/ECF system and thus do not have a docket number.

patent could have been declared invalid or not infringed) and did not confer a right to pay competitors to stay off the market in violation of the antitrust laws.

6. On July 3, 2002, Defendants filed their reply brief. *See* Dkt No. 110. In addition to reiterating the "scope of the patent" approach, Defendants noted that just days prior, their administrative trial before the FTC had concluded with the administrative law judge dismissing the FTC's complaint. *See In the Matter of Schering-Plough Corp.*, FTC Docket No. 9297 (June 27, 2002). Consequently, DPCPs submitted further briefing with respect to that decision in order to clarify, *inter alia*, that DPCPs were proceeding on a theory different from that of the FTC. *See* Dkt No. 117. Thereafter, DPCPs and Defendants also engaged in further letter briefing as other courts issued decisions concerning the legality of reverse payment agreements.

7. Oral argument on Defendants' motion was held in November 2002.

8. On December 23, 2003, after DPCPs had begun to review documents, DPCPs moved amend their complaint in order to detail additional evidence produced in discovery that supported DPCPs' initial allegations, and to address the merits of the Schering/Upsher patent allegations in order to rebut the arguments made by Defendants in their motion for judgment on the pleadings. *See* Dkt No. 158. On January 21, 2004, Defendants filed a brief opposing Plaintiffs' request, arguing that the Court should defer ruling on the motion until resolution of Defendants' motion for judgment on the pleadings. *See* Dkt No. 159.

9. Separately, on December 8, 2003, the full FTC commission reversed the administrative law judge's decision dismissal of the FTC's complaint against Defendants, concluding that the *quid pro quo* for Schering's payment to Upsher was Upsher's agreement to a deferred entry date. *See In the Matter of Schering-Plough Corp.*, 2003 FTC LEXIS 187 (FTC Dec. 8, 2003).

10. On September 30, 2004, Judge Greenaway denied Defendants' motion for judgment on the pleadings and granted DPCPs' motion for leave to amend their complaint. *See In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517 (D.N.J. 2004). In his opinion, Judge Greenaway rejected Defendants' "scope of the patent" argument, disagreeing that DPCPs should be required to plead patent invalidity or non-infringement. Judge Greenaway instead concluded that Plaintiffs could sustain their claims of anticompetitive conduct simply by alleging that, absent the payments from Schering to Upsher, a more pro-competitive result would have been reached. *Id.* at 531-32.

III. FACT DISCOVERY AND RELATED DISPUTES

11. Class Counsel obtained and reviewed the entire record from the FTC proceedings, which consisted of correspondence, documents, investigational hearing transcripts, depositions and the entire nine week trial record. Class Counsel then served additional discovery related to DPCPs' own theories of liability, causation and damages. Class Counsel served multiple sets of document requests on Defendants, and received voluminous responsive document productions. Class Counsel loaded the documents into a computerized database to perform an efficient and focused review, using database searches targeting specific concepts and custodians. This culminated in the DPCPs creating an extensively organized database that proved invaluable in identifying key issues, documents, deponents, and future discovery. Throughout the litigation, Class Counsel continuously used the database as DPCPs developed and refined their theories of liability, causation and damages and prepared for and engaged in depositions and motion practice.

12. In addition to document requests, Class Counsel served multiple sets of interrogatories and requests for admission on Defendants, which also covered a wide variety of topics.

13. Likewise, Defendants served DPCPs with document requests and interrogatories.

14. Class Counsel served objections to Defendants' discovery, and met-and-conferred with defense counsel on the scope of this discovery. As those discussions occurred, Class Counsel worked with the named plaintiff to gather potentially responsive documents and data for production. Class Counsel met and communicated with knowledgeable employees who collected, sorted and compiled documents and data for eventual production to Defendants. Class Counsel reviewed the named plaintiff's documents for responsiveness and privilege, and then produced documents in response to Defendants' document requests. Class Counsel also responded to interrogatories.

15. In addition to Class Counsel's document-discovery efforts, Class Counsel identified and then deposed numerous fact witnesses. After serving notices of deposition, Class Counsel engaged in meet-and-confers with Defendants' counsel about the timing and other logistics of those depositions. In total, thirty fact depositions were taken of Defendants' current and former employees and/or corporate representatives. Those witnesses were examined on a wide variety of topics including but not limited to: (1) the prosecution of Schering's patent; (2) the defenses raised in the Schering/Upsher patent litigation; (3) Defendants' respective projections and analyses concerning the timing and impact of generic competition for K-Dur; (4) the negotiation, execution and performance of the Schering/Upsher settlement agreement at issue; (5) the structure of the pharmaceutical marketplace and the pricing of brand and generic drugs; (6) Schering's market power; (7) Defendants' alleged justifications for the payments, *e.g.*, that the compensation provided for in the settlement agreement was not for delayed generic entry of K-Dur, but instead, fair value for a license to Upsher's Niacor-SR product; (8) the ability of

Upsher to receive final approval from FDA for its ANDA for generic K-Dur; and (9) the willingness of Upsher to enter the market with generic K-Dur absent the settlement agreement.

16. The following chart reflects the fact witness depositions DPCPs took a leading or substantive role in:

#	**Name**	**Company**	**Date(s)**	**Location(s)**
1	Audibert, James	Schering	2/2/2005	Washington, D.C.
2	Cannella, Nicholas	Upsher	2/18/2005	New York, NY
3	Cesan, Raul	Schering	2/9/2005	New York, NY
4	Christenson, Brad	Upsher	1/19/2005	Minneapolis, MN
5	Coleman, Robert	Upsher	5/6/2005	Minneapolis, MN
6	DeMola, Antonia	Schering	12/9/2004	Madison, NJ
7	Dolan, Denise	Upsher	12/8/2004	Minneapolis, MN
8	Driscoll, Martin	Schering	4/20/2005	Princeton, NJ
9	Dritsas, Phillip	Upsher	10/28/2004	Minneapolis, MN
10	Gast, Karin	Schering	12/15/2004	Madison, NJ
11	Gibbs, Diane	Upsher	10/19/2004	Minneapolis, MN
12	Gould, Scott	Upsher	11/4/2004	Minneapolis, MN
13	Haas, Bruce	Upsher	6/9/2006	Washington, D.C.
14	Halvorsen, Mark	Upsher	6/24/2005	Minneapolis, MN
15	Herman, Anthony	Schering	3/18/2005	Washington, D.C.
16	Hoffman, John	Schering	4/29/2005	Washington, D.C.
17	Hsaio, Charles	Schering	4/14/2005	Menlo Park, CA
18	Kapur, Raman	Schering	6/24/2005	Princeton, NJ
19	Kelly, Thomas	Schering	5/14/2007	Newark, NJ
20	Kralovec, Paul	Upsher	1/20/2005	Minneapolis, MN
21	Ku, Cathy	Schering	5/27/2005	Branchburg, NJ
22	Lauda, Thomas	Schering	4/26/2005	Newark, NJ
23	Maitner, John	Schering	5/20/2005	New York, NY
24	O'Neill, Victoria	Upsher	2/4/2005	Minneapolis, MN
25	Robbins, Mark	Upsher	4/22/2005	Washington, D.C.
26	Russo, Raymond	Schering	1/18/2005	Newark, NJ
27	Thompson, Paul	Schering	12/15/2004	Newark, NJ
28	Troup, Ian	Upsher	10/26/2005	Minneapolis, MN
29	Walsh, Michael	Schering	10/5/2004	Newark, NJ
30	Wasserstein, Jeffrey	Schering	12/23/2004	Newark, NJ

17. Additionally, Class Counsel also defended the depositions taken by Defendants. The following chart reflects the depositions that Defendants took of the named plaintiffs and absent class members:

	Name	Company	Date(s)	Location(s)
1	Factor, Saul	McKesson	4/27/2007	San Francisco, CA
2	Jones, Brian	ABC	11/4/2005	Philadelphia, PA
3	Kaufmann, Michael	Cardinal	5/25/2005	Columbus, OH
4	White, Gayle	LWD	11/9/2004	New Orleans, LA

18. During discovery, significant disputes arose that required extensive motion practice. The most significant of these disputes turned on Defendants' request for "downstream discovery" from class members, *i.e.*, class members' own sales of K-Dur and its generics, and the resulting profit margins earned on those products. Defendants sought such data for both damages and class certification purposes. As to the latter, Defendants contended that such "downstream discovery" was relevant to showing that not all members of the class were harmed on a "net economic basis" (*i.e.*, on a "downstream" or "lost profits" basis) by the delay of generic entry, and that therefore, there were purported conflicts of interest in the class. This issue was briefed and argued multiple times. Ultimately, DCPCs' successfully prevented Defendants' attempts to obtain such discovery.

19. Additionally, Class Counsel also litigated various other discovery motions, including numerous motions to compel concerning Defendants' responses to document requests, interrogatories and requests for admission, some of which also required repeated briefing.

IV. EXPERT DISCOVERY

20. Class Counsel retained eight expert witnesses who provided reports and testimony that supported DPCPs' claims and rebutted Defendants' defenses. Class Counsel devoted significant time and resources in working with all of the retained experts in the preparation of opening and rebuttal reports, as well as preparing experts for depositions taken by Defendants' counsel. Additionally, in early 2015, DPCPs submitted: (a) two substitute reports for an expert who had passed away; and (b) a supplemental expert reports from an existing experts in order to

update that expert's opinion in view of *Actavis*. Further depositions were taken by defense counsel concerning these substitute/supplemental reports. DPCPs' experts included:

a. Martha Bennett (deceased), formerly of Bennett and Company, a private consulting firm. Ms. Bennett opined on regulatory issues, including whether any FDA regulatory hurdles existed that would have prevented Upsher from launching its generic version of K-Dur on or about November 20, 1998.

b. Cheryl Blume, Ph.D., President of Pharmaceutical Development Group, Inc., a private consulting firm specializing in pharmaceutical development and registration activities. Ms. Blume opined on issues pertaining to Upsher's readiness and willingness to commercially launch its generic version of K-Dur.

c. Jack Goldstein, a patent attorney specializing in intellectual property matters.

d. Dr. James Benson (deceased), formerly of Sunstorm Research Corporation, a private consulting firm specializing in patent infringement and trade secrets involving biotechnology applications and polymer technology. Dr. Benson opined on how a person of ordinary skill in the art would interpret the '743 patent, whether Upsher's generic product contained all of the claim elements described in the '743 patent, whether the invention claimed in the '743 patent would have been obvious to one of skill and whether misrepresentations were made to the PTO during the prosecution of the '743 patent. Subsequent to the passing of Dr. Benson, Plaintiffs retained a replacement expert, as noted below.

e. Pardeep Gupta, Ph.D., a Professor of Pharmacy at the Philadelphia College of Pharmacy, University of the Sciences. Subsequent to the passing of Dr. Benson, Dr. Gupta replaced Dr. Benson and opined on the same issues, aside from certain limited exceptions.

f. Ted Hubert, an attorney specializing in ethics issues. Mr. Hubert opined on the applicable ethical and professional rules pertaining to certain statements made by Upsher to the patent court during the patent litigation.

g. Dr. Jeffrey J. Leitzinger, President of EconOne, a private economic consulting company. Dr. Leitzinger provided economic analysis, including analysis of Schering's market power, classwide antitrust impact in the form of overcharges and quantification of class members' overcharges on K-Dur purchases resulting from Defendants' unlawful conduct under a variety of scenarios. He also opined on the anticompetitive effects of reverse payment agreements.

h. Shannon McCool, President of The Fallon Group, a private consulting firm. Mr. McCool opined on issues pertaining to the structure of pharmaceutical licensing agreements and the terms of the Schering/Upsher settlement agreement.

i. Rory Remmel, Ph.D., Professor of Medicinal Chemistry in the College of Pharmacy at the University of Minnesota. Dr. Remmel opined on Upsher's pharmacokinetic and safety data for Niacor-SR.

21. Class Counsel also responded to fourteen experts retained by Defendants that opined on a variety of subjects. Specifically, Class Counsel, with the assistance of DPCPs' experts, reviewed and analyzed the reports submitted by Defendants' experts, and submitted rebuttal reports in response to certain of the opinions offered by Defendants' experts. Class Counsel also prepared for and took a leading or substantial role in the depositions of Defendants' expert witnesses. Defendants' experts were:

a. Sumanth Addanki, Ph.D., Senior Vice President at National Economic Research Associates. Dr. Addanki opined on the competitive effects of reverse payments and on the legal standards for evaluating such payments.

b. Dean Gilbert Banker, Dean and John L. Lach Distinguished Professor of Drug Delivery Emeritus at the College of Pharmacy, University of Iowa. Dean Banker opined on the nature and characteristics of the subject matter of the ‘743 patent.

c. David Dugan, a lawyer specializing in ethics issues. Mr. Dugan opined on the applicable ethical and professional rules pertaining to certain statements made by Upsher to the patent court during the patent litigation.

d. Anthony Figg, a lawyer specializing in intellectual property law. Mr. Figg opined on issues pertaining to the merits of the ‘743 patent litigation and the entry date provided for in the settlement agreement.

e. Nicholas Godici, Executive Advisor to a law firm specializing in intellectual property law. Mr. Godici opined on the rules and procedural requirements governing the filing and prosecution of patent applications by the PTO, the requirements for establishing inequitable conduct and the application of those requirements to the prosecution of the ‘743 patent.

f. Mario Gonzalez, Ph. D., President and CEO of P’Kinetics International, Inc., a private company that specializes in pharmacokinetics research. Dr. Gonzalez opined on Dr. Upsher’s pharmacokinetic and safety data for Niacor-SR.

g. Tamar Howson, Executive Vice President of Business Development at Lexicon Pharmaceuticals, a private company focused on the discovery and development of treatments for disease. Mr. Howson opined on certain of the terms of the Schering/Upsher settlement agreement.

h. William Kerr, Ph.D., Director of LECG, LLC, an economic and consulting firm. Dr. Kerr opined on the competitive effects of reverse payments.

i. Dr. Matthew Krasowski, a physician and Assistant Professor of Pathology at the University of Pittsburgh. Dr. Krasowski opined on Upsher's safety data for Niacor-SR.

j. James McGinity, Ph.D., Professor of Pharmaceutics at the College of Pharmacy, University of Texas at Austin. Dr. McGinity opined on issues pertaining to patent validity and infringement.

k. Robert Mnookin, Samuel Willison Professor of Law at Harvard Law School. Mr. Mnookin opined on issues pertaining to the settlement of legal disputes.

l. Mohan Rao, Ph.D., Director at LECG, a private consulting firm, and Adjunct Professor at the McCormick School of Engineering and Applied Science at Northwestern University. Dr. Rao opined on valuation issues pertaining to the settlement agreement.

m. Daniel Rubinfeld, Robert L. Bridges Professor of Law and Professor of Economics at the University of California, Berkeley. Dr. Rubinfeld opined on the competitive effects of reverse payments and issues pertaining to DPCPs' damage calculations.

n. Dr. Edward Snyder, George Schultz Professor of Economics at the University of Chicago Graduate School of Business. Dr. Snyder opined on the competitive effects of reverse payments and Upsher's ability to manufacture and launch generic K-Dur.

V. SUMMARY JUDGMENT, CLASS CERTIFICATION AND APPEALS

22. Over an approximately eight year period, the parties engaged in extensive summary judgment briefing and resulting appeals as the result of the rapid development of the

law on the legality of reverse payment agreements. Separately but concurrently, the parties also engaged in extensive class certification briefing and resulting appeals. Because these appeals were consolidated by the Third Circuit for purposes of briefing and disposition, Class Counsel address both appellate histories concurrently for the Court's convenience.

23. On June 1, 2004, DPCPs filed their motion for the certification of a direct purchaser class, contending that all of the requirements of Rule 23 had been satisfied. On August 9, 2007, Defendants submitted briefing opposing class certification. *See* Dkt No. 487. Among other arguments, Defendants contended that neither the typicality nor adequacy elements of Rule 23(a) were satisfied due to alleged "conflicts" within the class. Defendants also contended that delayed generic entry of K-Dur might have had a different "net" economic effect on certain class members as compared to the class representative.

24. On November 2, 2007, Plaintiffs submitted their reply brief. DPCPs argued, as they had successfully done in opposing Defendants' "downstream discovery" requests, that because established Supreme Court precedent provided that all class members were entitled to recover the full amount of their overcharge damages, there necessarily could not be any conflict among class members.

25. On November 20, 2007, Special Master Orlofsky[5] held oral argument on DPCPs' motion for class certification. After oral argument, both parties filed supplemental briefing.

26. On April 18, 2008, Special Master Orlofsky issued a Report and Recommendation granting DPCPs' motion and certifying a direct purchaser class. *See* Dkt No.

[5] In April 2006, with the consent of all parties, Judge Stephen M. Orlofsky (formerly of the District of New Jersey) was appointed Special Master by the Court. *See* Dkt No. 316. Special Master Orlofsky had the responsibility of deciding, in the first instance, discovery disputes, class certification and summary judgment. *Id.*

636. In his opinion, Special Master Orlofsky rejected Defendants' "conflict" arguments on two bases: first, that it had already been rejected in the "downstream discovery" context; and second, that there could not be conflicts given that the class members that Defendants targeted had submitted declarations affirming their belief that the class representative would adequately represent their interests. *Id.*

27. On March May 23, 2008, Defendants filed objections to the Special Master's Report and Recommendation granting class certification, contending that the Special Master made four errors of law, each of which warranted reversal. *See* Dkt No. 649. On July 18, 2008, DPCPs' filed an opposition contending that the Special Master's decision was correct and should be affirmed, and on August 13, 2008, Defendants filed their reply. *See* Dkt Nos. 670-674, 684-689, 693.

28. Separately, during July 2008, the parties filed a series of summary judgment motions. Generally speaking, the motions presented the parties' competing arguments as to the legal framework that should apply for antitrust analysis of reverse payment agreements. By that point in time - approximately seven years after the filing of DPCPs' initial complaint and almost four years after Judge Greenaway's 2004 decision - a significant number of authorities had issued competing opinions concerning the legality of reverse payment consequences. On the one hand, the Sixth Circuit, D.C. Circuit, FTC and Professor Herbert Hovenkamp (the nation's leading antitrust academic) all analyzed reverse payment settlement agreements using traditional principles of antitrust law. On the other hand, the Second and Eleventh Circuits utilized the "scope of the patent" approach, including in Schering's 2005 appeal to the Eleventh Circuit in the FTC case, which resulted in a dismissal of the FTC's case in its entirety. *See Schering-*

Plough Corp. v. FTC, 402 F. 3d 1056 (11th Cir. 2005), *cert. denied*, 2006 U.S. LEXIS 5128 (June 26, 2006).

29. DPCPs filed two motions for partial summary judgment. In the first motion, DPCPs comprehensively outlined the all of the existing case law and academic literature, and advocated that the Court utilize traditional antitrust rules and deem reverse payment agreements *per se* illegal (or in the alternative, apply a presumption of anticompetitive effects subject to rebuttal), rather than a "scope of the patent" based approach. *See* Dkt No. 679. In the second motion, DPCS argued that even if the Court were to utilize a "scope of the patent" approach, the undisputed facts showed that Upsher's product did not infringe Schering's patent, and therefore the patent conferred no rights upon Schering to exclude Upsher in the first instance. *See* Dkt No. 681.

30. Defendants filed one motion for summary judgment. *See* Dkt No. 677-678. In their motion, Defendants argued that DPCPs' claims failed the "scope of the patent" test because DPCPs could not demonstrate that Schering's patent infringement claim against Upsher was objectively baseless. Defendants also argued that the payment from Schering to Upsher was not a reverse payment, but instead fair value for Niacor-SR (and other licenses), and urged the Court to give special weight to the Eleventh Circuit's opinion dismissing the FTC case, arguing that the DPCPs' case was an essential repetition of the FTC's. *Id.*

31. On December 10, 2008, Special Master Orlofsky held oral argument on the parties' summary judgment motions.

32. While the summary judgment motions remained pending, Judge Greenaway, by order dated December 30, 2008, overruled Defendants' objections to Special Master's Orlofsky's

Report and Recommendation certifying a direct purchaser class and adopted the Report and Recommendation as the opinion of the Court. *See* Dkt No. 731.

33. On January 14, 2009, Defendants petitioned for permission under Rule 23(f) to appeal to the Third Circuit Court of Appeals with respect to the Court's class certification order. Because a ruling on the parties' summary judgment motions had not yet occurred, the Third Circuit stayed Defendants' appeal pending such a ruling.

34. On February 6, 2009, Special Master Orlofsky issued his Report and Recommendation on the parties' summary judgment motions. *See* Dkt Nos. 732-33. Special Master Orlofsky adopted the "scope of the patent" framework, concluded that the DPCPs' claims failed under such a framework, and dismissed DPCPs' claims in their entirety. *Id.*

35. On March 20, 2009, DPCPs filed objections to the Special Master's Report and Recommendation, urging the Court to reject the Special Master's decision to utilize the "scope of the patent" test, vacate the Special Master's decision granting summary judgment to Defendants and grant DPCPs' motions for partial summary judgment. *See* Dkt Nos. 738-39. On May 15, 2009, Defendants filed an opposition to DPCPs' objections, and on June 19, 2009, DPCPs filed a reply in support of their objections. *See* Dkt Nos. 738, 742 and 747.

36. By order dated March 24, 2010, Judge Greenaway adopted Special Master Orlofsky's Report and Recommendation as the opinion of the Court. *See* Dkt No. 758.

37. On April 12, 2010, DPCPs filed a Notice of Appeal to the Third Circuit Court of Appeals with respect to the Court's summary judgment rulings. *See* Dkt No. 759.

38. On November 24, 2010, Defendants' then-stayed 23(f) class certification petition was granted, and on December 21, 2010, Defendants' petition and DPCPs' appeal of summary judgment were consolidated by the Third Circuit for purposes of briefing and disposition.

39. On March 11, 2011, DPCPs filed their opening appellate brief concerning the summary judgment ruling. In their brief, DPCPs reviewed all of the jurisprudence on the legality of reverse payment agreements and provided detailed arguments as to why the Third Circuit should utilize traditional antitrust principles in order to evaluate the legality of reverse payment agreements and reject the use of a "scope of the patent" approach. DPCPs also presented arguments as to why their evidence was more than sufficient to warrant a reversal of summary judgment even under the "scope of the patent" standard.

40. On June 27, 2011, Defendants filed responsive appellate brief, which urged affirmance of the district court's ruling. Defendants' brief also served as their opening appellate brief with respect to class certification order as a cross-appeal. In that cross-appeal, Defendants argued that the DPCPs should be required to prove "lost profits;" that DPCPs could not establish predominance; and that the Third Circuit should follow the Eleventh Circuit's opinion in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181 (11th Cir. 2003).

41. On August 10, 2011, DPCPs filed their reply brief on summary judgment and opposition brief on class certification. On September 2, 1011, Defendants filed their reply briefing with respect to class certification, concluding briefing on both appeals.

42. Oral argument on both appeals was held on December 12, 2011. Shortly before argument was held, the Third Circuit granted the motion of the United States and the Federal Trade Commission for leave to participate alongside counsel during oral argument as *amici curiae*. In its motion and during oral argument, counsel for the United States urged the Third Circuit to reject the "scope of the patent" approach and instead conclude that reverse payment settlements are presumptively unlawful.

43. On July 16, 2012, the Third Circuit issued a precedential decision. In that decision, the Third Circuit reversed the district court's grant of summary judgment to Defendants by rejecting the "scope of the patent" approach and instead adopted a "quick look" rule of reason analysis which treated reverse payments as *prima facie* evidence of an antitrust violation, subject to rebuttal through a showing that the payment was for something other than delayed entry or offered some pro-competitive benefit. *See In re K-Dur Antitrust Litig.*, 686 F. 3d 197 (3d Cir. 2012). The Third Circuit then remanded the case for further proceedings in accordance with its holding. Separately, the Third Circuit affirmed the Court's grant of class certification, and expressly rejected Defendants' "lost profits" and *Valley Drug* arguments. *Id.* at 223 ("We reject the *Valley Drug* decision[.]").

44. On August 29, 2012, Defendants filed petitions for *certiorari* limited solely to the legal standard applied by the Third Circuit. In their petitions, Defendants argued that the "quick look" standard articulated by the Third Circuit was in conflict with the "scope of the patent" test applied by the Second, Eleventh and (according to Defendants) the Federal Circuit, resulting in a circuit split warranting Supreme Court intervention.

45. On November 7, 2012, DPCPs filed a brief opposing *certiorari*. DPCPs acknowledged some circuit split, but argued that the Supreme Court should await a final judgment and thus have the benefit of a complete record before granting *certiorari*. DPCPs alternatively argued that if the Court decided to grant Defendants' petitions for *certiorari*, that it should also grant the United States Solicitor General's then-pending petition for *certiorari* as to the Eleventh Circuit's decision in *FTC v. Watson Pharms, Inc.,* (U.S. Pet. No. 12-1416) (*i.e.*, "*Actavis*") and hear the cases in parallel.

46. The Supreme Court granted *certiorari* in *Actavis* and held Defendants' petitions in abeyance pending its decision in *Actavis*, which issued in June 2013. *See FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

47. In *Actavis*, the Supreme Court rejected the "scope of the patent" test, and directed district courts to apply the rule of reason in determining whether a reverse payment agreement violates the antitrust laws. *Id.* The Supreme Court then granted Defendants' petitions for *certiorari* in *K-Dur*, and remanded this case to the Third Circuit for further proceedings consistent with its decision in *Actavis*. *See Merck & Co., Inc. v. Louisiana Wholesale Drug Co.*, 133 S. Ct. 2849 (2013); *Upsher-Smith Laboratories, Inc. v. Louisiana Wholesale Drug Co.*, 133 S. Ct. 2849 (2013).

48. On August 2, 2013, after meeting and conferring, the parties made a joint motion to the Third Circuit to reinstate its holding on class certification, vacate its decision in all other respects, and remand the case for further proceedings.

49. On September 9, 2013, the Third Circuit granted the parties' join motion in full (thus preserving the full precedential effect of the Third Circuit's ruling on class certification), and the case was thus remanded back to the district court. *See* Dkt No. 809. *See In Re K-Dur Antitrust Litigation*, 2013 WL 5180857 (3d Cir. Sep. 9, 2013). The case was then twice reassigned, first to Judge Claire C. Cecchi and Magistrate Judge Mark Falk in October 2013, (*see* Dkt No. 812), and then to Judge Stanley R. Chesler and Magistrate Judge Cathy W. Waldor in December 2014. *See* Dkt No. 831.

50. After further meeting and conferring and attending a status conference with Magistrate Judge Falk, the parties agreed to mediate with Professor Eric Green (*See* Paragraph 68, *infra*) and, in view of *Actavis*, a schedule was established for the briefing of a renewed

summary judgment motion that Defendants planned to file and for the completion of supplemental expert discovery. *See* Dkt Nos. 836-837.

51. On November 14, 2014, Defendants filed a summary judgment motion as to all of DPCPs' claims. *See* Dkt No. 839 (docketed 4/9/2015). In their motion, Defendants argued that *Actavis* required that DPCPs demonstrate that Schering's payment to Upsher – *i.e.*, the purported Niacor-SR license – was a sham, and that because the Niacor-SR was purportedly a fair value transaction, the Court should determine as a matter of law that there was no reverse payment. Defendants also argued that DPCPs' case was no different than the one that the Eleventh Circuit dismissed in the FTC action, and thus warranted the same treatment. *Id.*

52. On January 9, 2015, DPCPs filed their opposition. *See* Dkt No. 841 (docketed 4/9/2015). In their opposition, DPCPs argued that Defendants' interpretation of *Actavis* was erroneous and could not be reconciled with the rule of reason, and that Defendants had failed to prove that the payment was for Niacor-SR, rather than delayed generic entry. As to the Eleventh Circuit's opinion, DPCPs noted that such a decision was pre-*Actavis*, and that in any event DPCPs had developed a much different, stronger factual record than that of the FTC. *Id.*

53. On February 13, 2015, Defendants filed reply briefing. *See* Dkt No. 946 (docketed 4/9/2015). Subsequently, the parties filed further letter briefs concerning the first appellate opinion to interpret *Actavis*: a controlling Third Circuit opinion issued in June 2015. *See* Dkt Nos. 852-853; *King Drug Co. of Florence, Inc. v. SmithKlineBeecham Corp.*, 791 F. 3d 388 (3d Cir. June 26, 2015)("*Lamictal*").

54. On July 22, 2015, the Court held oral argument on Defendants' motion. *See* Dkt No. 854.

55. On February 25, 2016, this Court issued an opinion denying Defendants' motion for summary judgment. *See* Dkt No. 863. In its opinion, the Court, applying the rule of reason, concluded that: (1) DPCPs had satisfied their initial burden of proof under *Actavis* by offering evidence that the agreement provided for a large payment from Schering to Upsher that induced Upsher to stay off the market; and (2) Defendants had then offered evidence that the payment was "fair value" for Niacor-SR as a pro-competitive justification; but (3) because DPCPs had offered evidence rebutting that justification, *i.e.*, evidence that Schering's payment to Upsher exceeded the value of the Niacor-SR license, "Plaintiffs' evidence [wa]s sufficient to raise a genuine issue of material fact" warranting the denial of summary judgment. *Id.* at p. 29.

VI. TRIAL PREPARATION

56. Following the Court's February 2016 summary judgment ruling and a status conference with Magistrate Judge Waldor, the parties began to prepare for trial. *See* Dkt Nos. 870, 878.

57. On September 2, 2016, the parties filed a joint 150-page Proposed Pretrial Order - not including voluminous appendices thereto - which outlined, *inter alia*, (a) all pending or contemplated motions and/or trial briefs; (b) all stipulations of fact; (c) all requests for facts to be judicially noticed and objections thereto; (d) all contested facts that each party intended to prove at trial; (e) all affirmative defenses raised; (f) all fact and expert witnesses each party intended to call; (g) the parties' respective deposition designations; and (h) the parties' respective exhibit lists. *See* Dkt No. 883.

58. On September 16, 2016, the Court granted DPC Plaintiffs' unopposed motion to: (a) amend the Class definition to exclude the Retailer Plaintiffs; and (b) provide class members with notice of the pendency of the litigation, the certification of a direct purchaser class, and the legal rights available to class members, including instructions on how a class member could

exercise its right exclude itself from the litigation. *See* Dkt No. 887. No class member opted to exclude itself. *See* Dkt No. 922.

59. On October 13, 2016, following a status conference, a Final Pretrial Conference was scheduled for January 27, 2017, and a schedule was set for further pretrial submissions and exchanges. *See* Dkt No. 891.

60. First, the parties engaged in extensive *Daubert* briefing, with a total of fifteen motions filed. Opening briefs were filed on October 31, 2016, oppositions were filed on December 5, 2016 and reply briefs on December 22, 2016. *See* Dkt Nos. 892-911, 946-968, 977-996. Defendants challenged all of DPCPs' eight expert witnesses on various bases. Likewise, DPCPs' challenged seven of Defendants' experts. *Id.*

61. Second, the parties engaged in extensive motion *in limine* briefing, with a total of twenty-three motions filed. Opening motions were filed on December 2, 2016, and oppositions were filed on January 20, 2017. *See* Dkt Nos. 925-945, 1004-1029.

62. Third, the parties exchanged drafts of proposed preliminary and final jury instructions, verdict forms and *voir dire* questions.

63. Fourth, on November 1, 2016, in the midst of *Daubert* briefing, Defendants moved for summary judgment on all of DPCPs' claims, arguing that because DPCPs had purportedly failed to put forth either direct or indirect evidence of Schering's market power, DPCPs had failed to prove the requisite anticompetitive effects element of their case. *See* Dkt No. 912. In response, on December 16, 2016, Plaintiffs filed their opposition brief, arguing that Defendants' motion was untimely and should otherwise be denied because Schering's payment to Upsher was in itself sufficient to support a finding of market power, and that even putting

aside the reverse payment, there was abundant evidence in the record of Schering's market power. *See* Dkt No. 973. Defendants filed their reply brief on January 17, 2017. *See* Dkt No. 999.

64. On January 27, 2017, the Final Pretrial Conference was held, and the parties continued with trial preparation. Shortly thereafter, on February 14, 2017, the parties attended the mediation that culminated in an agreement to settle the litigation.

VII. PRIOR ATTEMPTS AT SETTLEMENT

65. Prior to the February 2017 mediation with Judge Brown that culminated in settlement, the parties previously engaged in three previous mediations in an attempt to resolve the case.

66. In December 2005, then-presiding Magistrate Judge Arleo referred the parties to mediation with Judge Orlofsky, staying the case and administratively terminating all motions pending the outcome of mediation. *See* Dkt No. 305. The mediation occurred in early 2006. Prior to the mediation, Class Counsel prepared and submitted a detailed mediation statement which included a description of the case, the applicable law and a description of DPCPs' liability, causation and damage theories. However, the mediation did not result in settlement.

67. In the summer of 2007, the parties engaged in a second attempt at mediation with private mediator David Geronemus of JAMS. Prior to the mediation, Class Counsel prepared and submitted an updated mediation statement to reflect the litigation events that had transpired since the previous mediation. However, the mediation did not result in settlement.

68. In January 2015, at the suggestion of then-presiding Judge Cecchi, the parties engaged in a third attempt at mediation with private mediator Eric Green of Resolutions, LLC, who had previously assisted many of the lawyers in the case in resolving similar complex disputes. Prior to the mediation, Class Counsel again prepared and submitted an updated mediation statement. However, the mediation did not result in settlement.

69. The fourth and final mediation occurred on February 14, 2017 in New York City, and was presided over by The Honorable Garrett Brown, formerly of the District of New Jersey. The mediation commenced in the morning and ran well into the late evening, and involved extensive discussions and negotiations. The mediation concluded with the parties reaching a settlement, and drafting and executing a term sheet outlining the key provisions of settlement, subject to client approval. Thereafter, the parties negotiated a more detailed Memorandum of Understanding, which was executed on April 13, 2017, and then a formal settlement agreement, which superseded the Memorandum of Understanding in full.

VIII. THE SETTLEMENT WITH THE DEFENDANTS

70. On May 15, 2017, DPCPs filed the settlement agreement with the Court. *See* Dkt No. 1044. The settlement provides for the payment by Defendants of $60.2 million into an interest-bearing escrow account for the benefit of all direct purchaser class members. *Id.*

71. In their filing, Class Counsel requested that the Court preliminarily approve the settlement, approve notice to the Class, and set a schedule leading up to and including a Fairness Hearing. *Id.* In preparation for filing the motion, Class Counsel engaged a proposed escrow agent for maintenance of the settlement funds and entered into an escrow agreement with same, and engaged a proposed claims administrator to assist with the notice process. *Id.*

72. On May 23, 2017, the Court concluded that that the settlement between DPCPs and the Defendants was arrived at by arms'-length negotiations by highly experienced counsel after years of litigation and fell within the range of possibly approvable settlements, and preliminarily approved it. *See* Dkt No. 1045. Concurrently, the Court appointed an escrow agent and claims administrator, approved a form of notice to the class and set a schedule. *Id.*

73. Thereafter: (1) Defendants deposited the settlement proceeds into an escrow account held in trust that is earning interest for the benefit of the Class; and (2) the claims

administrator duly mailed the written notice to class members. *See* Ex. 1 (July 12, 2017 Affidavit of Michael Rosenbaum re: Escrow Account); *See* Ex. 2 (July 12, 2017 Affidavit of Michael Rosenbaum re: Mailing of Notice). Co-Lead Counsel then posted the written notice on the GGF and B&M websites.

74. Class members have until August 7, 2017 to object to the settlement or any of its terms and/or to Class Counsel's request for attorneys' fees, unreimbursed expenses and an incentive award to the class representative. As of the date of this Declaration, no objections have been received. If any objections are received between the date of this Declaration and August 7, 2017, they will be addressed in DPCPs' upcoming submission for final approval of the settlement, due on August 21, 2017.

IX. SUMMARY OF ATTORNEYS' FEES AND UNREIMBURSED EXPENSES

75. Class Counsel are highly experienced and nationally respected law firms that have almost two decades of extensive experience prosecuting and trying Hatch-Waxman antitrust cases on behalf of the same core class of direct purchaser plaintiffs.

76. Class Counsel initiated this litigation as one of the earliest cases challenging reverse payment settlements agreements and then litigated it for more than sixteen years, playing a substantial role in the development of antitrust law concerning reverse payments in the process. Indeed, the Third Circuit's decision in DPCPs' favor directly contributed to the split in circuit court authority that caused the Supreme Court to grant *certiorari* in *Actavis* and issue a landmark decision concerning the appropriate standard under which to analyze the antitrust consequences of such settlements. *See Actavis*, 133 S. Ct. at 2230 (acknowledging the Third Circuit's opinion as part of the circuit split).

77. At all junctures of this litigation, Class Counsel faced risk. As an initial matter, when Class Counsel initiated the litigation in 2001, Class Counsel were acutely aware of the

risks of prosecuting a complex antitrust case and bringing it to trial, particularly in a new area. From before the time DPCPs' initial complaint was filed up in this litigation up until the present, Class Counsel (who has also served, and continues to serve, as class counsel on behalf of direct purchases cases in numerous other delayed generic entry cases) litigated the case in step with rapidly evolving law on reverse payment agreements.

78. DPCPs' claims could have been dismissed in their entirety at any time, particularly in view of the rapidly evolving law, which forced Class Counsel to continuously refine their case theories and strategies in order to be able to satisfy the (now defunct) "scope of the patent" approach. Further, Class Counsel faced the independent risk that the Court could have denied class certification. And, absent the settlement with Defendants, Class Counsel still would have had to take the case to trial. At the time of the settlement, all of the parties' *Daubert* and motions *in limine* were pending, and rulings on such motions might have adversely affected the type of evidence and arguments that DPCPs would be permitted to make at trial. If a jury had found in favor of Defendants at that trial, Class Counsel's lengthy and protracted efforts, undertaken at great time and expense, would have been for naught. Even if successful before a jury, appellate risks would remain.

79. Despite the risks outlined above, Class Counsel diligently prosecuted this case for more than sixteen years. In doing so, Class Counsel: (a) reviewed an enormous number of documents; (b) successfully defeated Defendants' motion for judgment on the pleadings; (c) took thirty fact depositions and defended the named plaintiff and other class members in four depositions; (d) retained eight experts who rendered reports concerning various subjects, defended those experts in depositions and took the depositions of fourteen defense experts; (e) filed and defended against extensive discovery motions pertaining to numerous topics, most

significantly, on the issue of "downstream discovery;" (f) briefed, argued and obtained class certification through appeal; (g) filed two summary judgment/dispositive motions and defended against three of Defendants' summary judgment motions; (g) filed seven *Daubert* motions challenging defense experts and defended against eight of Defendants' *Daubert* motions; (h) filed ten motions *in limine* and defended against thirteen of Defendants' motions *in limine*; (i) engaged in numerous other tasks in preparation for trial; and (j) participated in four mediation sessions.

80. Litigating this case has involved highly protracted effort on Class Counsel's part, both in terms of time and resources spent. Class Counsel had to constantly formulate and refine their theories of liability, causation and damages both in response to legal developments and in anticipation of arguments that Defendants were likely to raise – and almost invariably did raise – throughout stages of the litigation. Indeed, in granting class certification, Special Master Orlofsky noted that Class Counsel had "vigorously and capably prosecuted this action, conducting appropriate discovery and presenting detailed analyses in memoranda, expert declarations and oral argument." *See* Dkt No. 636 at p. 13.

81. Defendants have been represented by some of the country's leading law firms and have vigorously defended against DPCPs' claims at all junctures. As noted above, Defendants vigorously argued both liability and class certification issues during appellate proceedings up through Supreme Court review.

82. Class Counsel believe that the settlement with the Defendants represents a highly successful outcome for the class and brings this protracted case to an overdue close.

83. The following chart summarizes the aggregate time and necessary and incidental expenses of all Class Counsel, as set forth in more detail in the separate firm declarations of Class Counsel, appended here as Exhibits 3-8:

Ex.	Firm Name	Hours	Lodestar	Expenses[6]
3	Garwin Gerstein & Fisher LLP	8,014.54	$5,824,531.35	$658,095.75
4	Berger & Montague, P.C.	16,265.75	$8,536,389.45	$917,138.98
5	Cohn Lifland Pearlman Herrmann & Knopf LLP	2,632.10	$1,511.749.91	$167,825.00
6	Smith Segura & Raphael LLP	5,799.80	$2,288,231.50	$371,884.64
7	Odom & Des Roches LLP	7,481.00	$4,681,518.75	$422,132.12
8	Heim Payne & Chorush LLP	6,338.06	$3,152,391.25	$411,445.52
	TOTAL	**46,531.25**	**$25,994,812.21**	**$2,963,522.01**

84. Additionally, Class Counsel incurred an additional outstanding expense of $198,948.75 for the services of a United States Supreme Court expert to assist Class Counsel in United States Supreme Court policies and procedures and in responding to Defendants' petition for *certiorari*. *See supra* at ¶¶ 44-47.

85. Accordingly, Class Counsel's total expenses of $3,162,470.76 - minus the $25,371.09 that is currently remaining in Class Counsel's litigation fund, (*see* n. 6) - results in a figure of **$3,137,099.67** of incurred, unreimbursed expenses.

86. Based upon the lodestar set forth above, the requested 33⅓% fee results in a multiplier of 0.772, *i.e.*, less than one.

87. Detailed time records and expense vouchers/receipts are available to the Court in camera should the Court wish to examine them.

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[6] Certain of the individual declarations of Class Counsel may list "contribution to litigation fund" (or similar phrase) as an expense. Co-Lead Counsel established a litigation fund used to pay certain of the reasonable expenses listed herein, primarily expert fees and fees paid to Special Master Orlofsky. The various firms made regular contributions throughout the litigation. Additionally, Squire Sanders & Dempsey, a law firm which no longer exists due to merger in 2014, contributed $15,000.00 to the litigation fund.

X. THE EFFORTS OF THE CLASS REPRESENTATIVE ON BEHALF OF THE CLASS

88. The Class Representative, LWD, made a significant contribution in prosecuting DPCPs' claims against Defendants for the benefit of all class members. LWD actively protected the Class's interests by filing the suit on behalf of the Class and undertaking all the responsibilities involved in being a named plaintiff, including responding to document requests and interrogatories, monitoring the progress of the case, testifying at deposition, and attending mediation sessions. LWD was required to expend time and effort that was not compensated over the many years that DPCPs pressed their claims against Defendants.

89. In recognition of its time and effort expended for the benefit of the Class, Class Counsel have requested an incentive award of $100,000.00 for LWD.

I, Bruce E. Gerstein, declare under penalty of perjury that the above is true and correct.

/s/ Bruce E. Gerstein
Bruce E. Gerstein

I, David F. Sorensen, declare under penalty of perjury that the above is true and correct.

/s/ David F. Sorensen
David F. Sorensen