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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: LIPITOR ANTITRUST LITIGATION	MDL No. 2332
This document relates to:	Master Docket No. 3:12-cv-2389 (PGS/JBD)
Direct Purchaser Class Actions	

DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT

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Direct Purchaser Class Plaintiffs Drogueria Betances, LLC, Professional Drug Company, Inc., Rochester Drug Co-Operative, Inc., Stephen L. LaFrance Holdings, Inc., and Value Drug Company (collectively, "Named Plaintiffs" or "Plaintiffs"), on behalf of the proposed Class,[1] respectfully submit this Memorandum of Law in Support of their Motion for Final Approval of Settlement.

[1] The settlement is on behalf of Plaintiffs and the class defined as follows ("Direct Purchaser Class" or "Class"):

> All persons or entities in the United States and its territories who purchased Lipitor or its AB-rated bioequivalent generic products directly from any of Defendants at any time during the period June 28, 2011 through May 28, 2012 (the "Class Period").
>
> Excluded from the Class are the Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, all federal governmental entities, and all persons or entities that (i) purchased Lipitor directly from Pfizer for the first time during the Class Period after November 30, 2011, but did not purchase generic Lipitor directly from Ranbaxy during the Class Period; and (ii) all persons or entities that purchased Lipitor directly from Pfizer after November 30, 2011 that did not also purchase generic Lipitor after November 30, 2011.
>
> Also excluded from the Class for purposes of this Settlement Agreement are the following entities: CVS Pharmacy, Inc. (which includes Caremark), Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co. (which includes Kerr Drug), The Kroger Co. (which includes Peytons), Safeway Inc., SuperValu Inc., Meijer, Inc. and Meijer Distribution, Inc., Giant Eagle, Inc., and H-E-B L.P. ("Retailer Plaintiffs").

See ECF No. 1374 (Order) at ¶ 3a (defining Class identically in granting preliminary approval).

I. INTRODUCTION

The $93 million settlement agreement with Defendants Pfizer Manufacturing Ireland, Warner-Lambert Co., and Warner-Lambert Co. LLC (collectively "Pfizer") (the "Settlement") is the product of more than a decade of intense and hard-fought litigation by Plaintiffs and their counsel. The Settlement assures that the litigation against Pfizer (but not Ranbaxy[2]) will end, avoiding continued litigation against Pfizer and potential appeals. While Plaintiffs were fully prepared to continue litigating against Pfizer, the Settlement provides a substantial and immediate cash recovery and eliminates the risks of motion practice, trial, and appeals, providing an outstanding result for the Direct Purchaser Class.

Pursuant to the Preliminary Approval Order entered by the Court on March 8, 2024 (*see* ECF No. 1374), members of the Class had until May 8, 2024, to request exclusion (opt out) of the Class or to object to either the Settlement and/or Class Counsel's request for attorneys' fees, reimbursement of expenses, and service awards to the Named Plaintiffs. *See* ECF No. 1397 ("Plaintiffs' Fee Submission").

There have been no opt outs, and no objections to the Settlement or Plaintiffs' Fee Submission.[3]

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[2] "Ranbaxy" means, collectively, Ranbaxy Inc., Ranbaxy Laboratories Limited, and Ranbaxy Pharmaceuticals, Inc. Ranbaxy and Pfizer are collectively referred to as "Defendants." The proposed Settlement is with Pfizer only.

[3] *See* Ex. 1 to the Pearlman Decl. (Declaration of Tina Chiango of RG/2 Claims Administration LLC Regarding Notice of the Proposed Settlement to the Direct

The fairness, reasonableness, and adequacy of the Settlement is also strongly supported by the application of Rule 23 and the "*Girsh/Prudential*" factors derived from *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) and *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998), which courts use to determine whether a proposed class action settlement warrants final approval. Each of these factors is addressed below.

For the reasons detailed herein, Plaintiffs respectfully request that the Court enter the accompanying proposed Order which, *inter alia*: (a) grants final approval to the Settlement; (b) approves the plan of allocation, which provides for a fair and reasonable method of determining each Class member's recovery based on their respective purchases; and (c) grants Plaintiffs' Fee Submission (with respect to attorneys' fees, reimbursement of costs and service awards).

II. RELEVANT BACKGROUND

For the convenience of the Court, Plaintiffs incorporate by reference the procedural history of this litigation, including the mediation proceedings and negotiations that led to the Settlement, as described in Class Counsel's Memorandum of Law and accompanying Declaration of Peter S. Pearlman that accompanied Plaintiffs' Fee Submission (ECF Nos. 1397-1 and 1397-2). Over the course of this litigation's extensive history, Plaintiffs vigorously and efficiently

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Purchaser Class) ("RG/2 Decl."). Plaintiffs' Fee Submission was filed on April 24, 2024. *See* ECF No. 1397. *See also infra* at Section II.

pursued this litigation, including by identifying, investigating, and filing this action, successfully appealing the Court's decision on the motion to dismiss,[4] engaging in fact and expert discovery, pursuing class certification, and opposing a narrow "causation" summary judgment motion.

On February 7, 2024, after more than twelve years of litigation and extensive mediation, Plaintiffs and Pfizer executed the Settlement Agreement under which Pfizer would pay $93 million in cash for the benefit of all Class members in exchange for dismissal of the litigation between Plaintiffs and Pfizer with prejudice and certain releases. The Settlement assures that all Class members will receive a cash settlement payment now. The Settlement also assures that the litigation against Pfizer will end, avoiding continued litigation and potential appeals with respect to the claims against Pfizer.

On February 14, 2024, the proposed Settlement was filed with the Court and Plaintiffs requested that, *inter alia*, the Court grant preliminary approval to the Settlement and direct that notice of the Settlement be provided to all members of the Class. *See* ECF Nos. 1363, 1363-2.

On March 8, 2024, the Court held that "it will likely be able to approve the Settlement," concluding that the Settlement "was arrived at by arm's-length negotiations by highly experienced counsel after years of litigation and a mediation

[4] *In re Lipitor Antitrust Litig.*, 868 F.3d 231 (3d Cir. 2017) (reversing dismissal of Plaintiffs' claims and remanding).

led by experienced mediator." ECF No. 1374 (Preliminary Approval Order) at ¶¶ 8-9. The Court further directed that notice of the Settlement be given to the Class. *Id.* at ¶ 10.

Counsel for Pfizer notified Class Counsel that Pfizer timely served, on Monday, February 26, 2024, the required notices pursuant to the Class Action Fairness Act of 2005 ("CAFA"). *See* 28 U.S.C. § 1715. As of the date of this filing, no CAFA recipient has filed an objection or informed counsel for any of the parties of any objection to the Settlement.[5]

In accordance with the terms of the Settlement, on March 14, 2024, Pfizer deposited $23.250 million into the Court-approved escrow account, and, on May 28, 2024, Pfizer deposited $69.750 million into the same Court-approved escrow account, where this money (totaling $93 million) has been earning interest for the benefit of the Class.

On March 22, 2024, Class Counsel, through RG/2, the Court-appointed Notice and Claims Administrator, caused notice to be given to Class members via first-class mail. The notice detailed, *inter alia*: (a) the terms of the Settlement; (b) the procedures and deadline for objecting to either the Settlement and/or Plaintiffs' Fee Submission or opting out of the Class; (c) the procedures and deadlines for

[5] As noted in Plaintiffs' motion for preliminary approval, a court may not finally approve a proposed settlement until 90 days from service of the CAFA notices. *See* ECF No. 1363-7 at p. 47 n.97. Here, the 90-day period expired on May 26, 2024.

submitting claim forms and/or receiving Settlement funds; and (d) the location, date, and time of the Court's final fairness hearing. *See* Ex. 1 to the Pearlman Decl. (RG/2 Decl.), at Ex. A (the notice). Additionally, contemporaneously with the notice, Class Counsel provided each Class member with a pre-populated claim form listing the amounts of each Class member's relevant purchases of brand and generic Lipitor, with Class members having the option to submit their own purchase data for review (though Class members were not required to do so and could instead simply verify that provided numbers were correct). *Id.* at ¶ 6 n.1. Both the notice and an exemplar claim form were posted on the websites of Lead Class Counsel.[6]

On April 24, 2024, Class Counsel filed Plaintiffs' Fee Submission, which addressed attorneys' fees, reimbursement of costs and service awards to the Named Plaintiffs. *See* ECF No. 1397.[7] Plaintiffs' Fee Submission was posted on the websites of Lead Class Counsel.

On May 8, 2024, the deadline for Class members to opt out of the Class, or object to the Settlement and/or Plaintiffs' Fee Submission expired. No opt-out

[6] https://www.hbsslaw.com/cases/lipitor-antitrust, https://garwingerstein.com/settlements/in-re-lipitor-antitrust-litigation/, and https://bergermontague.com/cases/in-re-lipitor-antitrust-lawsuit/.

[7] On May 16, 2024, a supplemental declaration was filed to correct the reported "historical" lodestar for one of the Class Counsel firms. *See* ECF No. 1404.

requests and no objections to either the Settlement or Plaintiffs' Fee Submission were received.

III. ARGUMENT

A. THE SETTLEMENT IS ENTITLED TO AN INITIAL PRESUMPTION OF FAIRNESS

"[A] class action cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable and adequate." *In re Prudential Ins.*, 148 F.3d at 316 (internal quotation omitted). *See also* Fed. R. Civ. P. 23(e)(2).

To further the policy of favoring settlement, the Third Circuit applies "an initial presumption of fairness in reviewing a class settlement when: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *11 (D.N.J. Nov. 15, 2016) (quoting *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 436 (3d Cir. 2016)). This presumption applies even where, as here, "the settlement negotiations preceded the actual certification of the class." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004).

Here, all four factors are readily met. As to the first three factors, in granting Plaintiffs' motion for preliminary approval, this Court previously determined that

the Settlement "was arrived at by arm's-length negotiations by highly experienced counsel after years of litigation and a mediation led by experienced mediator, the Hon. Faith Hochberg" ECF No. 1374 (Preliminary Approval Order) at ¶ 9.[8] *See also* ECF No. 1397-1 (Mem. of Law in Supp. of Plaintiffs' Fee Submission) and 1397-2 (Decl. of Peter S. Pearlman in Supp. of Plaintiffs' Fee Submission) (detailing the procedural history of the litigation, including the extensive discovery that took place, the negotiations that led to the Settlement, and the experience and skill of Class Counsel). As to the fourth and final factor, there have been no objections to the Settlement by any Class member, as noted above.

Accordingly, the Court should apply an initial presumption of fairness to the Settlement. When the presumption is found to apply and the proposed class "has satisfied the requirements for certification under Rule 23, a class action cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable and adequate." *In re Prudential Ins.*, 148 F.3d at 316 (internal quotation marks omitted). *See* Fed. R. Civ. P. 23(e)(2) (stating that a district court may approve a proposed settlement "only after a hearing and … on finding that it is fair, reasonable, and adequate"). The Third Circuit has affirmed the applicability of nine factors, established in *Girsh*, 521 F.2d at 157, which are to

[8] *See also* Fed. R. Civ. P. 23(e)(2)(A) ("the class representatives and class counsel have adequately represented the class"); Fed. R. Civ. P. 23(e)(2)(B) ("the proposal was negotiated at arm's length").

be considered when determining the fairness of a proposed settlement. *In re Prudential Ins.*, 148 F.3d at 317 (*Girsh* sets out appropriate factors to be considered when determining the fairness of a proposed settlement). "In cases of settlement classes, where district courts are certifying a class and approving a settlement in tandem, they should be 'even more scrupulous than usual when examining the fairness of the proposed settlement.'" *In re Ocean Power*, 2016 WL 6778218, at *4 (quoting *In re Nat'l Football League*, 821 F.3d at 436).

B. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE UNDER THE *GIRSH/PRUDENTIAL* FACTORS

Federal Rule of Civil Procedure 23(e)(2), as amended in 2018, lists four factors that courts must consider in determining whether a settlement is fair, reasonable, and adequate and therefore warranting final approval. Courts in this Circuit recognize that these four factors "overlap substantially with the factors identified by the Court of Appeals in *Girsh* and *Prudential*" utilized within the Third Circuit for evaluating the fairness of a proposed settlement for final approval purposes. *Becker v. Bank of New York Mellon Tr. Co., N.A.*, 2018 WL 6727820, at *5 (E.D. Pa. Dec. 21, 2018); *O'Hern v. Vida Longevity Fund, LP*, 2023 WL 3204044, at *5 (D. Del. May 2, 2023) ("Courts in the Third Circuit also continue to apply the *Girsh* factors, which include procedural and substantive considerations similar to those in the 2018 amendments to Rule 23(e)"); *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, 2019 WL 4877563, at

*1 (D.N.J. Oct. 3, 2019) (applying *Girsh* factors following 2018 amendments to Rule 23).

In *Girsh*, the Third Circuit identified factors to consider when deciding whether to grant final approval to a class action settlement. *Girsh*, 521 F.2d at 157; *Lincoln Adventures*, 2019 WL 4877563, at *1 (court "consider[s]" *Girsh* factors "when deciding whether a settlement is fair, reasonable, and adequate"). Subsequently, in *Prudential*, the Third Circuit advised that "it may be useful to expand the traditional *Girsh* factors" and articulated additional factors for district courts to consider. *In re Prudential Ins.*, 148 F.3d at 323.

The *Girsh* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *In re Nat'l Football League*, 821 F.3d at 437. The "permissive and non-exhaustive" *Prudential* factors are: (1) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific

knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; (2) the existence and probable outcome of claims by other classes and subclasses; (3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; (4) whether class or subclass members are accorded the right to opt out of the settlement; (5) whether any provisions for attorneys' fees are reasonable; and (6) whether the procedure for processing individual claims under the settlement is fair and reasonable. *Id*.

As demonstrated below, analysis of each of the *Girsh/Prudential* factors strongly supports final approval of the Settlement.

1. *Girsh* Factor 1: The Complexity, Expense, and Likely Duration of the Litigation[9]

"The first [*Girsh*] factor capture[s] the probable costs, in both time and money, of continued litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (internal quotes omitted). "Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming." *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 WL 9447623, at *17 (D.N.J. Dec. 9, 2008). If not for the Settlement, the case

[9] *See also* Fed. R. Civ. P. 23(e)(2)(C)(1) ("the costs, risks, and delay of trial and appeal").

against Pfizer would have continued to be fiercely contested by Plaintiffs and Pfizer. Significant time and expenses would be incurred to complete pre-trial proceedings and conduct a trial. Even if the Class recovered a larger judgment after trial, which is certainly not guaranteed, the additional delay, through summary judgment, trial, post-trial motions, and the appellate process, would deny the Class any recovery for years. *In re Ocean Power,* 2016 WL 6778218, at *13; *In re Prudential Ins.*, 148 F.3d at 318 (settlement favored where "the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court").

Accordingly, this factor strongly supports final approval of the Settlement.

2. *Girsh* Factor 2: The Reaction of the Class to the Settlement

This factor "gauge[s] whether members of the class support the settlement." *In re Prudential Ins.*, 148 F.3d at 318. This factor has been deemed "the most significant factor" to a court's fairness analysis. *See In re Schering-Plough Corp. Enhance Sec. Litig.*, 2013 WL 5505744, at *2 (D.N.J. Oct. 1, 2013) (the reaction of the class "is perhaps the most significant factor to be weighed in considering [a] settlement's adequacy") (quoting *Sala v. Nat'l R.R. Passenger Corp.*, 721 F. Supp. 80, 83 (E.D. Pa. 1989)).

A lack of significant objections by class members weighs in favor of approving the settlement. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568,

578 (E.D. Pa. 2003) ("[U]nanimous approval of the proposed settlement[ ] by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement."). *See also Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313, n.15 (3d Cir. 1993) (class members' "silence constitutes tacit consent to the agreement").

Here, not a single Class member has objected to the Settlement, nor has any opted out. This is strong evidence of the Settlement's fairness and adequacy, particularly since the class is composed of business entities, all of whom are well-positioned and incentivized to oppose any settlement that they deem unreasonable. *See e.g.*, *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *6 (D.N.J. Nov. 9, 2005) ("The absence of objections from the sophisticated Class is particularly significant here because many Class members here have also been members of classes certified in other pharmaceutical antitrust actions . . . and are therefore well suited to evaluate a proposed settlement in an action of this type") (citations omitted).

Accordingly, this factor strongly supports final approval of the Settlement.

3. *Girsh* Factor 3: The Stage of the Proceedings and the Amount of Discovery Completed

The goal of the third *Girsh* factor is to "capture[ ] the degree of case development that class counsel accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the

merits of the case before negotiating." *In re Ocean Power*, 2016 WL 6778218, at *17. Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion, and the settlement represents substantial concessions by both parties. *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 482-83 (D.N.J. 2012). Courts in this District have approved settlements for cases in the pre-trial stage when formal discovery had not yet commenced. *See, e.g., O'Brien v. Brain Research Labs, LLC*, 2012 WL 3242365, at *17 (D.N.J. Aug. 9, 2012). Because the Settlement was reached after more than a decade of litigation during which the parties participated in discovery (albeit not complete), motion practice, appellate proceedings, and a mediation led by an experienced mediator, there can be no question that Class Counsel understand the nature of Plaintiffs' claims and Pfizer's defenses. *See* ECF No. 1374 (Preliminary Approval Order) at ¶ 9 (noting settlement "was arrived at by arm's-length negotiations by highly experienced counsel after years of litigation and a mediation led by experienced mediator, the Hon. Faith Hochberg").

Accordingly, this factor strongly supports final approval of the Settlement.

4. *Girsh* Factors 4 and 5: The Risks of Establishing Liability and Damages

"The fourth and fifth [*Girsh*] factors survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *In re Johnson & Johnson*, 900 F. Supp. 2d at

483 (internal quotations omitted). "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *In re General Motors*, 55 F.3d at 814. In making this assessment, however, "a court should not conduct a mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel." *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 644-45 (D.N.J. 2004) (internal quotations omitted). In complex cases, "[t]he risks surrounding a trial on the merits are always considerable." *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995). Here, the Settlement provides the Class with a substantial and immediate recovery without the risks of litigating the case through a jury trial and appeals.

Accordingly, these factors strongly support final approval of the Settlement.

5. *Girsh* Factor 6: The Risks of Maintaining the Class Action Through Trial

This *Girsh* factor assesses "the risks of maintaining the class action through the trial." *Girsh*, 521 F.2d at 157. Plaintiffs moved for class certification before reaching the Settlement with Pfizer. *See* ECF Nos. 1221-23. Defendants opposed class certification. ECF No. 1241. The Third Circuit has explained that "[t]he value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the

combination of the individual cases also pools litigation resources and may facilitate proof on the merits." *In re General Motors*, 55 F.3d at 817. "The prospects of obtaining and maintaining class certification, therefore, have a great impact on the range of recovery one can expect to reap from the action." *Id.* Moreover, if, as is the case here, the "Class had yet to be certified and there is no guarantee of success . . . the risks favor settlement." *In re Ocean Power*, 2016 WL 6778218, at *20.

Accordingly, this factor supports final approval of the Settlement.

6. *Girsh* Factor 7: The Ability of the Defendant to Withstand a Greater Judgment

This *Girsh* factor "addresses whether Defendants could withstand a [monetary] judgment for an amount significantly greater than the [proposed] Settlement." *In re Johnson & Johnson*, 900 F. Supp. 2d at 484 (internal quotations omitted). Even assuming Pfizer has sufficient funds to pay a greater judgment, "a defendant's ability to pay a larger settlement sum is not particularly damaging to the settlement agreement's fairness as long as the other factors favor settlement." *O'Brien*, 2012 WL 3242365, at *19.

Accordingly, this factor is neutral.

7. *Girsh* Factors 8 and 9: The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of the Risks of Litigation

"The last two [*Girsh*] factors evaluate whether the settlement represents a fair and good value for a weak case or a poor value for a strong case." *In re Johnson & Johnson*, 900 F. Supp. 2d at 484 (internal quotations omitted). "In conducting this evaluation, it is recognized that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *Id*. at 484-85 (internal quotations omitted). These factors inquire "whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *In re Prudential Ins.*, 148 F.3d at 322.

The Settlement "becomes even more favorable when considered against the attendant risks of litigation." *In re Suboxone Antitrust Litig.*, 2024 WL 815503, at *9 (E.D. Pa. Feb. 27, 2024) (entering final approval in pharmaceutical antitrust action). Plaintiffs' expert economist, Dr. Jeffrey J. Leitzinger, performed an estimation of the Class's aggregate overcharge damages. *See* ECF No. 1223 (Jan. 10, 2023 Declaration of Dr. Jeffrey J. Leitzinger). These damages calculations were premised not only on Plaintiffs prevailing on liability at trial but also upon certain variables and determinations, including, for instance, the timing of the market

entry of generic Lipitor (a jury issue). The Settlement represents more than 22% of the most conservative (lowest) single damages calculation provided by Plaintiffs' expert Dr. Leitzinger at class certification and is reasonable in the context of the risks Plaintiffs face with continued litigation. *See generally* Sections III.B.4 and III.B.6, *supra*.

Accordingly, this factor strongly supports final approval of the Settlement.

8. ***Prudential* Factor 1: The Maturity of the Underlying Substantive Issues**

In *Prudential* the Third Circuit advised that courts may consider "the maturity of the underlying substantive issues" and the existence and probable outcomes of other individual and/or class actions involving the same underlying facts. *In re Prudential Ins.*, 148 F.3d at 323. Those considerations are inapposite here. The Third Circuit has already ruled that Plaintiffs' allegations would, if proven, state a claim,[10] and motions for class certification[11] and a narrow motion on summary judgment[12] on "causation" have been briefed and argued.[13] The case is sufficiently developed for the Court to assess the fairness and adequacy of the

[10] *See, e.g.*, *In re Lipitor*, 868 F.3d 231 (reversing dismissal of Plaintiffs' claims and remanding).

[11] *See* ECF No. 1221 (Plaintiffs' May 5, 2023 Motion for Class Certification).

[12] *See* ECF No. 1183 (Defendants' Mar. 15, 2023 Motion for Summary Judgement).

[13] *See* ECF No. 1323 (Nov. 27, 2023 Minute Entry for hearing regarding ECF Nos. 1221 and 1183).

Settlement.

Accordingly, this factor strongly supports final approval of the Settlement.

9. *Prudential* Factors 2 and 3: The Existence and Probable Outcome of Claims by Other Classes and a Comparison Between the Results Achieved by the Settlement of Results to Other Claimants

Prudential factors two and three "look at the outcomes of claims by other classes and other claimants" and disparities in the success of related settlements. *See, e.g.*, *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2020 WL 1922902, at *23 (E.D. Pa. Apr. 21, 2020) (finding that settlement satisfied this factor because "there do not appear to be any disparities in the success of the settlements obtained by the various claimants"). There are no apparent disparities in the success of settlements obtained by different claimants.[14]

Accordingly, this factor supports final approval of the Settlement.

10. *Prudential* Factor 4: The Right of Class Members to Opt Out of the Settlement

This factor assesses whether Class members were afforded the right to opt out of the Settlement. *See P. Van Hove BVBA v. Universal Travel Grp., Inc.*, 2017 WL 2734714, at *9 (D.N.J. June 26, 2017) (factor supports approval because "class members may elect to opt out of the class and were informed of the procedures to

[14] The recovery for the Direct Purchaser Class is fair and reasonable as compared to, for example, the amount the proposed End-Payor Class obtained in their settlement with Pfizer ($35,000,000.00). *See* ECF No. 1398-1.

do so"); *Corra v. ACTS Ret. Servs., Inc.*, 2024 WL 22075, at *9 (E.D. Pa. Jan. 2, 2024) (factor "weighs in favor of approval" where "class members have a clearly communicated right to opt out of the settlement"). Here, pursuant to the Preliminary Approval Order entered by the Court on March 8, 2024 (*see* ECF No. 1374), Class members were provided notice of their right to opt out of the Class. *See* Ex. 1 to the Pearlman Decl. (RG/2 Decl.). No Class member opted out. *Id*. Accordingly, this factor supports final approval of the Settlement.

11. ***Prudential* Factor 5: The Reasonableness of Requested Attorneys' Fees**[15]

This factor examines whether Class members were given reasonable notice of the attorneys' fees, costs, and service awards for the class representatives that would be sought. Here, pursuant to the Court's Preliminary Approval Order, Class Counsel disseminated notice to Class members advising them that Class Counsel "intend to seek attorneys' fees of up to one third (33⅓%) of the Settlement Fund, including a proportionate share of accrued interest, plus reimbursement of reasonable litigation expenses." *See* Ex. A to Pearlman Decl. Ex. 1 (the notice). The notice also stated that "Lead Class Counsel will ask for service awards for each Class Representative of $100,000 from the Settlement Fund in recognition of their efforts to date on behalf of the Class." *Id.* The notice also informed Class

[15] *See also* Fed. R. Civ. P. 23(e)(2)(C)(iii) ("the terms of any proposed award of attorney's fees, including timing of payment").

members that any request for attorneys' fees, costs, and service awards would be filed with the Court and posted on the websites of Lead Class Counsel, which was done.[16] Accordingly, Class members were provided reasonable notice of the requested fees (of one third, 33⅓%, of the Settlement Fund) and costs and no Class member objected. *See In re Ocean Power*, 2016 WL 6778218, at *27 (lack of any negative feedback after notice that plaintiff's counsel would apply for attorneys' fees not to exceed 33% of Settlement Fund indicates "the Class generally and overwhelmingly approves of the settlement.").

Plaintiffs' Fee Submission demonstrates the reasonableness of Class Counsel's requested fees and expenses. *See* ECF No. 1397. As noted herein, no Class member objected to the requested attorneys' fees. *See* Pearlman Decl. at ¶ 4.

Accordingly, this factor strongly supports final approval of the proposed Settlement.

12. *Prudential* Factor 6: The Reasonableness of the Procedure for Processing Claims Under the Settlement[17]

The final *Prudential* factor examines whether the procedure for processing Class members' claims under the Settlement is "fair and reasonable." *Castro v.*

[16] The notice is also available at https://www.hbsslaw.com/cases/lipitor-antitrust, https://garwingerstein.com/settlements/in-re-lipitor-antitrust-litigation/, and https://bergermontague.com/cases/in-re-lipitor-antitrust-lawsuit/.

[17] *See also* Fed. R. Civ. P. 23(e)(2)(C)(ii) ("the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims").

Sanofi Pasteur Inc., 2017 WL 4776626, at *7 (D.N.J. Oct. 23, 2017). Here, in conjunction with their motion for preliminary approval, Plaintiffs submitted a proposed Plan of Allocation which described the method for processing Class members' claims and is consistent with allocation plans that have been previously approved in similar cases. *See* ECF No. 1363-3 (Plan of Allocation). The Court preliminarily approved the Plan of Allocation as fair and reasonable. *See* ECF No. 1374 (Preliminary Approval Order) at ¶ 13.

Under the Plan of Allocation, Class members are compensated based on their respective *pro rata* share of weighted combined net purchases of brand and generic Lipitor tablets purchased directly from Pfizer, Ranbaxy, or Watson. *See* ECF No. 1363-3 at pp. 2-3. Similar plans of allocation have been approved in other pharmaceutical antitrust class actions. *See, e.g.*, *In re Suboxone*, 2024 WL 815503, at *12 (approving plan of allocation because "it provides a straightforward method for determining each Class Member's *pro rata* share of the Net Settlement Fund based upon purchases"). Using data produced during discovery, Plaintiffs' expert economist performed preliminary computations, which were inserted into individualized, pre-populated claim forms, with Class members having the option of either accepting the computations in those forms or submitting their own purchase data. *Id.* Consequently, there was little to no burden on Class members, who needed only to complete and return their claims form by May 8, 2024 – a date

prominently and repeatedly noted on the claim form as the date by which all claim forms must be postmarked. *See* Ex. A to Pearlman Decl. Ex. 1 (the notice).

The claims process is currently ongoing as of the date of this filing; the Notice and Claims Administrator and Plaintiffs' expert economist will review all of the claim forms submitted and finalize each Class member's *pro rata* share of the Net Settlement Fund (*i.e.*, the Settlement Fund (including any interest earned) net of Court-approved attorneys' fees, expenses (including settlement-related costs, expenses, and service awards to the Named Plaintiffs)), after which the Notice and Claims Administrator will prepare a final report for the Court's review and approval. *See generally* ECF No. 1363-3 at pp. 2-3, 8-14. Upon Court approval, the Notice and Claims Administrator will issue payment to Class members. *Id.* at p. 14-15. To the extent any monies remain unclaimed (which, in the experience of Class Counsel, is unlikely) and it is economically feasible to do so, Plaintiffs will seek court approval concerning the distribution of any such unclaimed funds. *Id.* at p. 15. In sum, the Plan of Allocation is straightforward and non-burdensome to Class members and will ensure timely processing of claims and distribution of settlement funds.

Accordingly, this factor strongly supports final approval of the proposed Settlement.

C. THE SETTLEMENT PROVIDES A SUBSTANTIAL AND IMMEDIATE DIRECT FINANCIAL BENEFIT TO CLASS MEMBERS

In *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013), the Third Circuit stated that "one of the additional inquiries for a thorough analysis of settlement terms is the degree of direct benefit provided to the class." *Id.* at 174. As the Third Circuit explained, "[i]n making this determination, a district court may consider, among other things, the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards." *Id.*

The first *Baby Products* consideration (the number of individual awards compared to both the number of claims and the estimated number of class members) is not relevant where, as here, "each class member who submit[s] a valid claim is eligible to receive an individual award." *Ward v. Flagship Credit Acceptance LLC*, 2020 WL 759389, at *22 (E.D. Pa. Feb. 13, 2020).

The second *Baby Products* consideration (the size of the individual awards compared to claimants' estimated damages) favors approval of the Settlement. While the Settlement represents a compromise of the full amount of Plaintiffs' damages, there can be no question that the Settlement allows Class members to

receive a substantial economic recovery – *i.e.*, a substantial direct benefit – while avoiding the risks of jury trial and appeals. *See generally id.* at *66-67.

The third *Baby Products* consideration (the claims process used to determine individual awards) also demonstrates direct benefit to Class members. As detailed above, the claims process outlined in the Plan of Allocation will ensure that each Class member's recovery is based on their respective qualifying direct purchases of brand and generic Lipitor, meaning that each Class member's recovery will fairly track the type and extent of their respective damages. *See also* Section III.D, *infra*.

Accordingly, this factor strongly supports final approval of the proposed Settlement.

D. THE PLAN OF ALLOCATION SHOULD BE APPROVED

In assessing plans of allocation, the same standards of review applicable to the Court's review of the settlement itself apply: courts consider whether an allocation plan is fair, reasonable and adequate. *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 126 (D.N.J. 2002).[18]

The Plan of Allocation (ECF No. 1363-3), which was preliminarily approved by this Court as in compliance with Rule 23(e) and "otherwise fair and reasonable" (*see* ECF No. 1374 (Preliminary Approval Order) at ¶ 13), meets this standard. As set forth more fully in the Plan of Allocation and accompanying Declaration of Dr.

[18] *See also* Fed. R. Civ. P. 23(e)(2)(D) ("the proposal treats class members equitably relative to each other").

Jeffrey J. Leitzinger, (ECF No. 1363-4), the proposed Plan of Allocation, which is similar to plans of allocation that have been approved repeatedly by other courts, treats Class members equitably by distributing Settlement proceeds to claimants[19] on a *pro rata* basis. This method of allocation, which distributes recovery to claimants in proportion to the share of overcharges each suffered, is reasonable. *In re Lucent Techs.*, 307 F. Supp. 2d at 649; *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *8 (D.N.J. July 29, 2013) (approving plan of allocation that "provides for the distribution of the Net Settlement Funds on a pro rata basis based on a formula tied to liability and damages"); *In re Suboxone*, 2024 WL 815503, at *12 (plan of allocation "fair, reasonable, and adequate as [] provides a straightforward method for determining each Class Member's *pro rata* share of the Net Settlement Fund based upon purchases"). Further, as detailed above, each Class member may submit a claim by verifying the purchase totals provided in pre-populated, individualized claims forms (or by submitting their own purchase data with their claim form if they wish). As detailed in Plaintiffs' preliminary approval papers, similar plans of allocation have been repeatedly approved in similar pharmaceutical antitrust actions. *See* ECF No. 1363-7 at p. 38 n.85 (listing cases). Finally, Class Counsel highly recommend the Plan of Allocation, which further supports approval. *See In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, 2021 WL

[19] Claimants are Class members or Class members' assignees that timely submitted completed claim forms. *See* Plan of Allocation (ECF No. 1363-3) at pp. 3-4 n.4.

358611, at *3 (D.N.J. Feb. 1, 2021) ("In determining whether a plan of allocation is fair, reasonable, and adequate, courts give great weight to the opinion of qualified counsel"). Lastly, no Class member objected to the Plan of Allocation.

Accordingly, the Plan of Allocation should be approved as fair, reasonable and adequate.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the accompanying proposed Order.

Dated: May 29, 2024

Respectfully submitted,

/s/ Peter S. Pearlman

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