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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE LIPITOR ANTITRUST LITIGATION	MDL No. 2332
This Document Relates To:	Case No. 3:12-cv-2389-ZNQ-JBD
All End-Payor Class Actions	

MEMORANDUM OF LAW IN SUPPORT OF END-PAYOR CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND OTHER RELIEF

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, End-Payor Plaintiffs ("EPPs"),[1] on behalf of themselves and the Third-Party Payor ("TPP") and Consumer Classes they seek to represent (together, the "Classes"), respectfully submit this Memorandum of Law in Support of End-Payor Plaintiffs' Motion for Final Approval of Settlement and Other Relief.

I. INTRODUCTION

The Settlement presented for approval[2] was achieved with Defendants Pfizer Inc., Pfizer Ireland Pharmaceuticals, Warner-Lambert Company, and Warner-Lambert Company LLC (collectively, Pfizer), after roughly a decade of hard-fought litigation. The Settlement provides that Pfizer will pay $35 million to settle all End-Payor Class claims against it in this Action.[3] Recognizing its terms were fair, reasonable, and adequate under Rule 23, and in the best interests of the Settlement

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[1] A.F. of L.-A.G.C. Building Trades Welfare Plan, the Mayor and City Council of Baltimore, New Mexico United Food and Commercial Workers Union's and Employers' Health and Welfare Trust Fund, Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana, Bakers Local 433 Health Fund, Fraternal Order of Police, Fort Lauderdale Lodge 31, Insurance Trust Fund, Nancy Billington, Emilie Heinle, and Andrew Livezey.

[2] The fully executed settlement agreement (hereinafter "Settlement," is attached as Exhibit A to the Declaration of Kenneth A. Wexler in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of End-Payor Plaintiffs' Class Settlement and Other Relief, ECF No. 1398-2 (the "Wexler Declaration").

[3] Nothing in the Settlement Agreement relates to the EPPs' claims against Defendants Ranbaxy Inc., Ranbaxy Laboratories Limited, and Ranbaxy Pharmaceuticals, Inc. (collectively, "Ranbaxy").

Classes, the Court preliminarily approved the Settlement on June 3, 2024. *See* ECF No. 1412 (Order Granting Preliminary Approval of Class-Action Settlement ("PAO")), ¶¶ 14-18. The Court also, *inter alia*, preliminarily certified the Classes for settlement purposes, preliminarily appointed the End-Payor Plaintiffs as Class Representatives for their respective Classes,[4] appointed Co-Lead and Liaison Counsel for the Settlement Classes, and directed the Claims Administrator to implement the approved Notice Plan. *Id.* ¶¶ 4-13, 21-26. The Claims Administrator—Epiq Class Action and Claims Solutions, Inc. ("Epiq")—subsequently disseminated notice in accordance with the approved Notice Plan. *See generally* Azari Final Approval Decl.[5] To date, no objections have been received from Settlement Class members (although one objection has been received from non-class members) and

[4] Specifically, the Court preliminarily appointed the following EPPs as Class Representatives for the TPP Class: A.F. of L.-A.G.C. Building Trades Welfare Plan; the Mayor and City Council of Baltimore; New Mexico United Food and Commercial Workers Union's and Employers' Health and Welfare Trust Fund; Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana; Bakers Local 433 Health Fund; and Fraternal Order of Police, Fort Lauderdale Lodge 31, Insurance Trust Fund. *Id.* ¶¶ 3 n.1, 9. The Court preliminarily appointed the following individuals as Class Representatives for the Consumer Class: Nancy Billington; Emilie Heinle; and Andrew Livezey. *Id.*

[5] "Azari Final Approval Decl." refers to the Declaration of Cameron R. Azari, Esq. Regarding Implementation and Adequacy of Notice Plan, submitted herewith. Azari is a Senior Vice President of Epiq, the firm appointed by the Court to serve as Settlement Claims Administrator and to assist Co-Lead Counsel in disseminating Notice. PAO ¶ 25. The Wexler Declaration attaches as Exhibit D the proposed Notice Plan approved by the Court in its PAO.

only one Settlement Class Member has timely sought to be excluded from the Settlement (though not in complete conformity with the exclusion requirements). *Id.* ¶ 36.

As detailed below, the Settlement readily meets Rule 23(e)(2)'s test for fairness, reasonableness, and adequacy under the Third Circuit's framework for determining whether a proposed class-action settlement should be granted final approval. So, too, have EPPs satisfied the requirements of Rule 23(a) and 23(b)(3) such that the Classes should be finally certified for settlement purposes.

EPPs thus respectfully request entry of an Order that, among other things, will: (1) finally approve End-Payor Class Plaintiffs' proposed Settlement with Pfizer; (2) certify the proposed Settlement Classes, appoint End-Payor Class Plaintiffs as Class Representatives for their respective Classes, and appoint Class Counsel for purposes of the Settlement; (3) conclude that the form and manner of giving notice of the proposed Settlement to the Settlement Class Members complied with Rule 23 and due-process requirements; and (4) approve the Plan of Allocation.

II. BACKGROUND

End-Payor Plaintiffs incorporate by reference and adopt herein the discussion of the background and procedural history of litigation contained in their Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of End-Payor Class Plaintiffs' Settlement and Other Relief, ECF

No. 1398-1, and in the Co-Lead Declaration[6] filed concurrently herewith. In short, EPPs have battled for justice in this Action for roughly a decade, and Co-Lead Counsel—who have staunchly represented the Classes over that period—submit that the Settlement represents an excellent result for the Classes, particularly when balanced against the risks and potential benefits of continued litigation against Pfizer.

III. SUMMARY OF SETTLEMENT

Pursuant to the proposed Settlement, Pfizer has agreed to pay $35 million to settle all End-Payor Class claims against it in this Action. Wexler Decl., Ex. A (Settlement Agreement), ¶¶ 7, 9. Pfizer has already deposited this amount into an escrow-bearing account for the benefit of the Classes. Co-Lead Decl., ¶ 70.

After reimbursement of costs, fees, and expenses related to the administration of the Settlement and costs and expenses incurred by Co-Lead Counsel in litigating the Action, payment of Class Counsel's attorneys' fees, and payment of service awards to each Class Representative, Wexler Decl., Ex. A, ¶¶ 10, 11, the balance of the $35 million will be used for cash payments to Class Members pursuant to the

[6] References to the "Co-Lead Declaration" refer to the Declaration of Co-Lead Counsel in Support of End-Payor Class Plaintiffs' Motion for Final Approval of Class-Action Settlement and Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Grant of Service Awards to the Class Representatives.

Plan of Allocation, *see* Wexler Decl., Ex. O (Plan of Allocation providing that consumers shall receive 20.3% of the Net Settlement Fund and TPPs shall receive 79.7% of the Net Settlement Fund).

Upon the Settlement Agreement becoming final, and in consideration for the Settlement Fund Amount, EPPs, on behalf of themselves and the EPP Classes, have agreed to release Pfizer and related entities as to claims alleged, or which reasonably could have been alleged, in the EPP Action (a) concerning the alleged anticompetitive scheme to prevent or delay approval and market entry of AB-rated generic equivalents of Lipitor; or (b) concerning end-payor purchases of Lipitor and/or its AB-rated generic equivalents in the Class States and arising under the Sherman Act, 15 U.S.C. §§ 1 & 2, *et seq.*, or any other federal or state statute or common-law doctrine relating to antitrust or consumer protection (the "Released Claims"). Wexler Decl., Ex. A (Settlement Agreement), ¶ 12. EPPs, on behalf of themselves and the EPP Classes, also agreed to waive and release their rights under Section 1542 of the California Civil Code, respecting unknown claims, and similar state or federal laws. *Id.* ¶ 12(b). The Released Claims specifically do not affect the claims and rights the EPPs and EPP Classes have against Ranbaxy. *Id.* ¶ 12(c). Nor does the Settlement release claims arising in the ordinary course of business that are unrelated to the allegations in the EPP case. *Id.* ¶ 12(d).

IV. PRELIMINARY APPROVAL AND NOTICE TO THE CLASS

A. The Court preliminarily certified the Classes for Settlement purposes.

In its PAO, the Court preliminarily certified for settlement purposes two classes of End Payors under the antitrust and consumer protection laws of the Class States[7]:

> **The "Third-Party Payor ('TPP') Class":**
>
> All entities that, for consumption by their members, employees, insureds, participants, or beneficiaries, purchased, paid, and/or provided reimbursement for some or all of the purchase price of branded Lipitor or generic atorvastatin calcium, in the Class States, other than for resale, at any time during the period from June 28, 2011 through and until December 31, 2012.
>
> **The "Consumer Class":**
>
> For the Total Generic Exclusion Period of June 28, 2011 through November 29, 2011: All individuals who purchased, paid, and/or provided reimbursement for some or all of the purchase price of branded Lipitor, in the Class States, without the use of a Pfizer co-pay card.
>
> For the Generic Overcharge Period of November 30, 2011 through December 31, 2012: All individuals who purchased, paid, and/or provided reimbursement for some or all of the purchase price of generic atorvastatin calcium, in the Class States.

ECF No. 1412, ¶¶ 4-12. The PAO excluded from the TPP Class the following

[7] Arizona, California, Washington, D.C., Florida, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, West Virginia, and Wisconsin.

entities: a) Pfizer, Ranbaxy, and their subsidiaries and affiliates; b) Federal and state governmental entities; c) Medicare Part D Plans; and d) Medicaid Plans. *Id.* ¶ 5. The PAO also excluded the following individuals from the Consumer Class: a) judges assigned to this case and their chambers' staff and any members of the judges' or chambers' staff's immediate family; b) Pfizer's and Ranbaxy's officers, directors, and employees; c) individuals who purchased only through a Medicare Part D or Medicaid Plan; d) individuals who purchased only branded Lipitor after November 30, 2011 and did not purchase generic atorvastatin calcium; and e) any "flat copay" consumers who purchased Lipitor only via a fixed dollar copayment that did not vary on the basis of the drug's status as brand or generic. *Id.* ¶ 6.

B. The Court preliminarily approved the Settlement Agreement and the proposed Plan of Allocation.

Turning to the proposed Settlement, the Court concluded it had "no obvious shortcomings and [wa]s within the range of possible approval." *Id.* ¶ 15. It noted the Settlement had been "reached as a result of extensive, arm's-length negotiations of disputed claims, including through the use and assistance of an experienced third-party neutral mediator, and that the proposed Settlement [wa]s not the result of any collusion." *Id.* ¶ 16. The Court thus "preliminarily approve[d] the Settlement Agreement, and all of its terms, as fair, reasonable, and adequate under Rule 23, and in the best interests of the Settlement Classes, subject to further consideration at the Final Fairness Hearing. *Id.* ¶ 18. The Court also preliminarily approved the Plan of

Allocation as fair, reasonable, and adequate. *Id.* ¶ 19.

C. The Court directed Notice be issued to the Classes.

The Court also assessed the proposed Notice Plan, which included, *inter alia*, notice by publication, direct mail notice to TPPs that could be identified with reasonable effort, and the establishment of a settlement website. *Id.* ¶ 21. The Court concluded that the Notice Plan satisfied Rule 23(e) and due process; it also approved the form and content of the Notices and Claims forms and directed Epiq to implement the Plan. *See id.* ¶¶ 22-26.

D. Class Members reacted favorably to the Notice issued pursuant to the Court-approved Notice Plan.

Epiq implemented the Notice Plan as directed in the PAO. Specifically, Epiq used its TPP Database to send Email Notices and/or Postcard Notices (via first-class mail) to 55,650 unique entities providing health and/or prescription drug benefits or administering such benefits (*e.g.*, entities sponsoring plans with 100 or more employees participating in health and welfare plans as well as third party administrators for health/welfare plan sponsors, pharmaceutical benefit managers, and others). Azari Final Approval Decl., ¶¶ 10-17. Epiq reports these efforts reached approximately 99% of the TPP Database entities. *Id.* ¶ 18.

To provide even further reach to TPP Class Members, Epiq published half-page advertisements in two national trade publications and ran 30-day digital banner-ad campaigns on two websites reaching TPP professionals. *Id.* ¶¶ 29-30. The TPP-targeted

digital notices ran from July 3, 2024 to August 1, 2024 and generated approximately 1.5 million impressions. *Id.* ¶ 31.

Epiq also implemented the media aspects of the Court-approved Notice Plan—including targeted digital advertisements, notices on social media, internet sponsored search listings, and an informational release—to reach individual Consumer Class members and any TPP Class members that, for whatever reason, might otherwise have been unaware of the Settlement. *Id.* ¶¶ 19-28. This campaign commenced on July 3, 2024 and concluded on August 13, 2024. *Id.* ¶¶ 25-27. Combined, the Digital Notices generated approximately 416.8 million impressions. *Id.* ¶ 25. The sponsored search listings were displayed 10,598 times. *Id.* ¶ 26. Epiq also established a case-specific toll-free telephone number and a Settlement Website containing important information regarding the Action and the Settlement. *Id.* ¶¶ 32-34. Together, the Notice Plan efforts reached plan sponsors (55,650) with plans (90,864) with 100 or more active participants covering 95.9% of identified plan participants in the TPP Class (178,831,060) and 80.7% of the Consumer Class. *Id.* ¶ 9.

The Notices were written in plain, easily understood language and clearly and concisely described: (1) the claims asserted in the Action; (2) the Classes; (3) the Settlement terms; (4) the time and manner for requesting exclusion; (5) the binding effect of a class judgment on Class members; (6) the Court-approved process for the proposed Settlement; and (7) Class Counsel's request for attorneys' fees, costs,

expenses, and service awards. *See id.*, Attachs. 1-3, 10-11. They also prominently featured Class Counsel's contact information, directions to the Settlement-specific website providing supplemental information, and Epiq's contact information. *See id.*

Further, as required by 28 U.S.C. § 1715(b), on May 13, 2024, Pfizer served notice of the proposed settlement on the appropriate officials pursuant to the Class Action Fairness Act. Co-Lead Decl. ¶ 74.

August 16, 2024 was the deadline to object to the Settlement or request exclusion from the Settlement Classes. *See* ECF No. 1412 (providing that such deadlines shall be no later than 45 calendar days after the Notice Date). As of the date of filing, Class Counsel is aware of only one timely—though non-conforming—request for exclusion. Azari Final Approval Decl. ¶ 36.[8] No class members objected to the settlement, although EPPs received one objection to the Settlement from non-class members. *Id.* As discussed further below, *see infra* at 16-17, the objectors lack standing to object as non-class members, and the objection, which is limited to basic claim and opt-out requirements and seeks clarification of an unambiguous exclusion from the TPP Class definition, lacks merit.

[8] Attorneys purporting to represent two additional consumers also requested exclusion, but they submitted their non-conforming request after the Court-ordered exclusion deadline. *Compare* ECF No. 1412 (PAO) (setting deadlines for requests for exclusion), *with* ECF No. 1463 (opt-out request dated August 21, 2024); Azari Final Approval Decl. ¶ 36.

V. THE NOTICE PLAN COMPORTED WITH RULE 23 AND DUE-PROCESS REQUIREMENTS.

The Court previously concluded that the Notice Plan and form of the Notices satisfied the requirements of Rule 23 and constitutional due process. ECF No. 1412, ¶¶ 22-23. Indeed, "first-class mail and publication regularly have been deemed adequate" to satisfy both requirements. *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90-91 (3d Cir. 1985). Notice plans with such attributes are thus routinely approved in pharmaceutical antitrust cases. *See, e.g.*, *In re Suboxone Antitrust Litig.*, 2023 WL 8437034, at *2, 20 (E.D. Pa. Dec. 4, 2023).

As discussed above, the Notice Plan was fully implemented as approved. Accordingly, the Court should find that Notice of the Settlement was timely and properly disseminated, and that such Notice satisfies all requirements of Rule 23 and due process.

VI. THE COURT SHOULD ISSUE FINAL APPROVAL OF THE SETTLEMENT.

A. The Settlement is entitled to a presumption of fairness.

In this Circuit, there is an "especially strong" presumption in favor of class-action settlements. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010). As the Third Circuit explained recently, a class-action settlement is entitled to an initial presumption of fairness if "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are

experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 326 (3d Cir. 2019) (citations omitted). This presumption applies even where, as here, "the settlement negotiations preceded the actual certification of the class." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). All four requirements are satisfied here.

The first three requirements are met readily, as the Settlement with Pfizer was the product of arm's-length settlement negotiations conducted by experienced counsel, after significant discovery and with the assistance of a professional third-party mediator. ECF No. 1463 (PAO), ¶¶ 16-17; Co-Lead Decl. ¶¶ 44-59, 68, Exs. A-T. The fourth requirement also is satisfied; no objections by class members were received in response to the Settlement, and only one Settlement Class Member requested exclusion by the deadline (with only two opt-out requests coming in after the deadline). Azari Final Approval Decl., ¶ 36; *see also, e.g.*, *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, at *17-18 (D.N.J. Sep. 13, 2005) (finding that 70 exclusions and 10 objections from a class of roughly 850,000 qualified for a presumption of fairness). The Settlement is thus presumptively fair, and the scrupulous analysis discussed below accordingly "skews . . . in favor of" approval. *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2020 WL 1922902, at *17 (E.D. Pa. Apr. 21, 2020).

B. The Settlement is also fair, reasonable, and adequate under *Girsh*.

Even where a presumption of fairness applies, the Court must still find that the proposed settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2) (stating that a district court may approve a proposed settlement "only after a hearing and . . . on finding that it is fair, reasonable, and adequate"); *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 319 (3d Cir. 2011). In *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), the Court articulated nine factors (the "*Girsh*" factors) for courts to consider in making this finding, namely: (1) the complexity, expense, and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998).[9] These factors weigh heavily in favor of approving the

[9] As amended in 2018, Rule 23 sets forth four factors a court must consider in granting final approval. *See* Fed. R. Civ. P. 23(e)(2). Courts in the Third Circuit continue to apply the *Girsh* factors in the wake of the 2018 amendments to Federal Rule 23(e)(2), finding they "include procedural and substantive considerations similar to those in the 2018 amendments." *O'Hern v. Vida Longevity Fund, LP*, 2023 WL 3204044, at *5 (D. Del. 2023).

Settlement.

1. The complexity, expense, and likely duration of the litigation.

The first *Girsh* factor "'captures the probable costs, in both time and money, of continued litigation.'" *Vista Healthplan*, 2020 WL 1922902, at *17 (citation omitted). "Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming." *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 WL 9447623, at *17 (D.N.J. Dec. 9, 2008).

Courts regularly note the complexity of litigating antitrust class actions. *See In re Remicade*, 2023 U.S. Dist. LEXIS 43284, at *71 (E.D. Pa. Mar. 15, 2023) (citing cases); *In re Fasteners Antitrust Litig.*, 2014 WL 285076, at *8 (E.D. Pa. Jan. 24, 2014). Indeed, falling at the intersection of patent and antitrust law, this litigation has been complex, expensive, and protracted. *See* Co-Lead Decl., *passim*. The Action also has been pending for roughly a decade; Class Counsel have logged over 23,291.65 hours litigating on behalf of the End-Payor Classes during that time. *Id.* ¶ 82. Any recovery through continued litigation with Pfizer would come at a significant cost and would not be realized for many years. This factor thus weighs heavily in favor of approving the Settlement.

2. Potential Class Members' reaction to the Settlement.

The second *Girsh* factor focuses on potential class members' reaction to the proposed settlement. *Prudential*, 148 F.3d at 318. Here, Epiq provided individual

notice to 55,650 unique entities in its TPP Database and reported reaching approximately 99% of such entities. Azari Final Approval Decl., ¶¶ 10-18. The Notice Plan also included various forms of media notice—including targeted digital advertisements, notices on social media, internet sponsored search listings, and an informational release—print advertising in two national trade publications, and TPP-targeted digital notices. *Id.* ¶¶ 19-31. This Notice reached 80.7% of the Consumer Class. *Id.* ¶ 9. Despite the robust notice campaign, no class members objected to the Settlement, and only one Settlement Class Member timely requested exclusion. *Id.* ¶ 36.

The lack of objections and small number of requests for exclusion in the face of such a comprehensive notice campaign weighs heavily in favor of approving the Settlement. *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) ("The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement . . . ."); *Prudential*, 148 F.3d at 318 (affirming the district court's conclusion that the reaction of the class was favorable where 19,000 out of 8 million class members opted out and 300 objected); *Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir.1990) (finding that the second *Girsh* factor weighed in favor of the settlement where 29 members of a 281-member class filed objections).

Further, the single objection by non-class members is meritless and raises no concerns about the fairness or adequacy of the proposed Settlement. On August 16, 2024, a number of "Objector Health Plans,"[10] represented by the same counsel, filed an objection to the Settlement on the grounds that it requires administrative services-only organizations ("ASOs") and third-party administrators ("TPAs") to demonstrate their authority to file claims, or to opt out, on behalf of their TPP clients. ECF No. 1461. As admitted in their objection, *id.* at 4-6, when acting as ASOs and TPAs for their TPP clients, the Objector Health Plans bear *no* risk with respect to payment or reimbursement for brand or generic Lipitor and are not TPPs. More to the point, they are not class members with respect to their ASO and TPA businesses. Therefore, without demonstrating the express authority from their TPP clients to do so, the Objector Health Plans have no antitrust standing to sue, object, file claims, or opt out on behalf of any TPP—which is precisely what they seek to do. *See, e.g.*, *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco*

[10] Aetna, Inc., CIGNA Corporation, Elevance Health, Humana, Inc., Blue Cross Blue Shield Association, BCBSM, Inc. d/b/a Blue Cross Blue Shield of Minnesota, BlueCross Blue Shield of South Carolina, BlueCross BlueShield of Tennessee, Harvard Pilgrim Health Care, Inc., Tufts Health Maintenance Organization, Inc., Point32Health, Inc., Blue Cross Blue Shield of North Dakota, Capital Blue Cross, EmblemHealth, Inc. Blue Cross and Blue Shield of North Carolina, California Physicians' Service d/b/a Blue Shield of California, Health Alliance Plan of Michigan, Highmark Western and Northeastern new York, Inc. d/b/a Highmark Blue Cross Blue Shield of Western New York and Highmark Blue Shield of Northeastern New York.

Managed Care, L.L.C., 504 F.3d 229, 238, 243 (2d Cir. 2007) (affirming denial of motion to intervene by TPA, finding TPA lacked authority to opt out its TPP-customers' claims because "[i]f anybody's rights were violated by [defendants], it was the rights of the Plan not the administrator with whom the Plan fiduciaries contracted"); *see also Sloan v. Winn-Dixie Raleigh, Inc.*, 25 F. App'x 197, 198 (4th Cir. 2002) ("[C]lass representatives cannot opt-out on behalf of other putative class members."); *In re Aggrenox Antitrust Litig.*, 812 F. App'x 26, 29 (2d Cir. 2020) (concluding that TPAs lacked standing to appeal entry of final approval of class-action settlement because, in part, there was no proof they had authorization to object or opt-out on behalf of the plans they purportedly administered); William B. Rubenstein, *Newberg on Class Actions* § 9:49 (2014) ("[A] plaintiff who chooses to opt out herself may not also opt out a group en masse with the express consent of each individual."). Plaintiffs will more fully respond to the Objector Health Plans' objection in their reply brief in support of their Motion for Final Approval.

3. The stage of the proceedings and the amount of discovery completed.

The third *Girsh* factor, which focuses on the stage of the proceedings and the amount of discovery completed, aims to assess "whether counsel had an adequate appreciation of the merits before negotiating." *Vista Healthplan, Inc.*, 2020 WL 1922902, at *17 (internal quotation omitted). Co-Lead Counsel have litigated this case steadfastly for over a decade, during which time Co-Lead Counsel engaged in

extensive document discovery, briefed summary judgment and class certification-related motions, conducted expert and fact depositions, undertook an appeal to the Third Circuit, and participated in myriad court proceedings and mediation sessions. *See* Co-Lead Decl., *passim*. Co-Lead Counsel thus undoubtedly had a well-developed appreciation of the risks and merits of the Action before negotiating the Settlement. *See In re Pet Foods Prods. Liab. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010). This factor thus weighs in favor of approving the Settlement.

4. The risks of establishing liability and damages.

The fourth and fifth *Girsh* factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *In re Warfarin*, 391 F.3d at 537.

End-Payor Plaintiffs believe their claims are meritorious and are prepared to prove them against Ranbaxy. But the Settlement provides immediate and substantial recovery to the End-Payor Classes without the risks of continued litigation against Pfizer. Events that transpired after Preliminary Approval underscore those risks: although the Court certified the Classes for settlement purposes, the Court subsequently granted Defendants' summary judgment motion. ECF No. 1416. It then denied Plaintiffs' motion to certify the Classes as to Ranbaxy for litigation purposes. ECF No. 1421. Although EPPs are appealing these decisions, ECF No. 1447, the Settlement provides members of the Classes with a substantial and certain

recovery now, without the risk of litigating the case against Pfizer through the immediate appellate process, further discovery, the uncertainties of a jury trial,[11] and post-trial appeals. This factor thus weighs in favor of approving the settlement.

5. The likelihood of obtaining and keeping class certification through trial.

This sixth *Girsh* factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial. *In re Warfarin*, 391 F.3d at 537. If, as here, the "Class ha[s] yet to be certified and there is no guarantee of success . . . the risks favor settlement." *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *20 (D.N.J. Nov. 15, 2016). Here, after the Settlement with Pfizer, the Court denied certification of the proposed litigation classes in EPPs' continued litigation against Ranbaxy. This ruling underscores the risk in obtaining and keeping class certification through trial. This factor thus weighs in favor of approving the Settlement.

6. The ability of the defendant to withstand a greater judgment.

The seventh *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *In re Warfarin*, 391 F.3d at 537-38 (internal quotation omitted). Pfizer likely could withstand a judgment of more than $35 million. But the Settlement provides certain and

[11] After years of litigation, jury trials were lost recently in both *In re HIV Antitrust Litig.*, No. 19-cv-02573, ECF No. 2057 (N.D. Cal. June 30, 2023), and *In re Opana ER Antitrust Litig.*, No. 14-cv-10150, ECF No. 1005 (N.D. Ill. July 1, 2022).

substantial recovery for the Settlement Classes while preserving the ability to continue litigating against Ranbaxy. And as demonstrated herein, the Settlement falls well within the range of what is fair, reasonable, and adequate, particularly when considering the risks and potential benefits of continued litigation. That Pfizer may have been able to withstand paying more does not merit a finding to the contrary. *See, e.g.*, *Henderson v. Volvo Cars of N. Am., LLC*, 2013 WL 1192479, at *11 (D.N.J. Mar. 22, 2013) ("[T]o withhold approval of a settlement of this size because [the defendant] could withstand a greater judgment would make little sense where the [settlement] is within the range of reasonableness and provides substantial benefits to the Class."); *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 484 (D.N.J. 2012) ("But even assuming there are sufficient funds to pay a greater judgment, the Third Circuit has found that a defendant's ability to pay a larger settlement sum is not particularly damaging to the settlement agreement's fairness as long as the other factors favor settlement" (internal quotation omitted)); *accord In re Fasteners*, 2014 WL 285076, at *10 ("[T]his factor does not require that the defendant pay the maximum it is able to pay." (internal quotation omitted)). Accordingly, this factor is neutral in consideration of the Settlement.

7. The range of reasonableness of the settlement fund in light of the best possible recovery and in light of the attendant risks of litigation.

The eighth and ninth *Girsh* factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *In re Warfarin*, 391 F.3d at 538. "In conducting this evaluation, it is recognized that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d at 484-85 (internal quotations omitted). Furthermore, "[i]n recognition that 'the outcome of litigation is always uncertain and inevitably time-consuming and expensive, courts have long held that a cash settlement providing only a fraction of the potential recovery does not render a settlement inadequate or unfair.'" *In re N.J. Tax Sales Certificate Antitrust Litig.*, 750 F. App'x 73, 82 (3d Cir. 2018) (quoting 2 McLaughlin on Class Actions § 6:16).

Here, after years of protracted litigation, Co-Lead Counsel achieved a $35 million, immediate cash settlement for the EPP Classes while retaining EPPs' ability to continue litigating against Ranbaxy. This Settlement is eminently reasonable, particularly given the uncertain future occasioned by risks associated with continued litigation of this complex matter. *See In re Suboxone Antitrust Litig.*, 2024 WL 815503, at *9 (E.D. Pa. Feb. 27, 2024) (entering final approval in pharmaceutical antitrust action

and noting the settlement "bec[ame] even more favorable when considered against the attendant risks of litigation"); discussion *supra* at 18-19. These factors thus weigh in favor of approving the Settlement.

C. The *Prudential* considerations also favor approval of the Settlement.

The Third Circuit articulated in *Prudential* additional factors district courts may, when appropriate,[12] consider in deciding whether to grant final approval to a class-action settlement, namely:

1. the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;

2. the existence and probable outcome of claims by other classes and subclasses;

3. the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants;

4. whether class or subclass members are accorded the right to opt out of the settlement;

5. whether any provisions for attorneys' fees are reasonable; and

6. whether the procedure for processing individual claims under the settlement is fair and reasonable.

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[12] *Prudential* considerations that are not relevant to the litigation in question need not be addressed. *See Prudential*, 148 F.3d at 323-24.

Prudential, 148 F.3d at 323. Each of the relevant considerations weighs in favor of approval.

As discussed above in connection with the third *Girsh* factor, this case was settled at an extremely mature state. Co-Lead Counsel were well-equipped to assess the strengths and weaknesses of EPPs' case as they had the benefit of extensive discovery and motion practice and a long-running mediation with Judge Hochberg. The first *Prudential* consideration thus weighs in favor of approval. *See In re Suboxone*, 2024 WL 815503, at *9 ("Under [the first *Prudential*] factor, the advanced development of the record weighs in favor of approval.").

"Factors two and three look at the outcomes by other classes and other claimants." *Id.* Pfizer faced antitrust claims from groups of differently situated claimants, including a class of direct purchaser plaintiffs. Consistent with the settlement of the direct purchaser plaintiffs' claims, the Settlement here allows claimants to recover reimbursement for a portion of the overcharges they paid. There are no "disparities in the success of the settlements obtained by the various claimants" that merit construing these factors against approval of the Settlement. *See Vista Healthplan*, 2020 WL 1922902, at *23.

Each of the remaining *Prudential* factors further supports approval of the Settlement. First, the Notices specifically advised potential Class Members they had the right to opt out themselves from the Settlement Classes. *See* Azari Final Approval Decl., Attachs. 1-3. As of the date of this Memorandum, only one Class member has timely

exercised that right, *id.* ¶ 36, further supporting the reasonableness of the Settlement, *see In re Fasteners*, 2014 WL 285076, at *11.

Second, the robust Notice campaign implemented by Epiq advised Class Members that Class Counsel could apply for an award of attorneys' fees in the amount not to exceed 34% of the Settlement Fund; the Notices also explained how Class Members could object to that fee request. Azari Final Approval Decl., Attachs. 1-3. The deadline for objecting has passed, and no objections directed to the contemplated fee request have been received. The dearth of fee-related objections supports the reasonableness of EPPs' request for attorneys' fees totaling 33⅓% of the Settlement Fund.

Third, the plan for processing Class Members' claims under the Settlement is "fair and reasonable." The information and documentation sought from Class Members is not burdensome. *See id.*, Attachs. 4-5 (TPP and Consumer Claim Forms). Class Members had an extended claims period during which to file claims, and the Claim Forms are straightforward, clear, and succinct. *See* discussion *supra* at 9-10; ECF No. 1412 (PAO) at 21 (setting forth deadlines for compliance). Further, the Plan of Allocation preliminarily approved by the Court clearly outlines the criteria for processing claims and allocating Settlement Funds, Wexler Decl., Ex. O (Plan of Allocation). After deduction of fees, costs, and expenses, and service awards to the named EPPs, the Allocation Plan provides that the balance in the Settlement Fund will be distributed to EPP Class

Members based on (1) their status as consumers or TPPs; (2) the volume of their purchases of brand and generic Lipitor during the Class Period; and (3) the number of claims made within the respective allocation pools. *See* Wexler Decl., Ex. O. This methodology is consistent with other court-approved allocation plans in cases seeking to recover damages arising from generic suppression and can be implemented with a high degree of efficiency. *See, e.g.*, *In re Suboxone*, 2023 WL 8437034, at *3, 10-13.

In sum, the *Prudential* factors further support approval of the Settlement.

D. The Settlement provides a substantial and immediate direct financial benefit to EPP Class Members.

The final consideration in evaluating the Settlement's fairness is "'the degree of direct benefit provided to the class.'" *Vista Healthplan*, 2020 WL 1922902, at *24 (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013)). This factor is met readily here, where all eligible Class Members who file valid claim forms will receive monetary payments based on their *pro rata* share of the Allocation Fund. *See, e.g.*, *supra* at 24-25; Wexler Decl., Ex. O (Plan of Allocation), ¶ 14. Further, there is no reversion to Pfizer, so the entire Net Settlement Fund will be exhausted through such payments. *Id.* ¶ 19 (contemplating redistributions to eligible claimants until no longer economically feasible). Accordingly, this final consideration also strongly supports approval of the Settlement.

VII. THE COURT SHOULD GRANT FINAL CERTIFICATION TO THE SETTLEMENT CLASSES.

The Court preliminarily certified the TPP and Consumer Classes for settlement purposes. ECF No. 1412, ¶¶ 4-12. Nothing has transpired since then that merits revisiting that considered determination. Certification of the TPP and Consumer Classes remains appropriate because the Classes meet all the requirements of Rules 23(a) and 23(b)(3). *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *see also* ECF No. 1398-1 (Memorandum in Support of Motion for Preliminary Approval).

Accordingly, EPPs respectfully request that the Court grant final certification of the End-Payor Classes for settlement purposes pursuant to Rules 23(a) and 23(b)(3), appoint the designated named EPPs as Class Representatives for their respective Classes, appoint Cohen Milstein Sellers & Toll PLLC, Wexler Boley & Elgersma LLP, Motley Rice LLC, and Grant & Eisenhofer P.A. as Co-Lead Counsel for the Settlement Classes, and appoint Dilworth Paxson LLP as Liaison Counsel.

VIII. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION.

The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Aremissoft Corp. Sec. Litig.*, 210 F.R.D. 109, 126 (D.N.J. 2002). Courts generally find reasonable "a plan of allocation that reimburses class members based on the

type and extent of their injuries." *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 469 (D.N.J. 2008).

EPPs' economist, Dr. Singer, identified three types of overcharges caused by the alleged anticompetitive conduct. *See* Wexler Decl., Ex. C (Settlement Decl. of Dr. Hal Singer dated Apr. 16, 2024), ¶¶ 2, 7-14. For each subtype of overcharge, Dr. Singer calculated the consumer share of the overcharge, leaving the TPP share as the remainder. *Id.* Using the data and damages calculations he presented in prior reports in this litigation, Dr. Singer calculated an equitable allocation that would distribute 20.3% of the Net Settlement Fund to consumers and 79.7% to TPPs. *Id*. EPPs' Plan of Allocation, which incorporates these equitable allocations, is similar to other court-approved *pro rata* allocation plans in cases brought to recover damages arising from generic suppression. *See, e.g.*, *In re Suboxone*, 2024 WL 815503, at *12 (finding plan of allocation "fair, reasonable, and adequate as it provide[d] a straightforward method for determining each Class Member's pro rata share of the Net Settlement Fund based upon purchases"); *Vista Healthplan*, 2020 WL 192290, at *25 (collecting cases). That Class Counsel recommend the Plan of Allocation and that no Class Member has objected thereto both further weigh in favor of finding that the Plan is fair, reasonable, and adequate. *See In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, 2021 WL 358611, at *3 (D.N.J. Feb. 1, 2021). Accordingly, EPPs respectfully request that the proposed distribution plan fairly and

appropriately reimburses End-Payor Class Members and should be approved.

IX. CONCLUSION.

EPPs respectfully request that the Court 1) approve the End-Payor Class Plaintiffs' proposed Settlement with Pfizer; (2) certify the proposed Settlement Classes, appoint End-Payor Class Plaintiffs as Class Representatives, and appoint Class Counsel for purposes of the Settlement; (3) conclude that the form and manner of giving notice of the proposed Settlement to the Settlement Class Members complied with Rule 23 and due-process requirements; (4) approve the Plan of Allocation; and (5) grant additional relief as outlined herein or as the Court deems appropriate.

DATED: August 27, 2024

Respectfully submitted,

/s/ Lisa J. Rodriguez

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 27, 2024, a copy of the foregoing Memorandum of Law in Support of End-Payor Class Plaintiffs' Motion for Final Approval of Settlement and Other Relief was filed with the Court electronically. Those attorneys who are registered with the Electronic Filing System may access this filing through the Court's System and notice of this filing will be sent to these parties by operation of the Court's Electronic Filing System.

/s/ Lisa J. Rodriguez