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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: LIPITOR ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** *All Direct Purchaser Class Actions*	**MDL No. 2332** **Master Docket No. 3:12-cv-2389 (PGS/JBD)**

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND SERVICE AWARDS FOR THE NAMED PLAINTIFFS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

I. INTRODUCTION

Class Counsel, who have represented named plaintiffs Drogueria Betances, LLC ("Betances"), Rochester Drug Co-Operative, Inc. ("RDC"), Stephen L. LaFrance Holdings, Inc. ("LaFrance"), Professional Drug Company, Inc. ("PDC") and Value Drug Company ("VDC") and the now-certified direct purchaser settlement class (hereinafter "Plaintiffs" or the "Class") throughout this litigation, respectfully submit this memorandum in support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Services Awards for the Named Plaintiffs.

On February 7, 2024, after more than twelve years of litigation and extensive mediation, Class Counsel agreed to a settlement (the "Settlement") with defendants Pfizer Manufacturing Ireland, Warner-Lambert Co., and Warner-Lambert Co. LLC (collectively "Pfizer") providing for an immediate cash payment by Pfizer of $93 million for the benefit of the Class. If finally approved by the Court, the Settlement will result in the dismissal of this long-pending litigation between Plaintiffs and Pfizer.[1]

[1] As noted in Plaintiffs' preliminary approval papers, defendant Ranbaxy is not part of the Settlement and so litigation will continue against Ranbaxy. *See* ECF No. 1363-7 at n. 1. Ranbaxy and Pfizer are collectively referred to as "Defendants" herein.

Investigating, bringing, litigating and mediating this lengthy and highly complex case involving the intersection of patent and antitrust law required Class Counsel to work and persevere for more than twelve years, knowing that they were litigating the case on a wholly contingent basis without any guarantee of success against formidable adversaries. From case investigation through the filing of their motion for preliminary approval of the proposed Settlement between Plaintiffs and Pfizer, Class Counsel expended more than 42,000 hours of uncompensated professional time. Class Counsel also incurred approximately $2.7 million in unreimbursed out-of-pocket expenses. For these efforts, Class Counsel seek an award of attorneys' fees in the amount of $31,000,000.00 (or one-third, 33⅓%, of the settlement amount) plus a proportionate amount of any interest accrued since the settlement was escrowed, reimbursement of expenses, and service awards to the named plaintiffs.[2]

As detailed below, Class Counsel's fee request is strongly supported by consideration of each of the "*Gunter/Prudential*" factors.

[2] The efforts of Class Counsel are described in further detail below and in the accompanying declaration of Peter S. Pearlman ("Pearlman Decl.") and individual law firm declarations, filed contemporaneously herewith (Pearlman Decl. Exs. A through O).

First, the size of the Settlement — $93 million cash — unquestionably represents a substantial, immediate, and guaranteed recovery for the Class in terms of dollar value.

Second, to the extent any objections to Class Counsel's requested fee award are received, Class Counsel will promptly inform the Court.

Third, Class Counsel are highly experienced antitrust litigators, some of whom have been representing essentially the same Class here for decades, and possess the valuable skill, knowledge, and expertise that were necessary to successfully resolve the claims of the Class against Pfizer in this long-pending litigation.

Fourth and fifth, while all antitrust cases are inherently complex and all litigation involves some degree of risk, these complexities and risks were magnified here for numerous reasons. Most notably, this case was litigated in the midst of rapidly evolving law concerning the appropriate legal standard under which to evaluate reverse payment agreements challenged as violative of the antitrust laws, resulting in the Supreme Court granting *certiorari* and issuing its landmark opinion in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) during the initial years of the litigation. Additionally, pharmaceutical antitrust cases involve a unique combination of intricate legal and factual issues spanning multiple fields. During the more than twelve years that this litigation has been pending, Class Counsel has

aggressively litigated across all issues – many of which were extensively briefed during mediation and certain of which remain pending in view of Plaintiffs' continuing case against Ranbaxy – to ensure that the Class's potential recovery would not be eliminated or curtailed during the litigation and/or had the litigation against Pfizer gone to trial. Nonetheless, a high degree of risk remained. As discussed further below, previous pharmaceutical antitrust cases have been lost after significant and lengthy litigation either because of successful defense summary judgment motions or adverse jury verdicts. Indeed, here, Defendants filed an early summary judgment brief on the issue of causation which Defendants contended would result in the demise of Plaintiffs' case.

Sixth, the Settlement is the result of lengthy, hard-fought, arm's length negotiations that first began in 2020 under the direction of Judge Hochberg pursuant to this Court's directive and proceeded for multiple years, with the parties comprehensively briefing numerous issues on various topics and participating in numerous in-person and telephonic mediation sessions (many of which occurred during the height of the COVID-19 pandemic).

Seventh, the requested fee award of one-third is squarely within the range typically awarded by courts in the Third Circuit, and is also in line with awards granted in other pharmaceutical antitrust cases.

Eighth, Class Counsel did not ride the coattails of any government investigation in initiating and prosecuting this litigation.

Ninth, the requested fee award is consistent with the percentage fee that courts in this Circuit have held would have been privately negotiated.

A lodestar cross-check equals a negative multiplier of 0.89 of Class Counsel's total lodestar under current billing rates, and a 1.13 multiplier on Class Counsel's total lodestar under historical billing rates.

II. SUMMARY OF CLASS COUNSEL'S LITIGATION EFFORTS

A. Pre-Filing Investigation

Certain of Class Counsel filed the first direct purchaser complaint in November 2011. Pearlman Decl. at ¶ 2. Shortly thereafter, similar direct purchaser complaints were filed by Class Counsel in different districts, which were ultimately centralized in this District by the Judicial Panel for Multidistrict Litigation. *Id.* at ¶¶ 2, 5.

None of the above-referenced complaints followed any governmental investigation or enforcement action. All such complaints were the result of pre-filing investigation performed by Class Counsel. That investigation included, *inter alia*, reviewing and analyzing the market availability of generic versions of Lipitor, including Abbreviated New Drug Applications ("ANDAs") filed with the Food and Drug Administration ("FDA") seeking approval to market generic versions of

Lipitor; publicly available regulatory filings for Lipitor, including Pfizer's Citizen's Petition; publicly available patent litigation records concerning Lipitor; Pfizer's and Ranbaxy's securities filings, including annual and quarterly reports; Pfizer's and Ranbaxy's public statements concerning Lipitor; publicly available materials concerning Lipitor; Pfizer's promotional materials related to Lipitor; and information related to Lipitor product packaging. *Id.* at ¶¶ 3-4.

B. Motions to Dismiss and Appeal to the Third Circuit

As detailed at length in the Pearlman Declaration, Class Counsel opposed two rounds of motions to dismiss as a result of the Supreme Court's issuance of its landmark *Actavis* opinion in view of numerous appellate court decisions reaching varying conclusions concerning the appropriate legal framework under which to analyze reverse payment agreements alleged to be violative of the antitrust laws. *Id.* at ¶¶ 15-35. *See also FTC v. Actavis, Inc.*, 570 U.S. 136 (2013). Because Defendants' first round of motions to dismiss preceded the *Actavis* decision, the parties submitted supplemental briefing to discuss the import of *Actavis*, followed by a second round of motion to dismiss briefing which focused primarily on whether Plaintiffs' reverse payment allegations stated a claim under *Actavis*. *Id.*

After this Court granted Defendants' motions to dismiss and Plaintiffs' subsequent motion for leave to amend, Plaintiffs appealed this Court's decision to the Third Circuit. The Third Circuit first held argument on the question of whether

Plaintiffs' appeal should be transferred to the Federal Circuit, as advanced by Defendants, who argued that Plaintiffs' claims arose under patent law. After rejecting Defendants' argument in a precedential opinion, the Third Circuit thereafter addressed the merits of Plaintiffs' appeal, and in a second precedential opinion, concluded that Plaintiffs' allegations were sufficient, and reversed this Court's decision and remanded the case to this Court for further proceedings. *Id.* at ¶¶ 35-45.

C. Discovery

While a limited amount of discovery (and discovery-related motion practice) occurred prior to this Court's decision granting Defendants' motion to dismiss and the appeal to the Third Circuit, full fact discovery did not open until February 2018. While fact discovery was subsequently formally stayed in March 2020 pending the results of this Court's order directing the parties to mediation, certain additional discovery occurred during mediation proceedings and for purposes of briefing class certification and Defendants' summary judgment motion on causation. *Id.* at ¶ 47.

Although full discovery has not been completed (including as to Ranbaxy's "but for" entry date absent being paid by Pfizer), Class Counsel received approximately ten million pages of documents from Defendants. *Id.* at ¶ 48. Just two of the many areas of discovery that Class Counsel had to devote extensive

attention to were: (a) Defendants' litigation and settlement of the *Accupril* litigation (which Plaintiffs alleged included an unlawful reverse payment from Pfizer to Ranbaxy in exchange for Ranbaxy's agreement to delay launching generic Lipitor); and (b) Ranbaxy's ability to enter the market with generic Lipitor earlier than the entry date contained in the Pfizer-Ranbaxy Lipitor agreement. This second issue, (b), is the issue on which Defendants have moved for summary judgment. Class Counsel carefully reviewed and analyzed the large volumes of documents produced, and marshalled this evidence for various purposes, including in working with experts and during expert depositions, in seeking class certification and in opposing summary judgment, and during the extensive and lengthy briefing that took place during mediation. *Id.* at ¶¶ 47-77.

Class Counsel also engaged in extensive discovery-related motion practice. Indeed, the extent of the discovery disputes that arose was such that this Court deemed it appropriate to appoint a Special Discovery Master. *Id.* at ¶ 63. While Class Counsel repeatedly and unsuccessfully requested that the formal discovery stay be lifted, Class Counsel nonetheless prevailed upon numerous motions to compel concerning Defendants' responses to Plaintiffs' document requests and interrogatories, and defended against a motion to compel seeking Plaintiffs to produce certain categories of documents and data. Class Counsel also successfully obtained a ruling setting a deadline for Defendants to make their privilege election

(an issue that was vigorously contested by Defendants), and during class certification and early summary judgment briefing successfully pursued some additional fact and expert discovery. *Id.* at ¶¶ 47-77.

D. Class Certification

While Class Counsel objected to class certification briefing occurring prior to the completion of fact and expert discovery (and thus before Defendants made their privilege election), Class Counsel developed the evidence necessary to support their motion for certification of the direct purchaser class, including expert evidence, and filed Plaintiffs' motion for class certification (seeking certification for purposes of litigation), which remains pending. *Id.* at ¶¶ 93-101.

E. Summary Judgment

While Class Counsel also objected to summary judgment briefing occurring prior to the completion of fact and expert discovery (and thus before Defendants made their privilege election), Class Counsel vigorously opposed Defendants' motion for summary judgment. As an initial matter, Class Counsel successfully obtained additional time necessary to review documents that were produced to Plaintiffs just weeks before Plaintiffs' expert report on causation was due. *Id.* at ¶ 84. Class Counsel then developed the fact and expert evidence to oppose Defendants' motion, including responding to each of Defendants' 165 statements of material fact. These efforts required Class Counsel, in a tight timeframe, to master

a large volume of exceptionally complex regulatory materials and exchange expert reports and take and defend expert depositions. *Id.* at ¶¶ 80-92.

F. Mediation and Settlement

The parties' first mediation occurred in 2015, but was unsuccessful. *Id.* at ¶ 103. The parties' second mediation attempt began in March 2020 pursuant to the directive of the Court, which, with the consent of the parties, appointed the Honorable Faith Hochberg (Ret.) as mediator. The mediation process, which started during the height of the COVID-19 pandemic, progressed via various written submissions followed by Zoom and/or telephonic sessions. Subsequently, mediation progressed to extensive and lengthy briefing across five sets of issues outlined by Judge Hochberg, over several years. *Id.* at ¶¶ 70-75, 78.

At all times up through and including the execution of a written agreement, both Class Counsel and Pfizer presented their views on the merits of each other's positions and engaged in hard fought, arm's length negotiations. Further, even after the parties reached agreement on a settlement structure, the parties continued to engage in hard fought negotiations concerning various specific terms of the settlement for several months, executing a written agreement approximately a week before Class Counsel filed a motion for preliminary settlement approval. *Id.* at ¶ 104.

III. ARGUMENT

A. Class Counsel Should Be Awarded Reasonable Attorneys' Fees

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." *See* Fed. R. Civ. P. 23(h). An attorney "who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

While attorneys' fees may be calculated using either the percentage-of-recovery method or the lodestar method, "[t]he Third Circuit favors the percentage-of-recovery method of calculating fee awards in common fund cases." *Glaberson v. Comcast Corp.*, 2015 U.S. Dist. LEXIS 127370, at *37 (E.D. Pa. Sep. 22, 2015) (collecting cases). *See also In re Kirsch v. Delta Dental of N.J.*, 534 Fed. Appx. 113, 115 (3d Cir. 2013) (percentage of recovery method "generally favored in common fund cases") (internal quotation omitted); *Kanefsky v. Honeywell Int'l Inc.*, 2022 U.S. Dist. LEXIS 80328, at *28 (D.N.J. May 3, 2022) (common fund settlements "best analyzed using the percentage-of-recovery methodology") (internal quotation omitted); *In re Philips/Magnavox TV Litig.*, 2012 U.S. Dist. LEXIS 67287, at *43 (D.N.J. May 14, 2012) ("The percentage-of-recovery method is preferred in common fund cases…").

B. The *Gunter/Prudential* Factors Support Class Counsel's Requested Fee

In evaluating fee awards, courts in the Third Circuit consider the following factors as articulated in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000):

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by counsel; and (7) awards in similar cases.

Additionally, as articulated in *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 336-40 (3d Cir. 1998), courts generally also consider:

> [8] [T]he value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, [9] the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and [10] any "innovative" terms of settlement.

Kanfesky, 2022 U.S. Dist. LEXIS 80328, at *28-29. *See also In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, 2022 U.S. Dist. LEXIS 116290, at *31-32 (D.N.J. Jun. 30, 2022) (in the Third Circuit, courts consider "the *Gunter-Prudential*" factors). Courts "need not apply these [factors] in a formulaic way" and "[c]ertain factors may be afforded more weight than the others." *In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *48.

Once all of the *Gunter* and *Prudential* factors have been considered, the Third Circuit has suggested that it is "sensible" for district courts to cross check the

percentage fee award yielded against the lodestar method. *In re Prudential*, 148 F.3d at 333. *See also Kanefsky*, 2022 U.S. Dist. LEXIS 80328, at *32 ("Courts in this District are encouraged to "cross-check" the reasonableness of percentage fee awards against the lodestar method").

As demonstrated below, consideration of each *Gunter/Prudential* factor, followed by a lodestar cross check, supports the requested fee.

1. The Size of the Fund Created and the Number of Persons Benefitted Favor the Requested Fee

The first factor examines the size of the fund created and the number of class members who are benefitted. Here, the Class constitutes 63 direct purchasers, all of which will be entitled to share in a recovery of $93 million (net of any attorneys' fees, expenses and service awards granted by the Court). Because numerous Class members have already elected to participate in the Settlement (*i.e.*, not opt out) and have returned the claim forms that were mailed to them contemporaneously with the notice of settlement, upon the Settlement becoming final Class members will promptly receive a substantial and immediate economic recovery.

The Settlement provides recovery to the Class that is substantial not only in terms of dollar value, but also when assessed in light of the risks Class Counsel faced in prosecuting the Class's claims, as discussed below in Section III.B.5. Absent the Settlement, Class Counsel would have had to continue to litigate against Pfizer (as indeed, Class Counsel is doing with respect to Ranbaxy) and

secure a favorable jury verdict. And even assuming that occurred, an appeal (and subsequent petition for *certiorari*) would inevitably follow, presenting additional risk and delay in a case already more than twelve years old. In comparison, the Settlement assures the Class of an immediate and substantial recovery free from the risks and delays of a jury trial and subsequent appeals. *See generally Kanefsky*, 2022 U.S. Dist. LEXIS 80328, at *30 ($10 million settlement in securities class action created a "significant" fund that benefitted the class); *Hall v. AT&T Mobility LLC*, 2010 U.S. Dist. LEXIS 109355, at *55 (D.N.J. Oct. 13, 2010) (one third fee award reasonable in $18 million settlement in consumer protection class action); *In re Suboxone Antitrust Litig.*, 2023 U.S. Dist. LEXIS 215754, at *40 (E.D. Pa. Dec. 4, 2023) (one third fee award reasonable in $30 million settlement benefitting class of purchasers in pharmaceutical antitrust class action).

Accordingly, analysis of this factor supports Class Counsel's fee request.

2. Objections to the Requested Fee

The Third Circuit has recognized that when there are either no or few objections to a fee request, it can be said that the class's "reaction to the fee request supports approval" of the requested fees, particularly where class members are "sophisticated" entities that have "considerable financial incentive to object had they believed the requested fees were excessive." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). *See also In re Schering-Plough Corp.*, 2012 U.S.

Dist. LEXIS 75213, at *18 (D.N.J. May 31, 2012) ("The lack of objections to the requested attorneys' fees supports the request, especially because the settlement class includes large, sophisticated institutional investors") (internal quotation omitted); *In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *49-50 (absence of objections "strongly support[ed] approval" of requested fees).

Here, on March 23, 2024, Class members were mailed a notice of settlement which informed them of the fact of and details concerning the Settlement, that Class Counsel intended to submit an application for attorneys' fees of up to 33⅓% of the Settlement Fund (including a proportionate share of interest accrued), plus Court-approved expenses and service awards, and that Class members had the right to opt out of the Settlement or object to any or all of the above and the procedures for doing so. The period for lodging objections to either the Settlement or Class Counsel's fee application concludes on May 8, 2024. *See* ECF No. 1374 (Order) at ¶¶ 10-11. In the event any objection is received, Class Counsel will promptly inform the Court.

Accordingly, this factor can be evaluated once the deadline for objections expires.

3. Class Counsel are Highly Skilled in Antitrust Litigation

Courts consider "the skill and efficiency of Plaintiff's counsel 'as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency

of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'" *Hall*, 2010 U.S. Dist. LEXIS 109355, at *63-64 (internal quotation omitted). "The Third Circuit has explained that the goal of the percentage fee-award device is to ensure 'that competent counsel continue to undertake risky, complex, and novel litigation.'" *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *41 (quoting *Gunter*, 223 F.3d at 198) (quotations omitted).

Here, Class Counsel is highly experienced in prosecuting pharmaceutical antitrust class actions, as one district court in this Circuit recently recognized. *See In re Suboxone (Buprenorphine and Naloxone) Antitrust Litig.*, 2024 U.S. Dist. LEXIS 33018, at *39 (E.D. Pa. Feb. 27, 2024) ("As repeatedly discussed above…Class Counsel are skilled and effective class action litigators that have obtained a highly favorable settlement in an extremely complex case litigated over the course of ten years"). Collectively, Class Counsel, and the sophisticated group of co-counsel who have litigated this case alongside Class Counsel, are some of the most preeminent antitrust firms in the country, with decades of experience in complex pharmaceutical antitrust litigation. *See generally* Pearlman Decl. at Exs. A through O. The law firms involved specialize in particular areas of expertise (*e.g.*, issues relating specifically to patent law, liability causation, regulatory regimes, economics, pharmaceutical industry business operations, pharmaceutical

wholesaler business operations), providing Class Counsel the ability to deploy an efficient and non-duplicative allocation of resources meant to both build the strongest case possible for the Class and to rebut each of Pfizer's numerous defenses. Class Counsel also had formidable adversaries in the form of a large and sophisticated defense firm retained by Pfizer.

As this Court is well aware, Class Counsel have aggressively prosecuted this case at all stages and were fully prepared eventually to try the case against Pfizer skillfully and with vigor (as indeed, Class Counsel continue to do against remaining defendant Ranbaxy). *See In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *16-17, *50-51 (class counsel had extensive experience litigating and settling complex consumer class actions and obtained substantial benefit for class through settlement); *Kanefsky*, 2022 U.S. Dist. LEXIS 80328, at *30 (noting "zealous advocacy" by counsel for all parties, which consisted of "highly reputable firms with experience in complex class actions and civil litigation").

Accordingly, analysis of this factor supports Class Counsel's fee request.

4. The Complexity and Duration of the Action Favor the Requested Fee

Courts have frequently acknowledged that "antitrust class actions are among the most complex to litigate." *In re Remicade*, 2023 U.S. Dist. LEXIS 43284, at *71 (E.D. Pa. Mar. 15, 2023) (citing cases). *See also Fusion Elite All Stars v. Varsity Brands, LLC*, 2023 U.S. Dist. LEXIS 179316, at *14-15 (W.D. Tenn. Oct.

4, 2023) ("Antitrust actions are 'arguably the most complex actions[s] to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome.'") (internal quotation omitted).

This case is no exception, and notably, has been exceptionally complex for numerous reasons. First and foremost, this litigation was brought during a unique era of rapidly evolving antitrust law. Shortly after the litigation was filed, the Supreme Court granted *certiorari* to address the appropriate antitrust framework for evaluating "reverse payment" agreements such as the one in the instant litigation, resulting in its landmark *Actavis* opinion. Indeed, as this Court recognized during a status conference shortly after *Actavis* was issued, "there's been some precedential events that occurred since this litigation began…the *Actavis* case came down which changes things. So, there are those extraordinary issues that arose here…" *See* ECF No. 496 (Dec. 5, 2013 Tr.) at 47:20-23. Additionally, Plaintiffs' case is otherwise highly complex. Plaintiffs' *Walker-Process* fraud allegations presents myriad technical and scientific issues that intersect with patent law, and Plaintiffs' reverse payment theory is factually complex. Additionally, as the result of this Court's decision to permit Defendants to file an early summary judgment motion, Class Counsel had to deal with highly complex regulatory issues and legal arguments (before full discovery was completed). *See generally Kanfesky*, 2022 U.S. Dist. LEXIS 80328, at *12

(securities class action involved "thorny issues regarding the accounting for asbestos liabilities"); *In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *23-24, *50 (consumer class action concerning design defects in flat screen televisions involved "many complex legal and technical issues…").

Likewise, the duration of the litigation - more than twelve years - is unquestionably significant by any measure. *See, e.g.*, *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *42 (litigation pending more than ten years); *Kanefsky*, 2022 U.S. Dist. LEXIS 80328, at *12, *29 (litigation pending three years, including through COVID-19 pandemic); *In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *51 (litigation pending three years).

Accordingly, analysis of this factor supports Class Counsel's fee request.

5. The Risk of Nonpayment Favors the Requested Fee

"Courts in the Third Circuit have consistently recognized that the attorneys' contingent fee risk is an essential factor in determining a fee award." *In re Mercedes-Benz Emissions Litig.*, 2021 U.S. Dist. LEXIS 256167, at *44 (D.N.J. Aug. 2, 2021). *See also In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *51 ("Courts recognize the risk of non-payment as a major factor in considering an award of attorneys' fees"). As numerous courts have recognized in the contingent fee context:

> Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since

> both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

Hall, 2010 U.S. Dist. LEXIS 109355, at *66 (internal quotation omitted).

Here, Class Counsel has litigated this case for more than twelve years, despite the very real risk that they would receive zero compensation for their hard work and long hours and would never recover the millions of dollars in out-of-pocket cash outlays. That risk was particularly significant here at the time of filing given that, as noted above, the law on reverse payment agreements was in a state of flux, and Class Counsel could not predict if the Supreme Court would grant *certiorari* and/or the consequences of same. Moreover, proving that a defendant has engaged in *Walker-Process* fraud, as alleged here, is notoriously difficult. While Class Counsel have always been confident in the Class's claims, and remain so, there was no guarantee of prevailing against Pfizer at trial (or that a favorable verdict would withstand the inevitable appeal). These risks are evident in view of several pharmaceutical antitrust cases that some or all of Class Counsel have been involved in that have been unsuccessful and yielded no recovery after Class Counsel expended thousands of hours and millions of dollars in resources.[3]

[3] After years of litigation, jury trials were lost in *In re HIV Antitrust Litig.*, No. 19-cv-02573 (N.D. Cal. Jun. 30, 2023), *In re Opana ER Antitrust Litig.*, No. 14-cv-10150 (N.D. Ill. Jul. 1, 2022), *In re Nexium Antitrust Litig.*, No. 12-md-02409 (D. Mass. Dec. 5, 2014), and *La. Wholesale Drug Co., Inc. v. Sanofi-Aventis*, No. 07-cv-07343 (S.D.N.Y. Nov. 20, 2008).

Nonetheless, Class Counsel represented the Class on a purely contingent basis, with no up-front retainer fees or allowance for expenses, or any compensation during the lengthy pendency of the litigation. *See generally In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *43 (for over "ten years, Class Counsel devoted extensive amounts of time and resources to litigating this case, all while pursuing complex legal theories which brought with them no guarantee of recovery at trial."); *In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *51 ("Class Counsel undertook this action on a contingent fee basis, assuming a substantial risk that they might not be compensated for their efforts"); *Hall*, 2010 U.S. Dist. LEXIS 109355, at *66 (that class counsel undertook litigation on a contingent basis was "a real and important factor to consider").

Accordingly, analysis of this factor supports Class Counsel's fee request.

6. The Significant Time Devoted to This Action Favors the Requested Fee

Class Counsel collectively expended more than 42,000 hours litigating this case and have advanced out-of-pocket outlays of approximately $2.7 million in that effort to date. Courts have found that where class counsel expends significant time in litigating the case, this represents a "substantial commitment" to the case that weighs in favor of approving a fee request. *See, e.g.*, *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2020 U.S. Dist. LEXIS 69614, at *87 (class counsel devoted more than 41,000 hours over a twelve year period in antitrust litigation); *In re Suboxone*,

2023 U.S. Dist. LEXIS 215754, at *44 (class counsel spent over 26,000 hours prosecuting case); *McDonough v. Toys "R" Us, Inc.*, 80 F.Supp.3d 626, 653 (E.D. Pa. 2015) (class counsel devoted more than 84,000 hours over an eight-year period in price-fixing case); *In re Remicade*, 2023 U.S. Dist. LEXIS 43284, at *72 (class counsel devoted more than 23,000 hours in "complex antitrust litigation that involved lengthy discovery"); *In re Mercedes-Benz*, 2021 U.S. Dist. LEXIS 256167, at *45-46 (class counsel expended more than 25,000 hours in complex litigation); *Wallace v. Powell*, 2015 U.S. Dist. LEXIS 172326, at *84-85 (M.D. Pa. Dec. 21, 2015) (where class counsel expended more than 40,000 hours such "a substantial commitment to this litigation…strongly favor[ed]" granting fee request).

Such was the case here. As detailed herein, from pre-complaint investigation through the time that the Court granted preliminary approval to the Settlement, Class Counsel expended an enormous amount of time over more than twelve years prosecuting the Class's claims. Moreover, if the Court grants final approval to the settlement, Class Counsel will be expending a significant number of non-compensable hours in connection with seeking final approval of, and administering, the Settlement so that Class members can achieve immediate financial recovery. *See In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, at *42 (D.N.J. Nov. 9, 2005) (observing that class counsel

would "likely incur hundreds of additional hours in connection with administering the settlement, without [compensation]").

Accordingly, analysis of this factor supports Class Counsel's fee request.

7. The Requested Fee is In Line With Awards in Similar Cases

"The Third Circuit has found that, in common fund cases…in which the percentage-of-recovery methodology is used, the fees typically awarded to class counsel generally range between 19% to 45% of the settlement fund." *Kanefsky*, 2022 U.S. Dist. LEXIS 80328, at *31 (same); *In re Suboxone*, 2024 U.S. Dist. LEXIS 33018, at *42-43 (same and noting that "[c]ourts have consistently approved such awards"). Thus, Class Counsel's one-third fee request falls squarely in line with fee awards in this Circuit in common fund cases.

Moreover, Class Counsel's one-third fee request is in line with numerous instances of one third fee awards in other complex pharmaceutical antitrust cases brought by direct purchasers both within and outside of this Circuit, as the chart below reflects:

Case	Settlement	Fee
In re Opana ER Antitrust Litigation, MDL No. 2580, (N.D. Ill. Nov. 3, 2022), ECF Nos. 1081, 1085	$145MM	36%
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. Apr. 23, 2009), ECF Nos. 531, 543.	$250MM	33⅓%
In re Buspirone Antitrust Litig., No. 01-cv-7951 (S.D.N.Y. Apr. 17, 2003), ECF No. 22	$220MM	33⅓%
La. Wholesale Drug Co. v. Pfizer, Inc. (In re Neurontin	$191MM	33⅓%

Case	Settlement	Fee
Antitrust Litig.), 2014 U.S. Dist. LEXIS 206338 (D.N.J. Aug. 6, 2014)		
In re Relafen Antitrust Litig., 2004 U.S. Dist. LEXIS 28801 (D. Mass. Apr. 9, 2004)	$175MM	33⅓%
In re Novartis and Par Antitrust Litig., No. 18-cv-04361 (S.D.N.Y. Jul. 26, 2023), ECF Nos. 604, 635	$126MM	33⅓%
In re Prograf Antitrust Litig., No. 2015 U.S. Dist. LEXIS 199792 (D. Mass. May 20, 2015)	$98MM	33⅓%
In re Celebrex (Celecoxib) Antitrust Litig., 2018 U.S. Dist. LEXIS 85125 (E.D. Va. Apr. 18, 2018)	$94MM	33⅓%
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	$75MM	33⅓%
In re Skelaxin (Metaxalone) Antitrust Litig., 2014 U.S. Dist. LEXIS 91661 (E.D. Tenn. Jun. 30, 2014)	$73MM	33⅓%
In re Solodyn Antitrust Litig., No. 14-md-2503 (D. Mass. Nov. 27, 2017), ECF No. 808	$72.5MM	33⅓%
In re Terazosin Hydrochloride Antitrust Litig., No. 99-md-1317 (S.D. Fla. Apr. 19, 2005), ECF No. 1557	$72.5MM	33⅓%
In re K-Dur Antitrust Litigation, No. 01-cv-1652 (D.N.J. Oct. 5, 2017), ECF No. 1057	$60.2MM	33⅓%
Meijer, Inc. v. Abbott Labs., No. 07-cv-5985 (N.D. Cal. Aug. 11, 2011), ECF No. 514	$52MM	33⅓%
In re Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012), ECF No. 485	$37.5MM	33⅓%
In re Nifedipine Antitrust Litig., No. 03-md-223 (D.D.C. Jan. 31, 2011), ECF No. 333	$35MM	33⅓%
Meijer, Inc. v. Barr Pharm., Inc., No. 05-cv-2195 (D.D.C. Apr. 20, 2009), ECF No. 210	$22MM	33⅓%
In re DDAVP Direct Purchaser Antitrust Litigation, No. 05-cv-2237 (S.D.N.Y. Nov. 28, 2011), ECF No. 113	$20.025MM	33⅓%
In re Metoprolol Succinate Antitrust Litig., No. 06-cv-	$20MM	33⅓%

Case	Settlement	Fee
52 (D. Del. Jan. 12, 2012), ECF No. 194		
In re Prandin Direct Purchaser Antitrust Litigation, No. 10-cv-12141 (E.D. Mich. Jan. 20, 2015), ECF No. 68	$19MM	33⅓%
Rochester Drug Co.-Op., Inc. v. Braintree Labs, Inc., No. 07-cv-142 (D. Del. May 31, 2012), ECF No. 243	$17.25MM	33⅓%
In re OxyContin Antitrust Litig., No. 04-md-1603 (S.D.N.Y. Jan. 25, 2011), ECF No. 360	$16MM	33⅓%
Mylan Pharm., Inc. v. Warner Chilcott plc., No. 12-cv-3824 (E.D. Pa. Sept. 6, 2014), ECF No. 665	$15MM	33⅓%
In re Asacol Antitrust Litig., No. 15-cv-12730 (D. Mass. Dec. 7, 2017), ECF No. 648	$15MM	33⅓%

Accordingly, analysis of this factor supports Class Counsel's fee request.

8. The Benefits of the Settlement are Attributable to Class Counsel

In evaluating a fee request, courts consider whether any governmental investigation preceded the plaintiffs' claims versus whether class counsel did not "ride on the coattails" of governmental action in initiating the litigation, such that the benefits of the settlement to class members can be said to be attributable to the work of class counsel. *Kanfesky*, 2022 U.S. Dist. LEXIS 80328, at *32.

Here, as noted above, the initial complaint filed by Class Counsel was not the result of, nor did it follow, any government investigation or enforcement action, and thus it cannot be said that the Settlement is attributable to any governmental efforts versus that of Class Counsel.

Accordingly, analysis of this factor supports Class Counsel's fee request.

9. The Requested Fee is Consistent With the Percentage Fee That Courts in This Circuit Have Held Would Have Been Privately Negotiated

This factor compares the requested fee to that which "would have been negotiated if the case had been subject to a private contingent agreement at the time counsel was retained. Courts in the Third Circuit have found that a one-third contingency fee would fit within the customary range." *In re Innocoll Holdings Pub. Ltd. Co. Sec. Litig.*, 2022 U.S. Dist. LEXIS 196845, at *33-34 (E.D. Pa. Oct. 28, 2022) (granting requested fee of one third). *See also Hall*, 2010 U.S. Dist. LEXIS 109355, at *70-71 ("The requested fee of 33⅓ % is…consistent with a privately negotiated fee in the marketplace"); *In re Remeron*, 2005 U.S. Dist. LEXIS 27013, at *45 ("Attorneys regularly contract for contingent fees between 30% to 40% with their clients in non-class, commercial litigation").

Here, the requested fee of one-third is consistent with what courts have awarded in other pharmaceutical antitrust cases.

Accordingly, this factor supports Class Counsel's fee request.

10. Innovative Terms of Settlement

Where a settlement does not contain any innovative terms, courts deem this factor as neutral. *See, e.g., Kanfesky*, 2022 U.S. Dist. LEXIS 80328, at *32; *In re Suboxone*, 2024 U.S. Dist. LEXIS 33018, at *46. Here, though Class Counsel spent

significant time negotiating the specific terms of the Settlement, the Settlement does not contain any particularly innovative terms.

Accordingly, analysis of this factor weighs neither in favor nor against Class Counsel's fee request.

C. A Cross-Check of Class Counsel's Lodestar Confirms the Reasonableness of the Requested Fee

A lodestar crosscheck is "a tool to 'ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple.'" *In re Healthcare Servs. Grp., Inc. Derivative Litig.*, 2022 U.S. Dist. LEXIS 134005, at *40 (E.D. Pa. Jul. 22, 2022) (internal quotation omitted). The multiplier is meant to "account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work" as well as "to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation." *Id.* at *41 (internal quotations omitted). [4]

As detailed in the Pearlman Declaration, Class Counsel worked over 42,000 hours on this case, and each firm has submitted declarations attesting to both the reasonableness of their firm's time and compliance with the Time and Expense Order. *See* Pearlman Decl. at Exs. A through O.[5]

[4] The multiplier is calculated by dividing the requested fee by Class Counsel's lodestar.

[5] *See* ECF No. 800 at Section I.B (stating that, *inter alia*, counsel must submit time to Co-Lead Counsel at "then-current billing rates for each individual listed," that

While the Third Circuit has recognized that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied," (*In re Prudential*, 148 F.3d at 341), the requested fee award here under Class Counsel's current billing rates results in a *negative* multiplier of 0.89, meaning that Class Counsel will "receive *less*…than their regular billing rates." *In re Remicade Antitrust Litig.*, 2023 U.S. Dist. LEXIS 43284, at *79 (internal quotation omitted). *See also O'Hern v. Vida Longevity Fund, LP*, 2023 U.S. Dist. LEXIS 76789, at *29 (D. Del. May 2, 2023) (negative multiplier provided "strong additional support for approving the attorneys' fee request") (internal quotation omitted); *In re Valeant Pharms. Int'l Third-Party Payor Litig.*, 2022 U.S. Dist. LEXIS 31090, at *23 (D.N.J. Feb. 22, 2022) (negative multiplier is "strong evidence that the requested fees are reasonable"). Moreover, Class Counsel's requested fee remains with the range of reasonableness even if the Court looks to the 1.13 multiplier yielded based on Class Counsel's historical billing rates. *See generally Brown v. Kadence Int'l*, 2023 U.S. Dist. LEXIS 164037, at *15 (E.D. Pa. Sep. 15, 2023) (multiplier of 1.64 fell within "the lower range of acceptability"); *In re Healthcare Servs.*, 2022 U.S. Dist. LEXIS 134005, at *43 (collecting cases and observing that multiplier of 2.01 was "lower than those approved and

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"[b]illing rates may be adjusted at the conclusion of the matter…" and that contract attorneys are subject to a $250 cap).

acknowledged as reasonable within this Circuit and around the country"). Indeed, an examination of the multipliers that are routinely awarded in this Circuit and in comparable cases demonstrates that the lodestar multiplier based on historical billings rates in well within that range (and indeed, lower than many multipliers previously awarded), as the chart below reflects.

Case	Settlement	Multiplier
In re Relafen Antitrust Litig., 2004 U.S. Dist. LEXIS 28801 (D. Mass. Apr. 9, 2004)	$175MM	4.87
In re Provigil Antitrust Litig., No. 06-cv-1797 (E.D. Pa. Oct. 15, 2015), ECF Nos. 858, 870	$512MM	4.12
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. Apr. 23, 2009), ECF Nos. 531, 543	$250MM	3.93
In re Prandin Direct Purchaser Antitrust Litig., No. 10-cv-12141 (E.D. Mich. Jan. 20, 2015), ECF No. 68	$19MM	3.01
In re Flonase Antitrust Litig., 951 F. Supp. 2d 739, 750-51 (E.D. Pa. 2013)	$150MM	2.99
In re Prograf Antitrust Litig., 2015 U.S. Dist. LEXIS 199792 (D. Mass. May 20, 2015)	$98MM	2.35
In re Skelaxin (Metaxalone) Antitrust Litig., 2014 U.S. Dist. LEXIS 91661 (E.D. Tenn. Jun. 30, 2014)	$73MM	2.26
In re Glumetza Antitrust Litig., No. 19-cv-5822 (N.D. Cal. Feb. 3, 2022), ECF No. 706	$453.8MM	2.20
In re Namenda Direct Purchaser Antitrust Litig., No. 15-cv-7488 (S.D.N.Y. May 27, 2020), ECF No. 947.	$750MM	2.0
La. Wholesale Drug Co. v. Pfizer, Inc. (In re	$191MM	1.99

Case	Settlement	Multiplier
Neurontin Antitrust Litig.), 2014 U.S. Dist. LEXIS 206338 (D.N.J. Aug. 6, 2014)		
In re Celebrex (Celecoxib) Antitrust Litig., 2018 U.S. Dist. LEXIS 85125 (E.D. Va. Apr. 18, 2018)	$94MM	1.94
In re DDAVP Direct Purchaser Antitrust Litig., No. 05-cv-2237 (S.D.N.Y. Nov. 28, 2011), ECF No. 113	$20.025MM	1.92
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	$75MM	1.8

Given the risks Class Counsel assumed and the amount of time, labor and expense dedicating to litigating for more than a decade, the requested fee is reasonable using a lodestar crosscheck, regardless of whether current or historical billing rates are used to calculate the multiplier.

Accordingly, the lodestar crosscheck supports Class Counsel's fee request.

D. Class Counsel's Expenses Were Reasonable and Necessary to the Result

Class counsel are "entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Safety Components Int'l Secs. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001). *See also In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *55 (same).

Here, Class Counsel's unreimbursed expenses were reasonably incurred and necessary to the prosecution of the litigation. These expenses, which fall within the confines of the Court's Time and Expense Order, include, *inter alia*, mediation fees, legal research, the creation and maintenance of an electronic document database, travel and lodging, court reporting services, and expert costs associated with class certification and summary judgment briefing.[6] Such documented expenses are of the type routinely deemed as reasonable and appropriately incurred. *See, e.g., In re Philips/Magnavox*, 2012 U.S. Dist. LEXIS 67287, at *56 (expenses for court fees, experts, computerized research, long distance telephone calls, photocopies, postage, couriers and travel expenses were reasonably and appropriately incurred); *Kanfesky*, 2022 U.S. Dist. LEXIS 80328, at *34 (noting that expenditures for travel, computer research, expert witnesses were routine and reimbursable). Accordingly, the Court should approve reimbursement of Class Counsel's expenses of $2,750,082.22 in full.

[6] Certain of the individual declarations of Class Counsel may list "contribution to litigation fund" (or similar phrasing) as an expense. As typically occurs, Co-Lead Counsel established a litigation fund at the inception of the litigation that was used to pay certain of the reasonable expenses herein, most particularly expert and central document database hosting fees, with various firms making regular funding contributions throughout the litigation. The expenses paid from the litigation fund throughout the course of the litigation were examined by a Certified Public Account, who determined that all such expenses were supported by receipt, reasonable and non-excessive. *See* Pearlman Decl. at ¶ 123; Exhibit P to Pearlman Decl.

E. Service Awards for the Class Representatives are Appropriate and Reasonable

Class Counsel request that the Court approve service awards in the amount of $100,000.00 each for each of the five class representatives Betances, RDC, PDC, LaFrance and BDC, in recognition of their continuous and extensive participation in this lengthy litigation. The class representatives actively pursued the Class's interests by filing suit on behalf of all direct purchasers and undertaking the responsibilities of serving as class representatives, including responding to discovery requests, being deposed, regularly being apprised of the progress of the case for more than twelve years and participating in mediation and settlement negotiation efforts.

It has long been recognized that private antitrust actions are critical to the enforcement of the antitrust laws for the protection of the general public. *See Am. Soc'y of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 573 n.10 (1982); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 54 (E.D.N.Y. 2010) ("[E]nforcement through private civil actions…is a critical tool for encouraging compliance with the country's antitrust laws"). As such, "[i]ncentive awards are 'not uncommon in class action litigation and particularly where, as here, a common fund has been created for the benefit of the entire class.'" *In re Suboxone*, 2024 U.S. Dist. LEXIS 33018, at *51 (internal quotation omitted). Courts "routinely approve incentive awards to compensate named plaintiffs for the services they

provided and the risks that they incurred during the course of the class action litigation." *Id.* (approving service awards where named plaintiffs "assisted greatly in the prosecution of this case by filing suit on behalf of the [direct purchaser class] and undertaking all responsibilities involved in being a named plaintiff, including monitoring the progress of the case and responding to discovery requests"). Numerous other courts have approved service awards in other pharmaceutical antitrust class actions, and the amount requested here is in line with the awards in such cases.[7] Accordingly, the Court should approve these appropriate and reasonable service awards to the class representatives, particularly given the long pendency of the litigation.

IV. CONCLUSION

For the reasons set forth above and in the Pearlman Declaration, Class Counsel respectfully request that this Court enter an Order awarding Class Counsel $31,000,000.00 (one-third or 33⅓% of the settlement amount) plus a proportionate amount of any interest accrued since the settlement was escrowed, and $2,750,082.22 in unreimbursed expenses. *See* Pearlman Decl. at ¶ 126. Class

[7] *See, e.g.*, *In re Opana ER Antitrust Litig.*, No. 1:14-cv-10150, ECF No. 1085 (N.D. Ill. Nov. 3, 2022) at ¶ 16 (awarding $150,000 each to two class representatives); *In re Novartis and Par Antitrust Litig.*, No. 1:18-cv-04361, ECF No. 635 (S.D.N.Y. Jul. 26, 2023) at ¶ 15 (awarding $100,000 to each of four class representatives); *In re Suboxone*, 2024 U.S. Dist. LEXIS 33018, at *52 (awarding $100,000 each to three class representatives).

Counsel also respectfully request that the Court approve service awards of $100,000.00 for each of the five class representatives for their efforts on behalf of the Class. *Id.*

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Respectfully submitted,

/s/ Peter S. Pearlman

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