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

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

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND INCENTIVE AWARD TO THE CLASS REPRESENTATIVE

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I. INTRODUCTION

Class Counsel, representing the class representative Louisiana Wholesale Drug Co., Inc. ("LWD") and direct purchaser class plaintiffs (collectively "DPCPs"), respectfully submit this memorandum in support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Award for the Class Representative.[1]

For more than sixteen years, Class Counsel have aggressively prosecuted this highly-complex, hotly-contested antitrust case against two pharmaceutical companies represented by some of the most prominent defense law firms in the country. This was one of the earliest antitrust cases challenging reverse payment settlement agreements between brand and generic pharmaceutical manufacturers as violative of the antitrust laws, and Class Counsel litigated the cutting-edge legal issues presented in this case all the way up to the Supreme Court of the United States.

On February 14, 2017, while the parties were preparing for trial, and during their fourth round of mediation, Class Counsel and counsel for Defendants agreed to the terms of a settlement of DPCPs' claims against Defendants[2] ("the Settlement"). Pursuant to the Settlement, Defendants agreed to pay $60.2 million in cash into an escrow fund for the benefit of DPCPs, in exchange for dismissal of the litigation between DPCPs and Defendants.[3] Class Counsel believes

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[1] Class Counsel are the firms listed in n. 2 of the accompanying Declaration of Co-Lead Counsel Bruce E. Gerstein and David F. Sorensen (the "Gerstein/Sorensen Dec.") annexed as Exhibit A hereto.

[2] Defendants are Merck & Co., Inc. (formerly known as Schering-Plough Corporation) ("Schering") and Upsher-Smith Laboratories, Inc. ("Upsher").

[3] On May 23, 2017, the Court granted preliminary approval to the Settlement and approved the form and manner of notice of the Settlement to the class. *See* Dkt No. 1045. Thereafter, the Defendants deposited $60.2 million into an escrow account held in trust that is earning interest for the benefit of the class and members of the class were mailed a notice of settlement. *See* Exs. 1-2 to the Gerstein/Sorensen Dec. Pursuant to the Court's order, Class Counsel's briefing in support of final approval of the Settlement and the entry of final judgment will be submitted to

that the Settlement, which unquestionably confers a significant financial benefit on class members and brings this long-pending litigation to a close, represents a highly successful outcome for DPCPs.

Class Counsel prosecuted DPCPs' claims against Defendants on a wholly contingent basis, without any guarantee of success or compensation for time spent, or for reimbursement of out-of-pocket costs and expenses. DPCPs' recovery was achieved as a result of Class Counsel's skill, competence, perseverance and diligence in the face of the Defendants' vigorous defenses and the legal and factual hurdles Class Counsel faced in litigating the case.

From the inception of the litigation through the time that the Court granted preliminary approval to the Settlement, Class Counsel expended more than 46,000 hours of uncompensated professional time and incurred more than three million dollars in unreimbursed out-of-pocket expenses. As compensation for its efforts, Class Counsel seek an award of attorneys' fees in the amount of 33⅓% of the Settlement (including a *pro rata* share of the accrued interest), and reimbursement of litigation expenses.[4] Class Counsel also seek an incentive award of $100,000 for the class representative LWD to recognize its extensive and vital participation in this litigation.

As described more fully below and in the Gerstein/Sorensen Declaration, the following factors strongly support Class Counsel's application:

First, the size of the Settlement is significant. The class will share in a recovery of $60.2 million (less any attorneys' fees, expenses, and incentive award granted by the Court), and the

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the Court on August 21, 2017, and the Fairness Hearing will take place on October 5, 2017. *See* Dkt No. 1045.

[4] Class Counsel submits, as Exhibits 3-8 to the Gerstein/Sorensen Dec., the declarations of the individual firms that worked on this litigation. These declarations detail the services rendered, the hours expended, and the expenses incurred by each firm.

only thing class members will need to do in order to receive their *pro rata* share is to submit a claim form that will be directly mailed to them after final approval of the Settlement.

Second, as noted above, although all antitrust cases are inherently complex and involve substantial legal risk, this case has travelled a unique litigation path. At the time DPCPs filed the litigation in 2001, few cases challenging reverse payment settlement agreements had been litigated. *See* Gerstein/Sorensen Dec. at ¶¶ 1, 76. As the case moved forward, rapidly evolving law concerning the legality of reverse payment agreements required Class Counsel to adapt and reformulate their case in order to keep pace with such developments. In particular, under the so-called (and now defunct) "scope of the patent" standard advocated by Defendants which over time gained traction with certain courts, DPCPs would have had to prove that the brand's patent suit was objectively baseless, a challenging standard. Indeed, the Third Circuit's rejection of the "scope of the patent" approach on appeal in this litigation directly contributed to the circuit split which caused the Supreme Court to grant *certiorari* and resolve the question of the appropriate standard by which to evaluate reverse payment settlement agreements, and hold DPCPs' case in abeyance until it did so through the issuance of its landmark opinion in *Federal Trade Commission v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). *See* Gerstein/Sorensen Dec. at ¶¶ 28-30, 39-47-76.

Third, in addition to filing and litigating the case in the face of rapidly developing law, Class Counsel confronted other significant obstacles in prosecuting this litigation. Defendants presented vigorous, sophisticated defenses to each and every aspect of DPCPs' case, including but not limited to arguing that: (a) the payment at issue was not a "reverse payment" but instead was made as part of a *bona fide* business transaction; (b) Upsher would not have launched its

generic earlier regardless of the settlement agreement; (c) that Schering lacked market power; and (d) that class certification was inappropriate. *See* Gerstein/Sorensen Dec. at ¶¶ 78-80.

Fourth, the litigation is in a very advanced stage, having been settled only after more than sixteen years' worth of exhaustive fact and expert discovery, significant motion practice (including numerous discovery motions, class certification, summary judgment, *Daubert* and motion *in limine* briefing), trial preparation, and three previous unsuccessful efforts at mediation. Class Counsel expended significant time and resources litigating the case against the Defendants up until the point of an imminent trial.

Fifth, Class Counsel's percentage-of-recovery fee request is consistent with fee awards in similar cases and strongly supported by analyses of the "*Gunter* factors" derived from *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 193 (3d Cir. 2000), and the "*Prudential* factors" derived from *In re Prudential Ins. Co. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 338-40 (3d Cir. 1998).

II. HISTORY OF THE LITIGATION

DPCPs are direct purchasers of Schering's brand-name drug, K-Dur. DPCPs filed their complaint in June 2001, in the wake of the Federal Trade Commission's investigation. *See* Gerstein/Sorensen Dec. at ¶ 1. In brief, DPCPs allege that Defendants engaged in anticompetitive conduct in violation of the antitrust laws, causing members of the class to pay artificially inflated prices for K-Dur and/or its generic equivalents. *Id.* at ¶ 2. Defendants have consistently denied wrongdoing and have asserted numerous defenses. A detailed history of the litigation is fully set forth in detail in the Gerstein/Sorensen Declaration.

III. CLASS COUNSEL'S LITIGATION EFFORTS

The team assembled by Co-Lead Counsel includes lawyers from some of the preeminent antitrust law firms in the country. These firms have almost two decades of extensive experience

prosecuting and trying Hatch-Waxman antitrust cases on behalf of the same core class of direct purchasers, and have been involved in many of the critical decisions made by various courts in this cutting-edge area of antitrust law. *See* Gerstein/Sorensen Dec. at ¶ 75. Class Counsel took advantage of each firm's particular area of expertise to litigate this case in the most effective and efficient manner possible. A detailed description of Class Counsel's efforts is fully set forth in the Gerstein/Sorensen Declaration.

IV. ARGUMENT

A. Class Counsel's Fee Request Is Reasonable

i. The Percentage-of-Recovery Method is Appropriate for Calculating an Award of Attorneys' Fees in This Case

Federal Rules of Civil Procedure 23(h) and 54(d) permit courts overseeing class actions to award reasonable attorneys' fees and costs. The Supreme Court has long recognized that a lawyer who recovers a "common fund" on behalf of a class is entitled to reasonable attorneys' fees and expenses from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In common fund cases, it is appropriate for attorneys' fees to be determined "based on a percentage of the fund bestowed upon the class." *Blum v. Stenson*, 465 U.S. 886, 930 n.16 (1984).

The Third Circuit has stated a preference for the use of the "percentage-of-recovery" method in determining fees. *See, e.g., In re Kirsch v. Delta Dental of New Jersey*, 534 Fed. Appx. 113, 115 (3d Cir. 2013) ("We have noted that '[t]he percentage of recovery method is generally favored in common fund cases…'") (internal quotation omitted); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (noting that "the percentage-of-recovery method is generally favored [in common fund cases] because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure") (citations and internal

quotations omitted); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (*en banc*) (citations omitted). Among other reasons, courts generally favor this method because:

> The percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system. The percentage approach is also the most efficient means of rewarding the work of class action attorneys, and avoids the wasteful and burdensome process – to both counsel and the courts – of preparing and evaluating fee petitions, which the Third Circuit Task Force described as "cumbersome, enervating, and often surrealistic."

In re Lloyd's Am. Trust Fund Litig., 96 Civ. 1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *74 (S.D.N.Y. Nov. 26, 2002) (quoting *Court Awarded Attorney Fees, Report of the Third Cir. Task Force*, 108 F.R.D. 237, 258 (3d Cir. 1985)).

ii. Application of the Third Circuit's Reasonableness Factors Supports the Requested Fee

Class Counsel's fee request is consistent with applicable law. The Third Circuit has identified ten factors for district courts to consider when applying the percentage-of-recovery method and considering the reasonableness of a request for attorneys' fees. The first seven of these factors – the *Gunter* factors – are:

> (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 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 plaintiffs' counsel; and (7) the awards in similar cases.

These *Gunter* factors "need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1; *Kirsch*, 534 Fed. Appx. at 116 (same).

The remaining three relevant factors – the *Prudential* factors – are:

> (1) the value of benefits accruing to class members that are attributable to the efforts of class counsel as opposed to other groups, such as government agencies

> conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement; and (3) any "innovative" terms of settlement.

See, e.g., In re Fasteners Antitrust Litig., 2014 U.S. Dist. LEXIS 9990, *10-20 (E.D. Pa. Jan. 27, 2014) (considering both *Gunther* and *Prudential* factors). In addition to the *Gunther/Prudential* factors, a court may consider "any other factors that are useful and relevant with respect to the particular facts of the case." *AT&T*, 455 F. 3d at 166. Because each case is different, the factors "need not be applied in a formulaic way" or be given the same weight. *AT&T*, 455 F.3d at 166 (quotation omitted).

As detailed below, analyses of these factors strongly supports approval of Class Counsel's requested fee.

a. The Size of the Fund Created and the Number of Class Members Benefitted Favors the Requested Fee Award

The class, which is comprised of forty-one members, will share in a recovery of $60.2 million, net of any attorneys' fees, expenses, and incentive award granted by the Court. Upon the Settlement becoming final, the only thing class members will need to do in order to receive their *pro rata* share of the net Settlement is to submit a claim form that will be made available to them via direct mailing. Accordingly, the recovery here is unquestionably substantial and immediate.

Not only is the recovery substantial in terms of dollar value, but also when assessed in light of the risks faced by Class Counsel going forward against Defendants. *See In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 105 (D.N.J. 2012) ($41 million settlement represented a reasonable and adequate settlement for the class in view of the "substantial risks" plaintiffs faced and the "immediate benefits" provided by the settlement). Absent the Settlement, Class

Counsel would have to win a favorable jury verdict against Defendants in the face of numerous defenses.

Even assuming a win at trial, an appeal (and a petition for *certiorari* thereafter) would inevitably follow, presenting additional risk and guaranteeing additional delay in a case that is already more than sixteen years old and has already gone to the Supreme Court. In comparison, through the Settlement, class members are assured of immediate and substantial recovery free of the risks and delays of a jury trial against Defendants and subsequent appeals.

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

b. The Absence of Objections by Class Members

The Third Circuit has recognized that the lack of objections to a fee request and positive views of Class Counsel's efforts, particularly from class members, are highly relevant to an evaluation of the fairness of a fee request. *See, e.g., In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (fact that a number of class members were "'sophisticated' institutional investors that had considerable financial incentive to object had they believed the fees were excessive" was a factor supporting the requested fee) (citation omitted); *See Stop & Shop*, 2005 U.S. Dist. LEXIS 9705, *33 (E.D. Pa. May 20, 2005) (noting that while class members consisted of sophisticated businesses not one class member objected to requested fee).

Here, class members were informed via notice of settlement mailed on June 7, 2017 of the details of the Settlement and that Class Counsel intended to submit a fee application seeking up to one-third of the Settlement amount, and not a single class member has objected to date. Class members have until August 7, 2017 to lodge any objections and in the event that any objection is received, Class Counsel will address it in their motion for final approval of the Settlement, due August 17, 2017.

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

c. Class Counsel Are Skilled in Antitrust Class Actions and Efficiently Resolved this Protracted Case

Class Counsel's skill and efficiency supports the fee request here. Class Counsel include some of the most preeminent antitrust firms in the United States, with decades of experience prosecuting and trying complex antitrust actions. *See* Gerstein Dec. at ¶ 75; Exs. 3-8 to the Gerstein/Sorensen Dec. These firms have a particular expertise in litigating Hatch-Waxman pharmaceutical antitrust cases on behalf of direct purchasers, having litigated such cases for almost two decades on behalf of the same core class of direct purchasers – no other collection of firms in the U.S. has litigated more Hatch-Waxman antitrust cases on behalf of the direct purchaser class. This experience has enabled each law firm involved to specialize in particular areas of expertise (*e.g.*, antitrust violations, patents, economics, class certification, the Hatch-Waxman regulatory regime, pharmaceutical company business operations, and direct purchaser business operations), thus providing Class Counsel with the ability to quickly and efficiently coordinate, organize, and implement litigation strategies, and to react to defenses of all makes and models.

"The skill and efficiency of the attorneys involved is measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Chemi v. Champion Mortg.*, No. 2:05-cv-1238 (WHW), 2009 U.S. Dist. LEXIS 44860, at *31 (D.N.J. May 26, 2009) (citation and internal quotations omitted). Class Counsel's experience and skill is evidenced by their

effective prosecution of this case over 16 years, including the highly favorable Settlement achieved.[5]

Additionally, the Court should consider the quality of defense counsel when evaluating Class Counsel's work. *See, e.g., In re Schering-Plough Corp.*, 2013 U.S. Dist. LEXIS 147981, *71 (D.N.J. Aug. 28, 2013); *Hall v. AT&T Mobility LLC*, 2010 U.S. Dist. LEXIS 109355, at *64 (D.N.J. Oct. 13, 2001). Over the course of this case, Schering/Merck has been represented by Howrey Simon Arnold & White LLP and Covington & Burling LLP, and Upsher has been represented by White & Case LLP. Achieving such a successful result for the Class when faced by such capable defense counsel further demonstrates Class Counsel's skill.

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

d. The Complexity and Duration of the Litigation Favors the Requested Fee Award

In evaluating a fee award, the complexity and duration of the litigation is a factor to be considered by the court. *See Gunter*, 223 F.3d at 195 n. 1. "An antitrust class action is arguably the most complex action to prosecute." *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000). *See also In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013) ("Antitrust class actions are particularly complex to litigate and therefore quite expensive.").

This litigation has been proceeding for more than sixteen years, a long time by any measure. *See, e.g., In re Fasteners Antitrust Litig.*, 2014 U.S. Dist. LEXIS 9990, *13-14 (E.D. Pa. Jan. 27, 2014) (deeming six-year antitrust litigation "lengthy"). And while all antitrust

[5] In a Hatch-Waxman case involving many of the same lawyers comprising Class Counsel here, a district court in this Circuit noted that "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience." *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, *37 (D.N.J. Nov. 9, 2005).

litigation is inherently complex, this litigation was exceptionally so both in that it was litigated in a unique era of rapidly evolving antitrust law and that the case travelled all the way up to the Supreme Court. Before and during the pendency of this litigation, Class Counsel has been litigating other, similar delayed generic entry cases on behalf of direct purchasers which have directly impacted the development of the law on "reverse payment" settlements, and consequently, the instant litigation. While Class Counsel lost some of these cases (and so recovered nothing), these same cases helped crystallize the central legal issues that eventually were taken up by the Supreme Court in *Actavis*.[6] Moreover, DPCPs' patent-related allegations presented technical and scientific issues lying at the intersection of patent and antitrust law. Even apart from such issues, building a record to demonstrate that Defendants had entered into an unlawful reverse payment agreement was factually complex. Class Counsel had to develop a detailed factual evidence in order to prove their allegations of an unlawful agreement and rebut Defendants' defenses that the agreement was a *bona fide* business transaction and not for delay. Separate from DPCPs' liability theories, Class Counsel also had to deal with complex issues pertaining to causation (*i.e.*, evidence that Upsher could and would have entered the market earlier), Schering's market power and class certification, all of which were contested by Defendants. *See In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 433 (E.D. Pa. 2001) ("[T]his litigation involved multiple complex issues and has been a hard fought battle for many

[6] *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 332 F. 3d 896 (6th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004); *Valley Drug Co. v. Geneva Pharms.*, 344 F. 3d 1294 (11th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004); *Arkansas Carpenters Health & Welfare Fund v. Bayer AG et al.*, 604 F.3d 98 (2d Cir. 2010), *cert. denied*, 562 U.S. 1280 (2011); *In re K-Dur Antitrust Litig.*, 686 F. 3d 197 (3d Cir. 2012), *vacated and remanded in light of Actavis*, 133 S. Ct. 2223 (2013). Class Counsel here has served as class counsel in all of the above cases. Further, Class Counsel here served (and continues to serve) as class counsel in the private companion case to *Actavis (In re Androgel Antitrust Litigation*, MDL No. 2084 (N.D. Ga.)) and served as *amicus curiae* after the Supreme Court granted *certiorari*.

years."). Accordingly, the complexity and duration of this lengthy litigation supports the requested fee. *See generally* Gerstein/Sorensen Dec.

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

e. The Risk of Nonpayment Favors Approval of Class Counsel's Fee Request

In *Gunter*, the Third Circuit noted the "stated goal in percentage fee-award cases of ensuring that competent counsel continue to be willing to undertake risky, complex and novel litigation." *Gunter*, 223 F.3d at 198 (citations and internal quotation omitted). Indeed, attorneys' risk is a critical factor in determining an appropriate fee award. *See, e.g.*, *Schering-Plough*, 2013 U.S. Dist. LEXIS 147981, at *79-80 ("Plaintiffs' Counsel undertook this Action on a purely contingent fee basis, assuming an enormous risk that the litigation would yield potentially little, or no, recovery and leave them uncompensated for their significant investment of time and very substantial expenses. Courts have consistently recognized that this risk is an important factor favoring an award of attorneys' fees.") (citation omitted); *Stop & Shop*, 2005 U.S. Dist. LEXIS 9705 at *37-40 (risk of overcoming numerous defenses "favors approval of the percentage of recovery requested as a fee in this case"); *Nichols*, 2005 U.S. Dist. LEXIS 7061 at *72 (risk of nonpayment was high where class counsel litigated complex legal and factual issues for more than four years in the face of strong defenses and the possibility that class would not be certified).

Here, Class Counsel filed and prosecuted this case despite facing the very real risk that they would receive nothing for the hard work and long hours, as well as the millions of dollars in cash outlays expended litigating. The risk was particularly significant here at the time of filing given that, as noted above, the law on reverse payment cases was still developing. Nevertheless, Class Counsel represented the named plaintiff and the class purely on a contingency fee basis,

with no up-front retainer fees or allowance for expenses, nor any compensation during the course of this litigation. *See, e.g., In re Fasteners Antitrust Litig*., 2014 U.S. Dist. LEXIS 9993, at *15 (noting that "Plaintiffs' Counsel undertook this case on a purely contingent fee basis, and that this poses a significant risk of not being paid or reimbursed for the costs of litigating the case").

Absent the Settlement, the case against Defendants was poised for trial. Although Class Counsel have always been confident in DPCPs' claims, and remain so, Class Counsel had no guarantee that a jury would find in DPCPs' favor or that a favorable jury verdict would withstand appellate scrutiny.

These risk considerations have particular application to complex Hatch-Waxman antitrust cases, where several cases litigated by the same Class Counsel as here have been unsuccessful and have yielded no recovery, even after Class Counsel expended thousands of hours in time and millions of dollars in out-of-pocket expenditures.[7]

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

f. The Significant Time Devoted by Class Counsel Supports Approval of the Requested Fee Award

Class Counsel expended more than 46,000 hours litigating this case, and have advanced out-of-pocket outlays of more than three million in that effort to date. *See* Gerstein/Sorensen Dec. at ¶¶ 83-85. As a court in this district has observed, "[o]ver the course of years, it is reasonable that so much time would have been spent on these complex cases, particularly given

[7] For instance, after years of litigation, jury trials were lost in the cases of *Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis*, Case No. 07-cv-07343 (S.D.N.Y.) and *In re Nexium (Esomeprazole) Antitrust Litig.*, Case No. 12-cv-2409 (D. Mass.). And Class Counsel litigated reverse payment agreements involving the brand drug Cipro for a decade, including conducting numerous depositions in London (with translators for German speaking witnesses of defendant Bayer). The Second Circuit affirmed dismissal of the case under the "scope of the patent" standard. *See Arkansas Carpenters*, 604 F.3d 98 (2d Cir. 2010), *cert. denied*, 562 U.S. 1280 (2011).

the excellent counsel of Defendants and their contested nature." *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 253 (D.N.J. 2005). *See also In re Gen. Instruments*, 209 F. Supp. 2d at 433 (class counsel's devotion of over 38,000 hours over a six year period "unquestionably represent a significant commitment…"). Such was the case here. From pre-complaint investigation through the time that the Court granted preliminary approval to the Settlement, Class Counsel expended an enormous amount of time and resources on this case. *See generally* Gerstein/Sorensen Dec. Moreover, Class Counsel will be expending a significant number of hours in connection with administering the Settlement without compensation. *See Varacallo*, 226 F.R.D. at 253 (fee award will be sole compensation for counsel "despite the continuing responsibilities [counsel] will have in responding to Class Member inquiries…").

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

g. Class Counsel's Requested Fee is Consistent With Awards in Similar Cases

A comparison of Class Counsel's fee request with attorneys' fees awarded in similar cases supports the instant fee request. Indeed, Class Counsel's requested fee of one-third is consistent with awards granted in the most analogous cases previously settled – other complex Hatch-Waxman antitrust class action cases brought by classes of direct purchasers alleging impeded generic entry – as the following chart indicates:

Case	Fee Award
In re Provigil Antitrust Litig., No. 07-1979 (E.D. Pa. Oct. 16, 2005)	27.5% of $512 million settlement (partial settlement)
In re Doryx Antitrust Litig., No. 12-3824 (E.D. Pa. Sept. 15, 2014)	33⅓% of $15 million settlement
In re Neurontin Antitrust Litig., No. 02-1830 (D.N.J. Aug. 6, 2014)	33⅓% of $191 million settlement
In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-cv-83 (E.D. Tenn. June 30, 2014)	33⅓% of $73 million settlement

In re Flonase Antitrust Litig., No. 08-cv-3149 (E.D. Pa. June 14, 2013)	33⅓% of $150 million settlement
In re Wellbutrin XL Antitrust Litig., No. 08-cv-2431 (E.D. Pa. Nov. 7, 2012)	33⅓% of $37.5 million settlement
Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc., No. 07-142 (D. Del. May 31, 2012)	33⅓% of $17.25 million settlement
In re DDAVP Antitrust Litig., No. 05-2237 (S.D.N.Y. Nov. 28, 2011)	33⅓% of $20.25 million settlement
In re Wellbutrin SR Antitrust Litig., No. 04-5525 (E.D. Pa. Nov. 21, 2011)	33⅓% of $49 million settlement
Meijer, Inc. v. Abbott Labs., No. C07-5985 CW (N.D. Cal. Aug. 11, 2011)	33⅓% of $52 million settlement
In re Nifedipine Antitrust Litig., No. 03-mc-223-RJL (D.D.C. Jan. 31, 2011)	33⅓% of $35 million settlement
In re Oxycontin Antitrust Litig., No. 04-md-1603-SHS (S.D.N.Y. Jan. 25, 2011)	33⅓% of $16 million settlement
In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. April 23, 2009)	33⅓% of $250 million settlement
In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005)	33⅓% of $75 million settlement
In re Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 43082 (S.D. Fla. Apr. 19, 2005)	33⅓% of $74 million settlement
In re Relafen Antitrust Litig., No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004)	33⅓% of $175 million settlement
In re Buspirone Antitrust Litig., No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003)	33⅓% of $220 million settlement
In re Cardizem CD Antitrust Litig., MDL No. 1278 (E.D. Mich. Nov. 26, 2002)	30% of $110 million settlement

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

h. The Benefits of the Settlement to the Class Are Attributable to the Efforts of Class Counsel

The Third Circuit has suggested that, in evaluating a fee request, it "may be relevant and important to consider" whether the benefits of the Settlement were attributable to the efforts of others, such as government investigators, rather than class counsel. *AT&T*, 455 F.3d at 165 (citing *Prudential*, 148 F.3d at 338).

Here, the Settlement is directly attributable to the efforts of Class Counsel. Although the FTC filed its administrative complaint a few months before DPCPs' complaint was filed, DPCPs case was materially different, proceeded on an independent track and was litigated for years after the Eleventh Circuit's 2005 dismissal of the FTC case. First, unlike the FTC, DPCPs developed a factual record regarding the patent merits, which was the primary reason for the Eleventh Circuit's dismissal. Second, although Class Counsel disagreed with the Eleventh Circuit's conclusion that the FTC had not offered sufficient proof of the existence of a reverse payment, Class Counsel worked to supplement the record with the exact type of evidence that the Eleventh Circuit claimed was lacking in the FTC case. *See* Gerstein/Sorensen Dec. at ¶¶ 6, 11, 52. Additionally, Class Counsel had the additional burdens of proving causation and damages and certifying a class, which were not necessary elements of the FTC's case. Thus, Class Counsel aggressively worked to, among other things: (a) establish that Schering possessed monopoly power; (b) build a strong record that "but for" the agreement at issue Upsher would have launched its less-expensive generic versions of K-Dur (something not required of the FTC); (c) calculate overcharge damages on a class-wide basis (not required of the FTC); and (d) certify a class of direct purchasers (not required of FTC). In sum, it cannot be said that the Settlement is attributable to the efforts of others.

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

i. The Percentage Fee Requested Is Consistent With The Fee That Would Have Been Negotiated If The Case Had Been

Subject To A Private Contingent Fee Agreement

While at least one court has interpreted *Prudential* as counseling courts not to give "great weight" to this factor because it is a "hypothetical exercise," (*see McDonough*, 2015 U.S. Dist. LEXIS 7510 at *124), the percentage fee requested by Class Counsel is consistent with the fee that would have been negotiated had this case been subject to a private contingent fee arrangement. *See, e.g.*, *AT&T*, 455 F.3d at 165 (citing *Prudential*, 148 F.3d at 338). "The percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee that would be negotiated if the lawyer were offering his or her services in the private marketplace." *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *46. In *In the Matter of Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (Posner, C.J.), the court explained that:

> The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible.

Here, the requested fee of 33⅓% is consistent with what would be "a privately negotiated contingent fee in the marketplace." *Hall*, 2010 U.S. Dist. LEXIS 109355, at *71. "Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation." *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *46. *See also In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. 97-381, 2000 U.S. Dist. LEXIS 15980, at *29 (E.D. Pa. Oct. 23, 2000) (noting that "plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery"). Indeed, Class Counsel has previously contracted private contingency fee arrangements ranging from 30-40% in other national pharmaceutical antitrust cases.

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

j. The Settlement Contains Innovative Terms

The presence of an innovative term contained in the Settlement further supports Class Counsel's fee request. *See Prudential*, 148 F. 3d at 339. Here, Class Counsel included a settlement term which provides that if the Court does not approve the settlement for any reason other than that the settlement is not fair, reasonable or adequate, Defendants will still offer Class members their *pro rata* allocated share of the settlement fund (subject to 40% of each share being placed into escrow while the Court reviews Class Counsel's petition for attorney's fees, costs, and incentive awards for the named plaintiffs). This represents an innovative term of settlement that works to provide a contingent method of recovery for class members.

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

k. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

The Third Circuit has suggested that district courts cross-check the percentage award against the "lodestar" -- which is determined by multiplying the number of hours reasonably worked on the case by a reasonable hourly rate for such services -- to help ensure the reasonableness of the fee. *See, e.g., Kirsch*, 534 Fed. Appx. at 116-17 (affirming district court's use of the percentage of recovery method to review fee application with lodestar calculation as a cross-check); *Gunter*, 223 F. 3d at 195 n. 1 ("[W]e have also suggested that district courts cross-check the percentage award at which they arrive against the "lodestar" method…"). In calculating the lodestar for cross-check purposes, the court need not scrutinize the documented hours. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.").

Class Counsel's requested percentage-of-recovery fee award is also reasonable when analyzed in light of a lodestar crosscheck. As detailed in the Gerstein/Sorensen Declaration, Class Counsel worked 46,531.25 hours on this case, which is collectively $25,994,812.21 million in time based on current billing rates.[8] *See* Gerstein/Sorensen Dec. at ¶ 83. A 33⅓% fee award would equate to a lodestar multiplier of 0.772. A multiplier "need not fall within any pre-defined range." *AT&T*, 455 F. 3d at 164. 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." *Prudential*, 148 F. 3d at 341 (quotation omitted). *See also Sewell v. Bovis Lend Lease LMB, Inc.*, 2012 U.S. Dist. LEXIS 53556, *38 (S.D.N.Y. Apr. 20, 2012) (courts "commonly award lodestar multipliers between two and six"). A multiplier of less than one – as is the case here – "'reveals that the fee request constitutes only a fraction of the work that the attorneys billed' and thus favors approval." *See Graudins v. Kop Kilt, LLC*, 2017 U.S. Dist. LEXIS 25926, *32 (E.D. Pa. Feb. 24, 2017) (internal quotation omitted). *See also Carroll v. Stettler*, 2011 U.S. Dist. LEXIS 121185, *26 (E.D. Pa. Oct. 19, 2011) (multiplier of less than one is within the accepted range in the Third Circuit).

Accordingly, the lodestar cross check in this case supports the requested fee.

B. Class Counsel's Costs And Expenses Are Reasonable And Were Necessarily Incurred To Achieve The Benefit Obtained.

It is well-settled that counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for out-of-pocket expenses reasonably incurred in creating the fund. *See Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey*, 297 F.3d 253, 267 (3d Cir. 2002) (attorneys may be reimbursed for costs that are "incidental and

[8] Where personnel are no longer with a particular firm, Class Counsel used the person's last applicable hourly billing rate.

necessary expenses incurred in furnishing effective and competent representation"); *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *48-49 ("Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.") (citing *In re Cendant Corp.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002) (internal citation omitted)).

Class Counsel's unreimbursed expenses were reasonably incurred and necessary to the representation of the Class. These expenses primarily include fees paid to experts who were instrumental in supporting DPCPs' liability, causation and damage theories and refuting Defendants' defenses, as well as fees paid to Special Master Orlofsky. *See* Exs. 3-8 to the Gerstein/Sorensen Dec. These expenses also include costs for computerized legal research, the creation and maintenance of an electronic document database, travel and lodging expenses, copying, court reporters, deposition transcripts and mediation. *Id.*[9] Accordingly, the Court should approve reimbursement of Class Counsel's expenses in full.

C. An Incentive Award For the Class Representatives is Appropriate and Reasonable.

Class Counsel requests that the Court approve an incentive award in the amount of $100,000 for the class representative, LWD, in recognition of its extensive participation in this lengthy litigation. As class representative, LWD actively pursued the class's interests by filing

[9]Such expenses are of the type routinely charged to hourly fee-paying clients. *See, e.g.*, *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *49-50 (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro hac vice.") (citing *Oh v. AT&T Corp.*, 225 F.R.D. 142, 154 (D.N.J. 2004)); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 479 (D.N.J. 2008).

suit as a named plaintiff on behalf of all direct purchasers and undertaking the responsibilities attendant upon them as representative plaintiff, including responding to document requests and interrogatories, appearing for deposition, and keeping apprised of the progress of the case. *See* Gerstein Dec. at ¶ 153.

Courts have long held that private class action suits are critical in enforcing the antitrust laws for the protection of the public. *See, e.g., Am. Soc'y of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 573 n.10 (1982) (noting "private suits are an important element of the Nation's antitrust enforcement effort"). Moreover, numerous courts have awarded named class plaintiffs for the benefits they have conferred on the class, and the amount requested here is in line with typical awards.[10] This Court should therefore approve these appropriate and reasonable incentive awards to the named plaintiffs.

V. CONCLUSION

For the reasons set forth above and in the Gerstein Declaration, Class Counsel respectfully request that this Court enter an Order awarding Class Counsel fees in the amount of $20,066,666.70, *i.e.*, 33⅓% of the Settlement (including a *pro rata* share of the accrued interest), and reimbursement of expenses in the amount of $3,137,099.67. Class Counsel also respectfully

[10] *See, e.g., In re Neurontin Antitrust Litig.*, Civil Action No. 02-1830 (FSH), Dkt No. 114 at ¶ 31 (D.N.J. Aug. 6, 2014) (awarding $100,000 to two class representatives); *In re Nifedipene Antitrust Litig.*, MDL No. 1515, Civil Action No. 1:03-MC-223 (RJL), Dkt No. 333 at ¶ 3 (D.D.C. Jan. 31, 2011) (awarding $60,000 to each of four class representatives, for a total of $240,000 in incentive awards); *Meijer, Inc. et al. v. Barr Pharmaceuticals, Inc.*, Civ. Action No. 05-2195 (CKK), Dkt. No. 210 at ¶ 17 (D.D.C. Apr. 20, 2009) (approving $50,000 to each of five class representatives for a total of $250,000 in incentive awards); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 347 (E.D. Pa. 2007) ($75,000 incentive award); *In re Lupron Mktg. & Sales Practices Litig.*, MDL No. 1430, 2005 U.S. Dist. LEXIS 17456, at *24-25 (D. Mass. Aug. 17, 2005) (awarding a total of $100,000 to named plaintiffs and noting that "the named plaintiffs participated actively in the litigation…"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535-36 (E.D. Mich. 2003) (awarding $75,000 to each of two corporate class representatives).

request that this Court approve an incentive award of $100,000 for the class representative LWD for its efforts on behalf of the Class in the prosecution of this action.

Dated: July 17, 2017

/s/David F. Sorensen

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