UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE OPANA ER ANTITRUST LITIGATION	MDL No. 2580 Lead Case No. 14-cv-10150
THIS DOCUMENT RELATES TO: All Actions	Hon. Harry D. Leinenweber

DIRECT PURCHASER CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS FOR THE CLASS REPRESENTATIVES

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I. INTRODUCTION

Class counsel representing Direct Purchaser Class Plaintiffs Value Drug Company ("Value Drug"), Meijer, Inc., and Meijer Distribution, Inc. (together, "Meijer"), and the certified direct purchaser class (collectively, "Plaintiffs," "Direct Purchaser Plaintiffs," or "DPPs") respectfully submit this memorandum in support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards for the Class Representatives. The declaration of Bruce E. Gerstein ("Gerstein Decl.") accompanies this memorandum.

For over eight years, Class counsel aggressively prosecuted this complicated and challenging antitrust case against determined Defendants. At the start of what would be a three-week trial, Class counsel reached an agreement in principle with defendant Impax Laboratories, Inc. ("Impax") to settle this matter for $145 million.[1] This is a particularly favorable outcome for the Direct Purchaser Class ("Class")[2] given the jury's ultimate verdict in favor of the remaining defendants, Endo Health Solutions Inc., Endo Pharmaceuticals Inc., and Penwest Pharmaceuticals Co. (collectively, "Endo").[3] This Court described the settlement with Impax as

[1] Under the terms of the Settlement Agreement, Impax will pay Plaintiffs $145,000,000 plus interest in three installments as follows: $58,000,000 was paid on June 22, 2022; $58,000,000 plus interest paid no later than January 17, 2023; and $29,000,000 plus interest paid no later than January 17, 2024. Settlement Agreement, ¶ 8 (ECF No. 1043-1).

[2] The Court previously certified the following Direct Purchaser Class:

> All persons or entities in the U.S. and its territories, including Puerto Rico, who purchased brand or generic Opana ER 5, 10, 20, 30, and/or 40 mg tablets directly from Defendants at any time during the period from April 1, 2011 until August 31, 2017 (the "Class"). Excluded from the Class are the Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.

ECF No. 751 at 1 ("Defendants" are Endo and Impax). Also excluded from the Class are the following entities who have independently filed actions and previously opted out of the Class: CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co., Albertsons LLC, Safeway Inc. and H-E-B L.P (collectively, the "Retailer Plaintiffs"). *See* ECF No. 768 at ¶ 9.

[3] The trial verdict is subject to a pending Post-Trial Motion for Judgment as a Matter of Law or for a New Trial. ECF No. 1048, which is stayed due to Endo's bankruptcy filing. ECF No. 1064.

"excellent" and "great." *See* Transcript of Preliminary Approval Hearing, dated July 28, 2022 ("Preliminary Approval Transcript") at 2, 6-7.[4]

Hatch-Waxman antitrust cases brought pursuant to the standard articulated in *Actavis*[5] are complicated, requiring: (a) an understanding of intricate FDA regulations and the drug application approval process; (b) expertise in patent law and patent litigation, including substantive analyses of patents and patent infringement allegations; (c) economic expertise to evaluate the contours of monopoly power, which can include analysis of the relevant market; (d) the development of factual evidence and an economic model to demonstrate a "but-for world" devoid of the alleged anticompetitive behavior; and (e) the calculation of damages to the Class caused by the alleged misconduct. These cases, including this one, also require substantial attorney (and support staff) hours and the incurrence of substantial expenses and costs.

This particular case added several layers of complexity on top of the typical framework described above. Because the payment at issue in the contested "reverse payment" agreement was associated with a Development and Co-Promotion Agreement ("DCA") for a yet-to-be developed drug, the case required an understanding of the due diligence typically involved in drug investment partnerships and an investigation into the due diligence analysis (or lack thereof) conducted by the Defendants for the DCA. Further, because the settlement agreement included a so-called "broad license," Defendants argued that this provision made their agreement on balance procompetitive notwithstanding the challenged reverse payments because it granted a license to later-issued patents Endo had not yet acquired at the time of the reverse payment agreement, and other generic companies later lost patent infringement lawsuits brought by Endo

[4] A copy of the Preliminary Approval Transcript is attached as Exhibit B to the Gerstein Decl.

[5] *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

concerning those later-issued patents. Additionally, unlike other cases, the complicated structure of the reverse payment—specifically the existence of the Endo Credit—made the establishment of any payment from Endo to Impax more difficult and challenging for Plaintiffs here than in other reverse payment cases. Indeed, Class counsel here needed to convince the Court and the jury that the Endo Credit was designed to guarantee Impax a significant payment at the time of the agreement no matter what happened to the market for Opana ER. Further compounding these unique and challenging complexities, since Opana ER is a controlled substance, the case required an understanding of FDA regulations related to controlled substances, the safety and dangers associated with different formulations of Opana ER for purported abuse deterrence, and analyses of Endo's claims of safety associated with its reformulated Opana ER, its petitions to the FDA to remove original Opana ER from the market, and its ultimate withdrawal of reformulated Opana ER from the market at the FDA's request.

The challenges and risks associated with this case were significant and were further intensified by the additional challenges imposed by Covid protocols. Those risks were ultimately realized following an almost three-week jury trial when the jury returned a verdict for Endo. Even the verdict underscored the complexities of this case. While the jury found that Class counsel successfully proved monopoly power and a reverse payment, they found that Endo's arguments concerning the "broad license" provided sufficient procompetitive justification for the conduct. The loss at trial underscores just how valuable the $145 million settlement is for the Class. Absent this settlement, secured by Class counsel as the trial commenced, the Class would currently be empty-handed, without *any* compensation for their injuries.

Class counsel investigated this case independently, without the aid of a preceding government action or indictment, and filed this case on an entirely contingent basis, knowing it

could take years to prosecute, millions of dollars and tens of thousands of attorney hours to properly resource, and assuming the very real risk of nonpayment. Class counsel began investigating this "pay for delay" case in early 2014, ultimately filing the first complaint on behalf of plaintiff Rochester Drug Cooperative, Inc. ("RDC") on June 4, 2014.[6] Gerstein Decl. Decl. ¶ 2. Soon thereafter, Class counsel filed complaints on behalf of plaintiffs Value Drug[7] and Meijer[8] and the cases were centralized by the U.S. Judicial Panel on Multidistrict Litigation in the Northern District of Illinois, along with cases filed on behalf other plaintiffs. ECF No. 1 (Dec. 12, 2014). Gerstein Decl. ¶¶ 2-4. The DPPs' complaints alleged that Defendants Endo and Impax violated Sections 1 and 2 of the Sherman Act under the standards set forth in *Actavis* by entering into an unlawful reverse payment agreement to settle patent infringement litigation. The litigation has since focused on the large, unlawful reverse payments Endo made to Impax, which induced Impax to delay its launch of generic Opana ER and suppressed competition, causing Class members to pay supracompetitive prices for brand and generic Opana ER sold by Defendants. Prior to the DPPs' complaint being filed, no other direct purchaser pursued the pay-for-delay theory that Class counsel and the Class Representatives here did, and the FTC did not file its case until 2016, almost two years after the first DPP complaint was filed.[9] Gerstein Decl. ¶¶ 8-9.

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[6] *Rochester Drug Co-Operative, Inc. v. Endo Health Solutions Inc. et al.*, No. 14-cv-3185 (E.D. Pa.) (complaint filed on June 4, 2014) (now No. 14-cv-10151 (N.D. Ill.)). RDC voluntarily dismissed its claims with prejudice in June 2018 (ECF No. 375).

[7] *Value Drug Company v. Endo Health Solutions Inc. et al.*, No. 14-cv-5416 (N.D. Ill.) (complaint filed on July 16, 2014).

[8] *Meijer, Inc., et al. v. Endo Health Solutions Inc. et al.*, No. 14-cv-7320 (N.D. Ill.) (complaint filed on Sept. 19, 2014).

[9] *Compare Rochester Drug Co-Operative, Inc. v. Endo Health Solutions Inc. et al.*, No. 14-cv-3185 (E.D. Pa.) (complaint filed on June 4, 2014) (now No. 14-cv-10151 (N.D. Ill.)), to *FTC v. Endo, et. al*, No. 16-cv-01440 (E.D. Pa.) (complaint filed on Mar. 30, 2016).

Class counsel pursued this case on a wholly contingent basis without any guarantee of success or compensation. Gerstein Decl. ¶ 9. The favorable settlement with Impax reached at the late stage in this case is the result of their unique skill and experience gained from 20-plus years of handling similar cases and their perseverance in this case in the face of vigorous defenses advanced by some of the best defense firms in the country.

From case investigation through preliminary approval of the settlement, over the course of eight years, Class counsel expended almost 66,000 hours of uncompensated professional time, equating to a lodestar of over $41.7 million based on 2022 rates, and incurred over $4.3 million in unreimbursed out-of-pocket expenses. Gerstein Decl. ¶¶ 66-69. As compensation for their efforts, Class counsel seek reimbursement of litigation expenses in the amount of $4,343,137.06, *Id*. at ¶ 66, service awards in the amount of $150,000 each for class representatives Value Drug and Meijer, and an award of attorneys' fees in the amount of $50,528,470.66, *i.e.*, 36% of the settlement amount (including an equal percentage of any interest accrued since the settlement amount was escrowed), net of reimbursed expenses and service awards granted by the Court pursuant to this motion. *Id*. at ¶ 71.[10] The requested fee, if awarded, would result in a modest lodestar multiplier of 1.21. *Id.*[11] It is respectfully suggested that these requests are justified for several reasons.

First, the result - $145 million in cash for the Class - is extraordinary as a stand-alone matter, but even more so in light of the loss at trial. The alternative for the Class was no recovery

[10] This is calculated by subtracting $4,343,137.06 in expenses and $300,000 in service awards from the $145 million settlement and multiplying the difference by .36. The notice sent to the Class stated that "Class Counsel intend to seek attorneys' fees of up to forty percent of the Settlement Fund less court-approved expenses and service awards." ECF No. 1055 at 9.

[11] The multiplier of 1.21 is calculated by dividing the requested fee $50,528,470.66 by the Class counsel's lodestar of $41,762,618.41.

at all pending post-trial briefing and a likely appeal (by whichever side loses at the district court), which will not resolve for many months, if not years, and may result in another trial with similar uncertainties.

Second, the requested fee is a reasonable market rate for Class counsel's services had they been negotiated *ex ante*, as the Seventh Circuit directs. The benchmarks employed in the Seventh Circuit to gauge reasonable market rates – existing or prior contracts between the parties, data from similar common fund cases, and class counsel auctions – all support Class counsel's request. Class members in this litigation have previously attested to the reasonableness of a 33% fee in similar class settlements of pharmaceutical antitrust cases and more than the 36% fee sought here if the case advanced to trial, as this one did. A 36% fee is also within the ordinary range of contingency fee arrangements actually negotiated *ex ante* between parties, including in complex securities and antitrust actions. And while there are few comparable, complex antitrust cases that advance all the way to a jury verdict, a 36% fee is not uncommon when they do.

Third, the unusually high risk, length, and complexities of this case, coupled with the caliber of performance and quality of work performed by Class counsel, including during trial, warrant the requested fee. This case was particularly complicated and risky, even among traditionally complicated antitrust cases brought under *Actavis*. Despite the very real risk of nonpayment, Class counsel committed 8 years, almost 66,000 attorney and professional hours, and $4,343,137.06 in unreimbursed expenses to ensure the vigorous prosecution of this case. Class counsel took this case through exhaustive fact and expert discovery, significant motion practice (under Federal Rules of Civil Procedure 12, 23, 56, and 702/*Daubert*, numerous motions to compel, numerous motions *in limine*, and motions regarding admissibility of evidence at trial),

and through a three-week jury trial. The case was hard fought at every stage against very well-resourced Defendants, represented by some of the top defense law firms in the country, who mounted an aggressive and sophisticated defense. A lodestar cross check confirms the reasonableness of the 36% fee request. The requested fee would equate to a 1.21 multiplier of lodestar, which is on the low side of what is routinely granted in this Circuit and others in complex cases.

These factors strongly support the requested fee, the $150,000 service award for each named class representative, and the reimbursement of $4,343,137.06 in costs/expenses.

II. SUMMARY OF CLASS COUNSEL'S LITIGATION EFFORTS

A. Pre-Filing Investigation

Class counsel began investigating this case in earnest in early 2014. Gerstein Decl. ¶ 1. Class counsel gathered information regarding the market availability of generic versions of Opana ER, reviewed and analyzed the Opana ER patent litigation proceedings, and researched and analyzed publicly available information regarding the terms and conditions of Endo's settlements with Impax and the other would-be generic competitors.

On June 4, 2014, Class counsel's client RDC filed the first complaint by any plaintiff alleging a delay in generic Opana ER competition due to Defendants' unlawful reverse payment agreement.[12] Soon thereafter, Value Drug[13] and Meijer[14] filed complaints with substantially

[12] *Rochester Drug Co-Operative, Inc. v. Endo Health Solutions Inc. et al*., No. 14-cv-3185 (E.D. Pa.) (complaint filed on June 4, 2014) (now No. 14-cv-10151 (N.D. Ill.)). RDC dismissed its complaint with prejudice on June 11, 2018, ECF No. 378, but other clients of Class counsel, Class Representatives Value Drug and Meijer, filed complaints making substantially similar allegations, as outlined below.

[13] *Value Drug Company v. Endo Health Solutions Inc. et al*., No. 14-cv-5416 (N.D. Ill.) (complaint filed on July 16, 2014).

[14] *Meijer, Inc., et al. v. Endo Health Solutions Inc. et al*., No. 14-cv-7320 (N.D. Ill.) (complaint filed on Sept. 19, 2014).

similar allegations, and the United States Judicial Panel on Multidistrict Litigation transferred the cases to the Northern District of Illinois for coordination with other actions.[15] Class counsel filed the First Amended Consolidated Class Action Complaint on May 4, 2015, which remained the operative complaint for the duration of litigation.[16] Class counsel investigated these allegations and developed the pleadings without the benefit of a related investigation or complaint brought by a government enforcement agency.

B. Prosecution of the Case

1. The Motion to Dismiss

Defendants filed a motion to dismiss on July 3, 2015, which argued that: (1) the "Endo Credit," no-AG agreement, and Endo's non-refundable upfront $10 million cash payment under the DCA did not constitute large reverse payments under *Actavis*; and (2) because other generic manufacturers were still embroiled in patent infringement litigation on later-issued patents, DPPs could not plausibly allege that Impax would have launched its generic Opana ER earlier absent the reverse payment agreement, which contained a so-called "broad license." ECF No. 118. Class counsel responded in sixty pages of briefing on August 21, 2015, raising, among other things, a newly issued decision in the Third Circuit which directly refuted Defendants' theory that a no-AG promise should not constitute a large reverse payment under *Actavis*. ECF No. 129 at 3, n. 6 (*citing King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp*., 791 F.3d 388, 395 (3d Cir. 2015)). The Court denied Defendants' motion in a 40-page opinion issued on February 10, 2016, acknowledging that, among other things, Plaintiffs' claims about the value of the alleged reverse payments "may be an issue for summary judgment or trial." *In re Opana ER*

[15] *See* Transfer Order, *In re: Opana ER Antitrust Litigation*, MDL No. 2580, ECF No. 54 (Dec. 12, 2014).

[16] ECF No. 101

Antitrust Litig., 162 F. Supp. 3d 704, 719-20 (N.D. Ill. 2016). With these risks and challenges in mind, Class counsel developed and executed a comprehensive discovery plan.

2. Discovery

Discovery in this case began in earnest in the spring of 2016 following the Court's denial of the motion to dismiss. Class counsel, on behalf of DPPs, served each Defendant with over 100 Requests for Production, at least fifteen interrogatories, and several Requests for Admission; took, participated in, and defended more than 20 fact depositions; and pursued non-party discovery, including from Actavis, another generic Opana ER manufacturer. Gerstein Decl. ¶¶ 15-18, 21. Discovery in this litigation was hotly contested, requiring Class counsel to file numerous motions to compel document production, deposition testimony, and interrogatory responses from Defendants and third parties to access the discovery necessary to prove their claims. *See e.g.* ECF Nos. 262, 279, 281, 285, 291, 347, 359, 372; Gerstein Decl. ¶ 19.

As discussed below, Class counsel's diligent pursuit of evidence armed Plaintiffs with documentary evidence and testimony to successfully support their class certification motion, opposition to two motions for summary judgment, and present evidence during an almost three-week trial before this Court.

3. Class Certification

Class counsel's work developing expert discovery and filing a Rule 23 motion resulted in the successful certification of a class of direct purchasers of generic and brand Opana ER from Endo and Impax. *See In re Opana ER Antitrust Litig*., 2021 WL 3627733, at *4 (N.D. Ill. June 4, 2021). Class counsel overcame Defendants' argument that the DPP class, with fewer than 40 distinct class members, was not sufficiently numerous to satisfy Rule 23(a), a hotly disputed issue resulting in split outcomes in district courts across the country. *See id.*

4. Experts

Class counsel retained eleven experts who issued 22 reports and sat for 22 depositions, resulting in expert fees of nearly $3 million. Gerstein Decl. ¶¶ 22-23. Class counsel also deposed or participated in the depositions of Defendants' twelve experts. Gerstein Decl. ¶ 26. These efforts required Class counsel to present and defend against very complex material in a concise and coherent manner. Class counsel also ensured that eight of the Class's experts were fully prepared to provide comprehensible testimony at trial. Gerstein Decl. ¶ 24.

5. Summary Judgment and *Daubert* Motions

After the conclusion of expert discovery, Defendants moved for summary judgment on causation and damages, arguing that Plaintiffs suffered no antitrust injury because Defendants' settlement agreement allegedly promoted competition and hastened generic entry by granting Impax a broad license that purportedly permitted Impax to continue selling generic Opana ER after Endo acquired the later-issued patents. ECF Nos. 539, 540. Endo also moved for partial summary judgment on several complex patent issues related to the prior patent litigation, seeking to prevent Plaintiffs from (a) recovering damages after the issuance of its two later-issued patents; and (b) from presenting certain arguments and defenses related to Impax's purported patent infringement. ECF Nos. 532, 533. Along with its summary judgment motions and replies, Defendants collectively submitted 160 pages of alleged undisputed facts and 138 exhibits. ECF Nos. 562, 581; Gerstein Decl. ¶ 29. Defendants also filed ten *Daubert* motions, totaling another 216 pages of briefing (including replies) and an additional 105 exhibits. ECF Nos. 510 & 512 (Tupman), 513 & 515 (DeLeon), 516 (Molina), 529 (Leitzinger), 537 & 542 (Bruno), 541 & 544 (Belvis), 546 & 549 (Byrn), 550 & 554 (Zettler and Lessem), 556 & 559 (McGuire), 757 & 758 (Leitzinger, renewed); Gerstein Decl. ¶ 30. Class counsel opposed with two summary judgment briefs, submitting their own statements of undisputed facts and replies to Defendants' statements

of facts and exhibits. ECF Nos. 615 & 617-21, 639, 644; Gerstein Decl. ¶ 32. Plaintiffs also filed 10 *Daubert* motions of their own, totaling 222 pages in briefing (including opening and replies) and supported by 98 exhibits, and opposed each of Defendants' ten *Daubert* motions in another 135 pages of briefing and supported by 57 exhibits. ECF Nos. 519 (Patel), 520 (Singer), 521 (Figg), 522 (Lowman), 523 (excluding opinions concerning lawsuits and patents that post-date the reverse payment agreement), 524 (Fassihi), 525 (Gilligan), 526 (Addanki), 527 (Green), 528 (Berneman), 534 (Declaration and Exhibits in support of *Daubert* motions), 565 (Patel reply), 566 (Singer reply), 568 (Figg reply), 569 (Lowman reply), 571 (Post-date reply), 572 (Fassihi reply), 573 (Gilligan reply), 575 (Addanki reply), 576 (Green reply), 577 (Berneman reply), 600 (Tupman opposition), 602 (DeLeon opposition), 603 (Molina opposition), 604 (Bruno opposition), 605 (Belvis opposition), 609 (Leitzinger opposition), 613 (McGuire opposition), 614 (Zettler & Lessem opposition), 616 (Byrn opposition), 762 (Leitzinger renewed opposition); Gerstein Decl. ¶¶ 31, 33.

In a 29-page opinion, the Court denied Defendants' summary judgment motions and denied, at least in part, all but one *Daubert* motion filed by Defendants. *In re Opana ER Antitrust Litig.*, 2021 WL 2291067 (N.D. Ill. June 4, 2021). In denying Defendants' motion for summary judgment on causation and damages, the Court rejected Defendants' argument concerning the broad license:

> Defendants would like to use the Broad License as a counterbalance to the reverse payment, but the Broad License is a concession in the same direction as the reverse payment—from Endo to Impax. As a result, while the Broad License has potentially beneficial effects to consumers, it does not counterbalance the $102 million reverse payment from Endo to Impax. Instead, the Broad License concession serves only to highlight how much Endo valued Impax's delayed start, suggesting monopolistic effects instead of procompetitive ones.

Id., at *25. The Court agreed with Plaintiffs that "there is additional evidence in the record that the Broad License was not a reasonably necessary part of the 2010 Settlement and License Agreement," and this became the defining issue at trial. *Id.*

6. Trial Preparation and Trial

With fact and expert discovery completed, summary judgment and *Daubert* motions resolved, Class counsel prepared for trial, which ultimately began on June 9, 2022. Gerstein Decl. ¶¶ 35, 44. Leading up to trial, Defendants filed 23 motions *in limine*, comprising 174 pages of briefing. ECF Nos. 801-05, 814-15, 817-20, 822, 824-25, 827, 829, 831; Gerstein Decl. ¶ 36. Class counsel filed 91 pages of briefing in opposition and seven motions *in limine* of their own, totaling 82 pages. ECF Nos. 806-12, 839, 842-43, 845-46, 848, 865; Gerstein Decl. ¶ 36. In preparation for trial and via the joint pretrial order filed on May 24, 2022, the parties exchanged witness lists, deposition designations, exhibit lists, proposed jury instructions, and proposed verdict forms. Gerstein Decl. ¶ 37. Class counsel, on behalf of Plaintiffs, named 35 fact witnesses and eight expert witnesses, which Class counsel prepared to examine or present via video depositions at trial. *Id.* at ¶ 38. Endo and Impax named 44 witnesses, which Class counsel prepared to cross-examine or present via counter-designated video depositions at trial. *Id.* Class counsel submitted a 186-page spreadsheet of deposition designations, to which Defendants objected and counter-designated deposition testimony. *Id.* at ¶ 39. Class counsel replied by responding to Defendants' objections, as well as by objecting and providing reply-designations in response to Defendants' counter-designations. *Id.* Endo submitted a 104-page spreadsheet of deposition designations and Impax submitted a 105-page spreadsheet. *Id.* For each, Class counsel responded with objections and counter-designations. *Id.* Class counsel prepared a final exhibit list with 1,664 exhibits, while Endo offered 618 and Impax offered 190, which Class counsel responded to with objections as appropriate. *Id.* at ¶ 40. Class counsel prepared general jury

instructions, Phase I jury instructions, and Phase II jury instructions, as well as a statement for the Court in support of their jury instructions, totaling more than 250 pages. *Id.* at ¶ 41. Class counsel also prepared objections to Endo's and Impax's separate, opposing jury instructions and responses to Endo's and Impax's objections to Plaintiffs' proposed jury instructions. *Id.* Last, Class counsel prepared proposed verdict forms for Phase I and Phase II, along with a supportive statement and objections to Endo's and Impax's separate proposed verdict forms, which collectively totaled 23 pages. *Id.*

Class counsel travelled to Chicago a few days before the final pre-trial conference on June 2, 2022 to submit to court-mandated COVID testing and further coordinate with co-counsel and the other plaintiff groups on trial strategy. *Id.* at ¶ 42. Class counsel telephonically attended the pretrial conference addressing the Court's rulings on motions *in limine* and instructions related to jury selection and trial logistics, among other things. *Id.* In preparation for jury selection, Class counsel reviewed over 200 pages of juror information and questionnaire responses. *Id.* at ¶ 43. The trial began on June 9, 2022 with *voir dire*. *Id.* at ¶ 44. A jury was selected that morning and Class counsel and co-counsel offered opening arguments that afternoon. Class counsel attended trial during the day, examining witnesses, countering any objections raised by Defendants, and proffering objections of their own. *Id.* at ¶ 45. Each evening, for witnesses whose deposition testimony was presented at trial by video, Class counsel exchanged exhibit lists, deposition designations, related objections, counter-designations, and reply-designations with Defendants. *Id.*

Just before opening statements on June 9, 2022, Impax and Class counsel announced a settlement with Impax, who also settled with the Retailer plaintiffs. *Id.* at ¶ 46. Because Impax had not yet settled with the end-payor plaintiffs, however, Impax participated at trial until June

15, 2022, when Impax and the end-payor plaintiffs informed the Court they had settled. *Id.* The trial continued against Endo, and the jury ultimately returned a jury verdict in favor of Endo on July 1, 2022. *Id.*

7. Mediation and Settlement

DPPs and Impax reached an agreement in principle on June 8, 2022 just as the parties prepared for opening statements. Gerstein Decl. ¶ 48. This represented the culmination of mediation efforts that first started in May 2022 with a full day mediation led by Jonathan Marks, one of the preeminent mediators in the nation, and continued with multiple individual virtual sessions in May and early June, laying the groundwork for the parties' ultimate settlement as trial started. *Id.* at ¶ 47. After the jury verdict, Class counsel negotiated the ultimate settlement agreement with Impax, which was executed on July 15, 2022, just two weeks after the jury's verdict in Endo's favor. *Id.* at ¶ 48.

* * *

For nearly eight years, Class counsel zealously prosecuted this action. The very substantial settlement reached with Impax will ensure that the Class receives a significant recovery despite a loss at trial.

III. CLASS COUNSEL SHOULD BE REWARDED REASONABLE ATTORNEYS' FEES

A. The Recovery for the Class is Extraordinary in Light of the Loss at Trial

Class counsel secured an "excellent"[17] $145 million settlement with Impax as trial commenced, which continued to conclusion with a verdict in Endo's favor. The $145 million Class counsel recovered from Impax on behalf of the Class is not only substantial in relation to

[17] Preliminary Approval Transcript at 2, 7.

similarly complex cases,[18] it is extraordinary in light of the known alternative: no recovery whatsoever. The indisputable value and benefit conferred on the Class by this settlement is a testament to Class counsel's determined pursuit of victory at every stage of this litigation.

B. Class Counsel's Fee Request is Reasonable

Under the "equitable fund" doctrine, attorneys for the plaintiffs in a class action may petition the court for compensation from the settlement fund that resulted from their efforts. *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980); Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees ... that are authorized by law or by the parties' agreement."). Courts in the Seventh Circuit use one of two methods for calculating reasonable attorneys' fees – either the "lodestar" method, which considers "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," or the percentage method, which "sets the fee award as a percentage of the recovered settlement fund, plus expenses and interest." *In re Dairy Farmers of Am., Inc*., 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015) (citations omitted); *In re Cap. One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) ("It has long been the law in the Seventh Circuit that in common fund cases like this one, district courts have discretion to choose either the lodestar or a percentage approach to calculating fees.") (citing *Florin v. Nationsbank of Ga., N.A*., 34 F.3d 560, 566 (7th Cir.1994)). The trend in common-fund cases like this one is to use the percentage method. *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund in recognition of the

[18] *See 2021 Antitrust Annual Report: Class Actions in Federal Court*, at 15 (April 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930 (last accessed Sept. 16, 2022) ("2021 Antitrust Annual Report") (Settlement recoveries in pharmaceutical antitrust cases average $54.2 million).

fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis") (collecting cases, internal citations omitted); *Dairy Farmers*, 80 F. Supp. 3d at 844 (Applying the percentage method and explaining that it "has emerged as the favored method for calculating fees in common-fund cases in this district"). As Professor Brian Fitzpatrick of Vanderbilt Law School, an expert on fee awards in class action litigation, has observed, where a court can monitor against premature settlement—which clearly is not an issue here—then the percentage of recovery, not lodestar, is the best method for determining appropriate attorneys' fees. Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees In Class Actions*, 89 Fordham Law Review 1151, at 1170 (2021) (hereinafter, "*Guide to Awarding Fees In Class Actions*").

As the Seventh Circuit directs, "[t]o determine the reasonableness of the sought-after fee in a common-fund case, 'courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" *Cap. One*, 80 F. Supp. 3d at 788–89 (quoting *In re Synthroid Mktg. Litig*., 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") (citations omitted). This is often referred to as the "*ant*e approach," which asks the court to assign fees that "mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir.2011); *Synthroid I,* 264 F.3d at 719 (Directing the district court on remand to "set a fee by approximating the terms that would have been agreed to *ex ante*, had negotiations occurred.").

In *Synthroid I*, the Seventh Circuit provided "guides" or "benchmarks" to approximate the market rate by looking at "similar bargains," such as (1) actual fee contracts between the parties and class counsel in similar cases, (2) data from similar common fund cases, and (3) information from lead counsel auctions in similar cases. *Synthroid I*, 264 F.3d at 719;

Taubenfield v. AON Corp., 415 F.3d 597, 599 (7th Cir. 2005). The market rate should also be adjusted to account for (1) the risk of nonpayment a firm agrees to bear, (2) the quality of its performance, (3) the amount of work necessary to resolve the litigation, and (4) the stakes of the case. *Synthroid I,* 264 F.3d at 721.

Here, Class counsel's request for a fee of 36% of the net settlement fund is supported by these factors, consistent with the law, and commensurate with awards in similar cases.

C. Benchmarks Provided by Similar Cases Support Class Counsel's Fee Request as an Appropriate Market Rate

Attorneys' fees negotiated and arrived at in similar complex cases provide an initial benchmark for a reasonable market rate. *Cap. One*, 80 F. Supp. 3d at 796 ("the Seventh Circuit explained that it is possible to learn about 'similar bargains' and set forth three 'guides' or 'benchmarks' to help district courts estimate the market fee: (1) actual fee contracts between plaintiffs and their attorneys; (2) data from similar common fund cases where fees were privately negotiated; and (3) information from class-counsel auctions.") (citing *Synthroid I*, 264 F.3d at 719); *Dairy Farmers*, 80 F. Supp. 3d at 845 ("As a barometer for assessing the reasonableness of a fee award in common-fund cases, courts look to the going market rate for legal services in similar cases.").

1. Fee Contracts Between Class Counsel and Clients

As is often true in class action litigation, the parties here did not agree upon a contingent fee award in advance, but this Class consists of sophisticated business entities who have served as Class members and recovered settlements from numerous pharmaceutical pay-for-delay antitrust cases like this one. Class counsel are largely the same legal team that have been litigating direct purchaser delayed generic entry antitrust cases since 1998. As a result of Class counsel's historical efforts, the largest members of these classes – the three "national

wholesalers," AmerisourceBergen Corp., Cardinal Health, Inc. and McKesson Corp. – have received substantial recoveries in prior pharmaceutical pay-for-delay cases. These same entities have provided letters and declarations in previous cases affirmatively supporting fee applications, where Class counsel requested a fee of one-third (33.3%) of the settlement. *See* Gerstein Decl., Ex. A (prior letters). The prior support from these Class members, all large corporations with extensive experience in negotiating fair legal fees, for fees of 33% in similar pharmaceutical antitrust cases suggests that this is a fair guide or benchmark. A critical distinction, however, is that none of the cases approving a 33% fee was litigated through trial and none involved a significant settlement with one defendant during a trial that ended with a verdict for the other defendant, as occurred here. In an antitrust case brought on behalf of a class with a similar make up to the Class here, the class representative, Louisiana Wholesale Drug Co., Inc., attested that they "would have retained [Class counsel] based on a 33 1/3% contingency fee in the event of settlement or compromise without trial and/or based on a 40% contingency fee in the event of trial." *In re Neurontin Antitrust Litig*., No. 02-1830, ECF No. 114 at 12 (D.N.J. Aug. 6, 2014).

2. Data from Similar Common Fund Cases

Courts nationwide recognize that a 36% fee is within the ordinary range of *ex ante* rates in privately negotiated contingency-fee arrangements. *Dairy Farmers*, 80 F. Supp. 3d at 845 (in class actions, the "usual range for contingent fees is between 33 and 50 percent"); *In re Corel Corp. Sec. Litig*., 293 F. Supp. 2d 484, 495–98 (E.D. Pa. 2003) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation."); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *4 (N.D.Ill. Dec.10,

2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered.").[19]

When looking to similar class cases and fee awards ultimately granted by courts for a benchmark, the unique posture of this case should be considered. Very few antitrust cases proceed to trial and even fewer reach a jury verdict. *See Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1193 (S.D. Fla. 2006) ("The most apparent feature distinguishing this class action from virtually every other class action in the reported federal decisions is obviously that it did not settle before trial."). This is one of only two reverse payment antitrust cases to go to verdict since the Supreme Court's *Actavis* decision in 2013, and the only case that resulted in both a significant mid-trial settlement for, and a jury verdict against, the same plaintiffs. Where complex class action cases proceed to trial, a fee award of even 40% is not uncommon. *See* Order Granting Mot. for Att'ys Fees, *In re Melridge, Inc. Sec. Litig*., No. 87-cv-01426-FR, ECF No. 2419 (D. Or. Apr. 15, 1996) (awarding 40% fee in eight-year litigation after jury trial and appeal). *See also In Re Mushroom Direct Purchaser Antitrust Litig.,* No. 06-0620, ECF No. 1088

[19] *See also Temp. Servs., Inc. v. Am. Int'l Grp., Inc*., 2012 WL 4061537, *8-*9 (D.S.C. Sept. 14, 2012) ("the market rate for private contingency fees is in the range of 33 1/3 percent to 40 percent"); *Montague v. Dixie Nat. Life Ins. Co*., 2011 WL 3626541, at *2-3 (D.S.C. Aug. 17, 2011) (noting that "[v]ery few class actions are ever litigated to judgment as in this case" and that "[i]n non-class contingency fee litigation, a 30% to 40% contingency fee is typical."); *Flournoy v. Honeywell Int'l, Inc*., 2007 WL 1087279, at *2 (S.D. Ga. Apr. 6, 2007) ("Forty percent fee contracts are common for complex and difficult litigation. . . ."); *In re Remeron Direct Purchaser Antitrust Litig*., 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *In re Ikon Off. Sols., Inc., Sec. Litig*., 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *In re Orthopedic Bone Screws Products Liability Litig*., 2000 WL 1622741, *7 (E.D.Pa. Oct.23, 2000) ("... the court notes that plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery"); *Cimarron Pipeline Const., Inc. v. Nat'l Council on Comp. Ins*., 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993) ("Fees in the range of 30-40% of any amount recovered are common in complex and other cases taken on a contingent fee basis."); *Durant v. Traditional Investments, Ltd*., 1992 WL 203870, *4 n. 7 (S.D.N.Y. Aug.12, 1992) ("contingent fee agreements up to 40 percent have been held reasonable").

(E.D. Pa Jan. 9, 2020) (awarding 40% after 13 years of litigation, weeks before trial, following summary judgment and several interlocutory appeals).

As Professor Fitzpatrick explained in his recent article, awarding "higher percentages after class trials" is "consistent with models that recommend escalating percentages as the litigation matures," but "because trials are so rare in class actions, there are no published studies" on the topic. *Guide to Awarding Fees In Class Actions*, at 1168. Professor Fitzpatrick ultimately concluded based on his analysis, that "judges should usually choose the percentage method. I also think this percentage should either be fixed or escalate with litigation maturity." *Id*. The observation supporting a higher fee award for cases that go to trial is particularly relevant to the Court's analysis here, as Professor Fitzpatrick studied 33 delayed generic entry cases brought on behalf of basically the same class of wholesalers as the Class here over 17 years (between 2003 and 2020) and found that the typical, *unobjected-to* fee request was around 33% for cases that did not go to trial. *Id.* at 1161-62. Here, of course, Class counsel did go to trial, taking on even more risk than the typical case, which justifies a fee greater than 33% of the settlement. This premise is also supported by the fee negotiated by an opt-out plaintiff in an antitrust case, *In re High Fructose Corn Syrup Antitrust Litig.*, which promised its lawyers 33 percent to 40 percent of the recovery, "depending upon the time of any settlement." Decl. of John C. Coffee, Jr., *In re High Fructose Corn Syrup Antitrust Litig.*, No. 95-cv-01477, ECF No 1421, Ex. A at 2 (C.D. Ill. Oct. 7, 2004).

The 36% fee sought here is also supported by a study published by David L. Schwartz, which surveyed contingent fee arrangements in patent litigation. Patent litigation often involves some of the largest, most sophisticated corporations in the country and therefore serves as a good proxy for this complex pharmaceutical antitrust litigation containing a patent component. The

study found that companies hiring patent litigators on a contingency basis use two types of fee arrangements: flat fee arrangements, with a fixed percentage, and graduated arrangements, setting escalating rates at various case milestones. For flat fee arrangements, fees averaged 38.6% of the recovery. For graduated arrangements, the average fee negotiated was 28% upon filing and 40.2% through appeal. David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012).[20]

The length of this case further supports Class counsel's fee request. The average antitrust case settles in 5.2 years, well before the case proceeds to trial and significantly earlier than the 8 years required to reach a settlement in this case. *2021 Antitrust Annual Report*, at 8 (Settlements in antitrust cases take an average of 5.2 years from filing to final approval). In antitrust class actions of similar complexity to this one, where recoveries exceed $100 million, but where settlements are reached earlier in the litigation, courts routinely award fees of 33%. *See e.g*. *In re Tricor Direct Purchaser Antitrust Litig*., No. 05-cv-340, ECF No. 543 (D. Del. April 23, 2009) (33% of $250 million settlement, settled after 3 ½ years of litigation at the commencement of trial); *Neurontin,* No. 02-1830, ECF No. 114 (D.N.J. Aug. 6, 2014) (33 1/3% of $191 million settlement, settled after 12 years of litigation, following summary judgment and *Daubert* decisions); *In re Titanium Dioxide Antitrust Litig*., 2013 WL 6577029 (D. Md. Dec. 13, 2013)

[20] Professor Schwartz's findings are consistent with reports found in patent blogs, one of which explained:

> Contingent Fee Arrangements: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid from damages obtained in a verdict or settlement. Typically, the law firm will receive between 33-50% of the recovered damages, depending on several factors. This is strictly a results-based system.

Matt Cutler, *Contingent Fee and Other Alternative Fee Arrangements for Patent Litigation*, available at https://www.harnessip.com/blog/2020/06/08/contingent-fee-and-other-alternative-fee-arrangements-for-patent-litigation/ (June 8, 2020) (last accessed Sept. 16, 2022).

(33% of $163.5 million settlement after 3 years of litigation, settled on the eve of trial); *In re Se. Milk Antitrust Litig*., 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (33% of $158.6 million settlement after five years of litigation, at the close of discovery, with class certification and summary judgment briefed); *In re Flonase Antitrust Litig*., 951 F. Supp. 2d 739 (E.D. Pa. 2013) (33% of $150 million settlement after five years of litigation, following the close of discovery and decisions on class certification and summary judgment); *In re Plasma-Derivative Protein Therapies Antitrust Litig*., No. 09-cv-07666, ECF Nos. 693, 697, 697-1 and 701 (N.D. Ill. 2014) (33% of $128 million settlement after five years of litigation in the midst of discovery).[21] *See also 2121 Antitrust Annual Report*, at 27 (The median award for attorneys' fees in antitrust cases are around 30% for recoveries up to $249 million). As discussed above, a higher fee is warranted here in light of the unique posture of this case.

3. Class Action Auctions

Auctions for class counsel are not an appropriate benchmark in an antitrust case such as this one. While there are cases from over 20 years ago adopting a competitive approach to negotiate fee structures at the outset of litigation, this is not a method that has been adopted by courts in the current market environment. *Cap. One*, 80 F. Supp. 3d at 800–01 (collecting cases selecting class counsel through an auction process, all dated prior to 2002).[22] For just this reason,

[21] *See also In re Relafen Antitrust Litig*., No. 01-12239, ECF No. 297 (D. Mass. April 9, 2004) (33 1/3% of $175 million settlement after a year and a half of litigation, two weeks before trial, following rulings on class certification and summary judgment); *In re Buspirone Antitrust Litig*., No. 01-cv-07951, ECF No. 22 (S.D.N.Y. April 17, 2003) (33 1/3% of $220 million settlement after two years of litigation, in the midst of fact discovery); *In re: Cardizem CD Antitrust Litig*., 99-md-01278, ECF No. 724 (E.D. Mich. Nov. 26, 2002) (30% of $110 million settlement after four years of litigation, following class certification and summary judgment, with an appeal pending); *In re Vitamins Antitrust Litig*., 2001 WL 34312839, at *14 (D.D.C. July 16, 2001) (34.6% of $365 million settlement, following motions to dismiss and on the heels of guilty pleas by the defendants in parallel DOJ investigations).

[22] *See also Guide to Awarding Fees In Class Actions*, at 1164-66 (explaining that auctions for class counsel are impractical and criticizing their effectiveness, because (a) bids submitted by attorneys are

the Seventh Circuit cast doubt on the use of contingent fees arrived at by auctions in securities class actions as a metric for other lawsuits. *In re Synthroid Mktg. Litig*., 325 F.3d 974, 979 (7th Cir. 2003) ("*Synthroid II*") ("if securities suits present less risk to the plaintiff class than does a fraud suit against a drug manufacturer, it is unsound to use a contingent fee appropriate to the former as the measure in the latter.").

There is one example of an attempted auction in a risky litigation associated with a bankruptcy proceeding that is instructive. In *In re Merry-Go-Round Enterprises, Inc*., 244 B.R. 327 (D. Md. 2000), the bankruptcy trustee wanted to assert claims against Ernst & Young. The trustee looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40% of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees,[23] 21 times its lodestar. The bankruptcy judge granted the request, writing: "[v]iewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." *Id*. at 335.

D. A 36% Fee is Fair and Reasonable Given the Remarkable Recovery for the Class in a Case with Extraordinary Risk, Length, and Difficulty

The $145 million Class counsel recovered from Impax for the Class is remarkable in light of the certain alternative: loss at trial and currently no recovery at all. Using the market rate as a "guide," courts can and should adjust fee rates obtained in similar cases based on factors unique

often complex and not easily comparable to one another, (b) the lowest bidder may not be the best lawyer and it is difficult for judges to subjectively evaluate quality in exchange for price, (c) the lawyers winning the auction with the lowest bid will have the strongest incentive to settle the case too early for too little.).

[23] The 40% contingency request was made after reimbursement of expenses and reduced by $2 million to reflect a settlement with an objecting, major creditor. *Id.* at 333.

to the case at hand, *i.e.*, the (1) risk of nonpayment, (2) quality of lawyering, (3) work required, and (4) the stakes of the case. *Synthroid I,* 264 F.3d at 721 ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case."). Since the certain alternative for the Class was to prosecute this case through to an unfavorable jury verdict (pending post-trial briefing and likely appeal), Class counsel's fee request of 36% is eminently reasonable considering the risk of nonpayment, quality of lawyering required, work invested, and high stakes involved to achieve such an extraordinary outcome.

1. Risk of Nonpayment

The risk assumed by Class counsel in prosecuting this case warrants a 36% fee award. *Cap. One*, 80 F. Supp. 3d at 805 ("The estimated magnitude of the risk necessarily affects the price at which Class Counsel in this case would have been willing to offer their services in an *ex ante* negotiation, had such a negotiation occurred.") (citing *Synthroid I*, 264 F.3d at 721). When Class counsel filed this case over eight years ago, no government agency had taken any action to prosecute a similar case involving Opana ER. Class counsel did not have the advantage of "piggy backing" on pre-existing litigation or the reassurance of liability associated with a coinciding government indictment or guilty plea when it initiated the case entirely on a contingent basis. *Dairy Farmers*, 80 F. Supp. 3d at 848 ("One proxy for assessing risk is whether the litigation followed on the heels of some prior criminal or civil proceeding involving the same parties or subject matter. This inquiry provides insight into whether class counsel benefitted from the work of others.").

If Class counsel had not secured this settlement, neither the Class nor Class counsel would have received anything, despite the eight years, thousands of hours, and millions of dollars expended. The 36% fee request is consistent with the considerable risk assumed by Class

counsel with no guarantee of recovery (and, in hindsight, the certainty of no recovery absent this settlement). *Silverman v. Motorola Sols., Inc*., 739 F.3d 956, 958 (7th Cir. 2013) (citation omitted) ("Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.") (affirming above-average fee percentage because district court could have found that the "suit was unusually risky."); *Synthroid I*, 264 F.3d at 719 ("The greater the risk of loss, the greater the incentive compensation required."); *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir.2007) (holding that class counsel was undercompensated where "the district court failed to provide for the risk of loss"); *Matter of Cont'l Illinois Sec. Litig*., 962 F.2d 566, 569 (7th Cir. 1992) (emphasizing the need to adjust fee awards to account for risk).

2. The Quality of Performance

"Yet another litmus test for assessing reasonableness is quality of Class Counsel's performance in achieving the settlement—that is, whether this is the type of outcome that willing clients would have envisioned from the outset." *Dairy Farmers*, 80 F. Supp. 3d at 849. This litigation was bitterly fought and aggressively litigated by both sides. Defendants were large, sophisticated corporations represented by skilled, nationally respected trial and appellate attorneys with practically unlimited resources at their disposal. Litigating this case against formidable Defendants and their attorneys required extraordinary skill. Class counsel expertly navigated this unusually complicated case, from initial investigation in 2014 through numerous discovery battles, extensive class certification briefing, dozens of expert reports and *Daubert* motions, summary judgment, trial preparation, including dozens of motions *in limine*, more than three weeks of trial, and settlement, with tremendous skill and faithful adherence to the Class's best interests at every stage.

Class counsel have decades of experience pursuing and trying pharmaceutical antitrust cases, which lends the team efficiency and sophisticated litigation judgment. The result speaks for itself: Class counsel obtained class certification and defeated Defendants' summary judgment motions and almost all of Defendants' *Daubert* motions. Class counsel's ability to secure what this Court described as an "excellent" and "great"[24] $145 million settlement for the Class at the outset of the three-week-long trial is a testament to the strength of Class counsel's preparation for trial. Had Class counsel failed to secure this settlement, the Class today would be left empty-handed. It speaks to the quality of representation provided by Class counsel and supports their fee request.

3. Class Counsel Devoted Extensive Time and Work to Successfully Prosecute this Case

Class counsel devoted eight years and almost 66,000 hours to the prosecution of this case, which invoked complex and unique issues of fact and law. *Synthroid I*, 264 F.3d at 721 ("The market rate for legal fees depends in part on …the amount of work necessary to resolve the litigation.").

Antitrust cases are some of the most complex, expensive, and time-consuming actions to prosecute. *See In re Motorsports Merch. Antitrust Litig.,* 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000) ("An antitrust class action is arguably the most complex action to prosecute."); *In re Air Cargo Shipping Servs. Antitrust Litig*., 2015 WL 5918273, at *6 (E.D.N.Y. Oct. 9, 2015) (prosecuting an antitrust conspiracy required "complex expert analysis and review of mountains of documents"); *Flonase*, 951 F. Supp. 2d at 743 ("Antitrust class actions are particularly complex to litigate and therefore quite expensive."). This lawsuit was especially large and

[24] Preliminary Approval Transcript at 2, 6-7.

complicated, as borne out at trial, where a jury returned a verdict for Endo. Class counsel had to grapple with numerous factual obstacles, including: a settlement agreement that contained a "broad license" for later-issued patents; Endo's success litigating patent infringement lawsuits against other generic manufacturers for those later-issued patents; a complicated payment provision called the "Endo Credit" contained in the settlement agreement; the DCA signed in conjunction with the settlement agreement and disputes over its related payments; Endo's efforts to convert the market from original Opana ER to reformulated Opana ER and disputes over each product's safety and abuse deterrence, related petitions filed with and decisions issued by the FDA, and Endo's ultimate decision to remove reformulated Opana ER from the market at the FDA's request. Needless to say, if there is a "standard" reverse payment case, this case deviated from that mold. It is hard to overstate the challenge Class counsel faced in making the complexities of this case comprehensible to a lay jury. The time and labor involved in prosecuting this case, and the novelty and difficulty of the questions presented, support Class counsel's fee request.

The Seventh Circuit does not require a lodestar cross-check. *See Williams*, 658 F.3d at 636 ("[C]onsideration of a lodestar check is not an issue of required methodology.") (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir.1998) ("[W]e have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach."); *Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 598 (N.D.Ill. 2011) (noting that "many courts in this circuit have criticized the use of a lodestar cross-check in common fund cases" when approving fee request with lodestar risk multiplier of 2.5); *Will v. Gen. Dynamics Corp*., 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."). Nonetheless, the lodestar multiplier

in this case supports the appropriateness of Class counsel's fee request. As detailed in the Gerstein Declaration, Class counsel worked almost 66,000 hours on this case thus far, amounting to $41,762,618.41 in lodestar based on 2022 rates. Gerstein Decl. ¶ 67. A 36% fee award equals a lodestar multiplier of 1.21. Such a multiplier falls on the low end of the range routinely awarded by courts in this Circuit. *Harman v. Lyphomed, Inc*., 945 F.2d 969, 976 (7th Cir. 1991) ("[a risk] multiplier is, within the court's discretion, appropriate when counsel assume a risk of non-payment in taking a suit" and "[m]ultipliers anywhere between one and four, *In re Cenco, Inc. Sec. Litigation*, 519 F.Supp. 322, 325 (N.D.Ill.1981) (four, which is quite rare), have been approved."); *accord Schulte*, 805 F. Supp. at 598 (citing *Harman* with approval); *In re TikTok, Inc., Consumer Priv. Litig*., 2022 WL 2982782, at *29 (N.D. Ill. July 28, 2022) ("In practice, most multipliers fall between one and four.") (Approving a multiplier of 2.04 for a $92 million fund); *In Re Broiler Chicken Antitrust Litigation*, 2021 WL 5709250, at *1 (N.D. Ill. Dec. 1, 2021) (approving a multiplier of 1.11 for a $169 million settlement); *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig*., 332 F.R.D. 202, 225 (N.D. Ill. 2019), *aff'd sub nom. Walker v. Nat'l Collegiate Athletic Ass'n*, 2019 WL 8058082 (7th Cir. Oct. 25, 2019) (approving a multiplier of 1.5 for a $70 million settlement). *See also* Newberg on Class Actions § 14.6 (4th ed. 2009) ("multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied"); *In re: Urethane Antitrust Litig*., 2016 WL 4060156, at *7 (D. Kan. July 29, 2016) (approving a fee yielding a multiplier of approximately 3.2, and noting that a multiplier of up to 4 or 5 "would fall within the range of multipliers accepted by a number [of] courts in megafund cases."). Pharmaceutical pay-for-delay antitrust cases commonly result in similar or significantly higher multipliers. *Flonase*, 951 F. Supp. 2d at 750-51 (approving 2.99 multiplier for $150 million fund, explaining that one to four is the

standard multiplier range); *In re Loestrin 24 Fe Antitrust Litig*., 2020 WL 4035125, at *6 (D.R.I. July 17, 2020), *report and recommendation adopted sub nom*. 2020 WL 5203323 (D.R.I. Sept. 1, 2020) (approving 1.31 multiplier for $120 million settlement); *King Drug Co. of Florence, Inc. v. Cephalon, Inc*., 2015 WL 12843830, at *6 (E.D. Pa. Oct. 15, 2015) (approving 4.12 multiplier for $512 million settlement); *In re Prograf Antitrust Litig*., No. 1:11-md-02242-RWZ, 2015 WL 13908415, at *5 (D. Mass. May 20, 2015) & ECF No. 667 (April 9, 2015) (approving 2.35 multiplier for $98 million settlement); *Neurontin,* No. 02-1830, ECF No. 114 (D.N.J. Aug. 6, 2014) (approving 1.99 multiplier on $191 million settlement); Order and Final Judgment Approving Settlement, *Tricor*, No. 05-cv-340, ECF No. 543 (D. Del. April 23, 2009) (approving 3.93 multiplier for $250 million fund); *In re Relafen Antitrust Litig*., 231 F.R.D. 52, 82 (D. Mass. 2005) (approving 2.02 multiplier for $75 million settlement). Given the risk Class counsel assumed and the amount of time, labor, and expense dedicated to litigating this case all the way through trial, the requested fee is reasonable. *See* Newberg on Class Actions §15:87 (5th ed. 2015) (substantial multiplier is appropriate where case was risky, time-consuming, involved wrongdoing uncovered by counsel in the first instance, and delivered exceptional results).

4. <u>The stakes in the case</u>

The high stakes of this litigation likewise support Class counsel's fee request. According to Plaintiffs' damages expert, the Class's total overcharges in this case exceeded $500 million. Ex. 3, Supplemental Report of Dr. Jeffrey Leitzinger, dated July 26, 2021 (ECF No. 758-2). With trebled damages under the Sherman Act, Defendants' joint exposure was over $1.5 billion. Class counsel also had a great deal at stake, taking the case on an entirely contingent basis, expending almost 66,000 hours and over $41.7 million in uncompensated attorney and professional time to litigate the case, and advancing litigation costs over $4.3 million. Gerstein Decl. ¶¶ 66-67; *Heekin v. Anthem, Inc*., 2012 WL 5878032, at *5 (S.D. Ind. Nov. 20, 2012) (noting that Class

counsel "had a great deal at stake, with the risk of non-payment, burden of advancing litigation costs of over $6 million, and the "opportunity costs" of turning down other lucrative clients."); *Schulte*, 805 F. Supp. 2d at 598 (observing that "the stakes in the case are high given the size of the Class, the scale of the challenged activity, the complexity and costs of the legal proceedings, and the amount of money involved.").

The very real risk of non-payment, quality of representation, work required to resolve the litigation, and high stakes of this particularly complex antitrust class action – only the second of its kind to ever reach a jury verdict – all weigh in favor of awarding Class counsel their requested 36% fee. *See Beesley v. Int'l Paper Co*., 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("Class Counsel's fee request is more than justified in this case given the extraordinary risk counsel accepted in agreeing to represent the Class; Class Counsel's demonstrated willingness to pursue this action over more than seven years of intense, adversarial litigation; and the enormous value of … relief included in this settlement.").

IV. CLASS COUNSEL'S COSTS AND EXPENSES ARE REASONABLE AND WERE NECESSARY TO THE RESULT

It is well-settled that counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for out-of-pocket expenses reasonably incurred in creating the fund. *Schulte*, 805 F. Supp. 2d at 600 ("The Federal Rules of Civil Procedure allow the Court, in a certified class action, to 'award reasonable…nontaxable costs that are authorized by law or by the parties' agreement.'") (quoting Fed.R.Civ.P. 23(h)). Here, Class counsel's unreimbursed expenses of $4,343,137.06 were reasonably incurred and necessary to the representation of the Class. These expenses have been itemized by category for the Court's convenience. Gerstein Decl. ¶ 66-69. *See Synthroid I*, 264 F.3d at 722 ("If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more."). These

unreimbursed expenses include costs for computerized legal research, the creation and maintenance of an electronic document database, expert costs, travel and lodging expenses, copying, court reporters, transcripts, and mediation. Gerstein Decl. ¶ 69. They also include trial expenses, such as a jury consultant and various other trial-related costs, such as a workspace in Chicago for almost two months. *Id.* These are typical expenses, routinely deemed reasonable and necessary, and they are consistent with expenses in similar, complex class cases, particularly in light of the eight years of litigation and the expense of preparing for and conducting a trial. *See* Order Granting Reimbursement of Litig. Expenses, *In re AT & T Corp*., 455 F.3d 160, 163 (3d Cir. 2006) (upholding reimbursement of $5.4 million in expenses in case that settled mid-trial); *King Drug Co. of Florence, Inc. v. Cephalon, Inc*., No. 2:06-cv-01797, ECF No. 870 at 10 (E.D. Pa. Oct. 15, 2015) (approving $3.5 million in costs and expenses); *Tricor*, No. 05-340, ECF No. 543 at 10 (D. Del. Apr. 23, 2009) (approving $3.5 million in costs and expenses in a case that settled after 3 ½ years of litigation at the commencement of trial); *In re Wellbutrin XL Antitrust Litig*., No. 2:08-cv-2431, ECF No. 485 at 8 (E.D. Pa. Nov. 7, 2012) (approving $3.1 million in costs and expenses in a case that settled after the close of fact and expert discovery, following summary judgment rulings). Accordingly, Class counsel respectfully request that the Court approve reimbursement of Class counsel's expenses in full.

V. SERVICE AWARDS FOR THE CLASS REPRESENTATIVES ARE APPROPRIATE AND REASONABLE

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook*, 142 F.3d at 1016 (citation omitted). Here, Class counsel believes that awards of $150,000 each to Value Drug and Meijer are appropriate in recognition of the long hours they spent participating in this litigation, filing suit, collecting discovery, sitting for depositions, defending their

adequacy in motions, and attending and participating in trial. Gerstein Decl. ¶¶ 72-79. *See Cook*, 142 F.3d at 1016 ("In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation."). The named plaintiffs here, Value Drug and Meijer, are regular customers of the Defendants, routinely purchasing products from both Impax and Endo. Gerstein Decl. ¶ 73. There is inherent risk in filing suit as a named plaintiff on behalf of a class against an entity with which all class members transact business, a risk Value Drug and Meijer assumed in order to benefit the Class. *See Dial Corp. v. News Corp*., 317 F.R.D. 426, 439 (S.D.N.Y. 2016) ("[T]he decision to fire the first shot on behalf of the Class was fraught with risks. Notably, the named Plaintiffs in this case assumed a substantial risk in antagonizing a longstanding, powerful business partner[.]").

The amount requested here is in line with awards made to named representatives in other pharmaceutical reverse payment cases, which did not go to trial. *See e.g., In re Lidoderm Antitrust Litig.*, No. 3:14-md-02521-WHO, ECF No. 1054 at ¶ 15 (N.D. Cal. Sept. 20, 2018) ($100,000); *In re K-Dur Antitrust Litig.,* No. 01-1652, ECF No. 1057 at ¶ 12 (D.N.J. Oct. 5, 2017) ($100,000); *In re Modafinil Antitrust Litig.*, No. 2:06-cv-01797 (MSG), ECF No. 870 at ¶ 30 (E.D. Pa. Oct. 15, 2015) ($100,000 to certain representatives); *Neurontin,* No. 02-1830 (FSH), ECF No. 114 at ¶ 31 (D.N.J. Aug. 6, 2014) ($100,000). The amount requested here also reflects that this case was not settled until trial. Both named representatives prepared for trial, with J. Mark Bover, on behalf of Value Drug, traveling to Chicago and testifying at trial on behalf of the Class. Gerstein Decl. ¶ 77. Employees of both Class representatives sat for extensive pretrial depositions, produced thousands of pages of documents and several sets of purchase and

chargeback data, and spent hours consulting with Class counsel and staying apprised of the litigation. *Id*. at ¶¶ 74-78.

VI. CONCLUSION

For the reasons set forth above and in the Declaration of Bruce E. Gerstein, Class counsel respectfully request that this Court enter an Order awarding Class counsel fees in the amount of $50,528,470.66, *i.e.,* 36% of the net settlement amount (including a *pro rata* share of the accrued interest), and reimbursement of expenses in the amount of $4,343,137.06. Class counsel also respectfully request that this Court approve service awards of $150,000 to each of the class representatives for their efforts on behalf of the Class.

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Respectfully submitted,

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