IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

IN RE AGGRENOX ANTITRUST LITIGATION	**Master Docket No. 3:14-md-02516 (SRU)** **Judge Stefan R. Underhill**

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

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I. INTRODUCTION

Class Counsel, who have represented class representatives Miami Luken Inc. ("Miami Luken"), Rochester Drug Co-Operative, Inc. ("RDC"), American Sales Company, LLC ("American Sales") and Cesar Castillo, Inc. ("Castillo") and direct purchaser class plaintiffs (collectively "DPCPs") in this litigation, respectfully submit this memorandum in support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Class Representatives.[1]

For nearly four 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. In May 2017, with the assistance of a private mediator, the Honorable Layn R. Phillips (formerly of the Western District of Oklahoma), Class Counsel and counsel for Defendants agreed to the terms of a settlement in principle of DPCPs' claims against Defendants[2] ("the Settlement"). Pursuant to the Settlement, Defendants agreed to pay $146 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 that the Settlement,

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

[2] Defendants are Boehringer Ingelheim Pharma GmbH & Co. KG, Boehringer Ingelheim International GmbH and Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer") and Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries, Ltd., Barr Pharmaceuticals, Inc. (n/k/a Barr Pharmaceuticals, LLC), Barr Laboratories Inc., Duramed Pharmaceuticals Inc. (n/k/a Teva Women's Health Inc.) and Duramed Pharmaceutical Sales Corp. (n/k/a Teva Sales and Marketing, Inc. ("Teva") (collectively, "Defendants").

[3] On September 19, 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. 685. Thereafter, the Defendants deposited $146 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 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 the Court on November 24, 2017, and the Fairness Hearing will take place on December 18, 2017. *See* Dkt

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

From the inception of the litigation through the time that the Court granted preliminary approval to the Settlement, Class Counsel expended more than 33,000 hours of uncompensated professional time and incurred almost one 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 incentive awards of $75,000 for each of the four class representatives in recognition of their vital participation in this litigation.

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

First, the size of the Settlement will unquestionably confer substantial financial benefit on class members. The class will share in a recovery of $146 million (less any attorneys' fees, expenses, and incentive awards granted by the Court), and in order to receive their respective *pro rata* shares, a class member need only submit a claim form that will be directly mailed to them after final approval of the Settlement, if granted.

Second, Class Counsel undertook significant risk by expending substantial time and resources in aggressively prosecuting this complex and lengthy case. Although all antitrust cases are inherently complex and involve substantial legal risk, Defendants sought to dismiss DPCPs' claims just as district courts around the country began issuing opinions interpreting the Supreme

No. 685.

[4] Class Counsel submits, as Exhibits 3-16 to the Gerstein 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.

Court's landmark decision concerning reverse payment agreements, *Federal Trade Commission v. Actavis, Inc.*, 133 S. Ct. 2223 (2012). Consequently, Class Counsel had to develop and reformulate DPCPs' liability theories in step with rapidly evolving case law, in addition to developing DPCPs' causation theories and damage models. Class Counsel also spent significant time successfully responding to Defendants' two petitions for interlocutory appeal pursuant to 28 U.S.C. 1292(b), which dealt with statute of limitations and market power/relevant market issues, respectively. Both petitions were denied. *See* Gerstein Dec. at ¶¶ 29, 54. Class Counsel also faced significant financial risk since they 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.

Third, Class Counsel's percentage-of-recovery fee request is consistent with fee awards in similar cases that Class Counsel has litigated, and is otherwise strongly supported by analysis of the "*Goldberger* factors" derived from *Goldberger v. Integrated Resources, Inc.*, 209 F. 3d 43 (2d Cir. 2000) that are used by the Second Circuit in determining attorneys' fees.

II. HISTORY OF THE LITIGATION

DPCPs are direct purchasers of Boehringer's brand-name prescription pharmaceutical product, Aggrenox. In November 2013, Class Counsel, on behalf of DPCPs, filed the first antitrust lawsuit brought by a putative class of direct purchasers challenging certain of Defendants' conduct concerning Aggrenox as violative of the antitrust laws, causing members of the Class to pay artificially inflated prices for Aggrenox and/or its generic equivalents. *See* Gerstein Dec. at ¶ 2. Defendants have consistently denied wrongdoing and have asserted numerous defenses. A more detailed history of the litigation is fully set forth in detail in the Gerstein Declaration.

III. CLASS COUNSEL'S LITIGATION EFFORTS

The team assembled by Lead Counsel, Liaison Counsel and the Executive Committee 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 evolving area of antitrust law. *See* Gerstein Dec. at ¶ 68; *infra* at pp. 1-12. Class Counsel took advantage of each firm's particular area of expertise to litigate this case in the most effective and efficient manner possible, without duplication of effort. A detailed description of Class Counsel's efforts is fully set forth in the Gerstein 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, as here, 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). This Court has discretion in determining what attorneys' fees are reasonable. *See Kemp-Delisser v. St. Francis Hosp. & Med. Ctr.*, 2016 U.S. Dist. LEXIS 152496, at *43 (D. Conn. Nov. 3, 2016).

In the Second Circuit, there are two methods that courts may use in order to award attorneys' fees: (1) the "percentage-of-fund" method, which bases the fee on a percentage of the total amount of a common settlement fund; or (2) the "lodestar" method, which multiplies the amount of attorney hours reasonably expended by reasonably hourly rates. *Id.* at *45. Courts in the Second Circuit have largely stated a preference for the use of the percentage-of-fund method in awarding attorneys' fees. *See In re BioScrip, Inc. Sec. Litig.*, 2017 U.S. Dist. LEXIS 118881, at

*56 (S.D.N.Y. July 26, 2017) (though both methods are available, "the trend in [the Second] Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases…")(internal quotation omitted); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010)(trend in Second Circuit is toward the percentage method). 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., 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 Second Circuit's Reasonableness Factors Supports the Requested Fee

Class Counsel's fee request is consistent with applicable Second Circuit law. Regardless of whether the percentage method or the lodestar method is used, the Second Circuit has identified six factors for district courts to consider in analyzing the reasonableness of a request for attorneys' fees. These six factors – known as the *Goldberger* factors – are:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Kemp-Delisser, 2016 U.S. Dist. LEXIS 152496 at *43 (quoting *Goldberger v. Integrated Res., Inc.*, 209 F. 3d 43, 50 (2d Cir. 2000). *See also Caitflo, L.L.C. v. Sprint Communs. Co. L.P.*, 2013 U.S. Dist. LEXIS 90858, at *5-6 (D. Conn. June 24, 2013) (listing factors).

As detailed below, analysis of each of the *Goldberger* factors strongly supports approval of Class Counsel's requested fee.

a. The Time and Labor Expended by Counsel

Class Counsel expended more than 33,000 hours in prosecuting this case from its inception in 2013 up through September 6, 2017, the date upon which Class Counsel submitted its request for preliminary approval of the Settlement. As detailed more fully in the Gerstein Declaration, Class Counsel, *inter alia*: (a) successfully defeated Defendants' motion to dismiss; (b) reviewed and analyzed almost 11 million of pages of documents; (c) analyzed the many defenses raised by Defendants in light of the millions of pages of documents they produced and documents which were obtained from numerous third-parties; (d) took 6 fact depositions; (e) consulted with and retained four expert witnesses; (f) engaged in substantial motion practice on various issues, including but not limited to complex legal and economic issues pertaining to monopoly power and relevant market; (g) successfully defeated Defendants' two petitions for interlocutory appeal; and (h) prepared for and participated in mediation, during which Class Counsel engaged in hard-fought settlement negotiations and agreed to the terms of a settlement in principle. *See generally Kemp-Delisser,* 2016 U.S. Dist. LEXIS 152496 at *46-47; *In re BioScrip, Inc. Sec. Litig.*, 2017 U.S. Dist. LEXIS 118881 at *62 (litigation was "a hard-fought, complicated case, requiring extensive work on the part of Lead Counsel"); *Velez v. Novartis Pharms. Corp.*, 2010 U.S. Dist. LEXIS 125945, at *54 (S.D.N.Y. Nov. 30, 2010)("Class Counsel devoted 36,996.77 hours from 68 attorneys and staff members to the successful prosecution of this matter"). Moreover, Class Counsel will be expending a significant number of hours in connection with administering the Settlement without any compensation. *See Garcia v. Pancho Villa's of Huntington Vill., Inc.,* 2012 U.S. Dist. LEXIS 144446, at *22-23 (E.D.N.Y. Oct. 4, 2012)(acknowledging that class counsel would perform more work on behalf of the class after final approval, including "assisting with the administration of the

settlement, and answering Class Member questions, which further supports their fee request"); *Aros v. United Rentals, Inc.*, 2012 U.S. Dist. LEXIS 104429, at *17 (D. Conn. July 26, 2012)(acknowledging that class counsel would continue to perform work on behalf of the class during the settlement approval process and the disbursement phase).

Accordingly, the significant time and labor that has been (and will be) expended by Class Counsel supports Class Counsel's fee request.

b. The Magnitude and Complexities of the Litigation

"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."); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 138479, at *148-49 (E.D.N.Y. Oct. 9, 2015)(price-fixing conspiracy required "complex expert analysis and review of mountains of documents").

This antitrust case was no exception. As an initial matter, Class Counsel had to brief and argue the question of what jurisdiction the litigation should proceed in before the Judicial Panel for Multidistrict Litigation. Once transferred to this Court, Class Counsel was then almost immediately faced with two motions to dismiss grounded upon multiple bases, which resulted in protracted briefing, and upon disposition, a petition for interlocutory appeal to the United States Court of Appeals for the Second Circuit on statute of limitations grounds. The Second Circuit denied the petition in September 2015. Thereafter, Class Counsel then had to undertake fact discovery to support their liability, causation and damages theories and to rebut Defendants' defenses, and received and reviewed almost eleven million pages of documents. Apart from developing DPCPs' liability theories, which Class Counsel had to constantly evaluate in view of the rapidly developing case law concerning the legality of reverse payment agreements, Class

Counsel also had to address causation and damages, and establish that Boehringer had market power with respect to Aggrenox, which, were all issues that were hotly contested by Defendants. In particular, Class Counsel faced repeated discovery motions filed by Defendants as part of their attempt to prove that Boehringer did not have monopoly power in a relevant market. The parties' continuing disputes relating to this issue ultimately resulted in the Court ordering the parties to brief the issue so that it could make a predicate ruling on market power. That decision, which held that the relevant market was Aggrenox and its generic equivalents, resulted in Defendants' second petition for interlocutory appeal, which was denied by the Second Circuit in January 2017. *See generally Dial Corp. v. News Corp.*, 317 F.R.D. 426, 435 (S.D.N.Y. 2016)(monopolization case involved complex and contested theories of liability and a serious challenge pertaining to establishing damages); *Kemp-Delisser,* 2016 U.S. Dist. LEXIS 152496 at *48 (facts and law "at the heart" of ERISA class action were complicated and litigation was "highly contentious").

Accordingly, the magnitude and complexity of the litigation supports the requested fee.

c. The Risk of the Litigation

"The Second Circuit recognizes that the risk of success is 'perhaps the foremost factor' to be considered in determining a fee award in class actions." *Kemp-Delisser,* 2016 U.S. Dist. LEXIS 152496 at *48 (quoting *Goldberger*, 209 F. 3d at 54). *See also Woburn Ret. Sys. v. Salix Pharms., Ltd.*, 2017 U.S. Dist. LEXIS 132515, at *17 (S.D.N.Y. Aug. 18, 2017)("risk of the litigation is one of the most important factors, if not the foremost factor, to consider when determining the reasonableness of fee.").

It is well-established that when lawyers undertake litigation on a contingency basis, they face the "significant risk of non-payment." *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010). *See also Woburn Ret. Sys.*, 2017 U.S. Dist. LEXIS 132515 at *17 (lawyers who undertake litigation on contingency basis "assume a great deal of risk"); *Aros,* 2012 U.S. Dist.

LEXIS 104429 at *18 (efforts of class counsel were "without compensation, and their entitlement to be paid has been wholly contingent upon achieving a good result"). Here, Class Counsel represented the named plaintiffs and the class purely on a contingency fee basis – with no up-front retainer fees or allowance for expenses, nor any compensation from any other source – and prosecuted this case for nearly four years. Consequently, Class Counsel faced the very real risk that they would ultimately receive nothing for the hard work and long hours, as well as the millions of dollars in cash outlays expended litigating.

And indeed, the litigation itself presented substantive risks. At the time when Defendants' motions to dismiss were filed, district courts were beginning to issue conflicting decisions interpreting the Supreme Court's *Actavis* decision, and there was no guarantee that this Court would find DPCPs' allegations sufficient in view of such decisions. *See* Gerstein Dec. at ¶¶ 69, 72. Moreover, proving causation (*i.e.,* that Barr could and would have entered the market earlier with a less-expensive version of generic Aggrenox) also presented significant risks because Barr contended that it could not and would have launched in view of equipment, supply and FDA approval problems. Additionally, as this Court itself observed, the parties' protracted disputes concerning monopoly power and relevant market presented a potentially dispositive issue. *Id.* at ¶¶ 44, 69, 72.[5] Further, absent the Settlement, Class Counsel would have had to, *inter alia*, complete costly and time-consuming expert discovery, litigate class certification and then take the case through summary judgment and trial, as well as the (inevitable) appeals. Although Class Counsel have always been confident in DPCPs' claims, and remain so, Class Counsel had no

[5] *See also* Dkt No. 423 (Nov. 30, 2015 Hearing Tr. at 35-36)("[A]s I see it, if [defendants] win the product market definition, [plaintiffs] lose. If [plaintiffs] win the product market definition, many – much of [defendants'] discovery and their defenses go away, and we have a very narrow case…").

guarantee that class certification would be obtained, that DPCPs' claims would survive summary judgment and/or that a jury would ultimately find in DPCPs' favor (and 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.[6]

Accordingly, the significant risks faced by Class Counsel support the requested fee.

d. The Quality of Representation

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 ¶ 68; Exs. 3-16 to the Gerstein 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, causation, quantifying damages, economics, class certification, the Hatch-Waxman regulatory regime, pharmaceutical patents, pharmaceutical company business

[6] 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 now-defunct "scope of the patent" standard that pre-dated the Supreme Court's decisions in *Federal Trade Commission v. Actavis*, 133 S. Ct. 2223 (2013). *See Arkansas Carpenters*, 604 F.3d 98 (2d Cir. 2010), *cert. denied*, 562 U.S. 1280 (2011).

operations, and direct purchaser business operations), thus providing Class Counsel with the ability to efficiently coordinate, organize, and implement litigation strategies, and to react to defenses of all makes and models. Class Counsel's experience and skill is evidenced by their effective prosecution of this case for nearly four years, including the highly favorable settlement achieved.[7] *See, e.g., In re BioScrip, Inc. Sec. Litig.,* 2017 U.S. Dist. LEXIS 118881 at *73 ("[L]ead Counsel's work was consistently of a high quality – in its motion practice, in its appearances before the Court, and in attaining a fair and reasonable settlement"); *Kemp-Delisser,* 2016 U.S. Dist. LEXIS 152496 at *49-50 (class counsel was comprised of national leaders in ERISA class action litigation that had been appointed lead or co-lead counsel in numerous other cases). Relatedly, "the quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work." *Id.* at *50 (internal quotation omitted); *In re BioScrip, Inc. Sec. Litig.,* 2017 U.S. Dist. LEXIS 118881 at *73 ("[O]pposing counsel in this case was itself highly skilled, a factor courts have considered in approving fees."). Here, Defendants here have been vigorously represented by some of the country's leading defense firms both of which also have extensive Hatch-Waxman antitrust litigation experience: White & Case LLP and Goodwin Procter LLP. Achieving such a successful result for the class when faced by such skillful defense counsel further demonstrates Class Counsel's skill. *See also Kemp-Delisser,* 2016 U.S. Dist. LEXIS 152496 at *50 (defense counsel was a "highly capable" leading international firm).

Separately, the quality of representation provided by Class Counsel is further demonstrated by the recovery that Class Counsel achieved for the benefit of class members. *See Dial Corp.*, 317

[7] In a very recent Hatch-Waxman case involving many of the same lawyers comprising Class Counsel here, a district court acknowledged Class Counsel's skill and experience. *See In re K-Dur Antitrust Litig.,* Case No. 01-1652 (D.N.J.) (Dkt No. 1057) (Oct. 5, 2017 Order) ("The settlement here is directly attributable to the skill and efforts of Class Counsel, who are highly experienced in prosecuting these types of cases").

F.R.D. at 435 ("The results achieved through the efforts of [c]ounsel are a 'critical element in determining the appropriate fee to be awarded.'")(internal quotation omitted). As noted above, the recovery for class members here is unquestionably financially substantial. *Id.* ($244 million settlement "undoubtedly" benefitted class); *Velez*, 2010 U.S. Dist. LEXIS 125945 at *55 ($175 million settlement deemed "substantial"). Not only is the recovery substantial in terms of dollar value, but also when assessed in light of the risks of going forward against Defendants, discussed *supra*. Through the Settlement, class members are assured of an immediate and substantial financial recovery free of the attendant risks of continuing to litigate through trial and any subsequent appeals.

Accordingly, the quality of representation provided by Class Counsel supports Class Counsel's fee request.

e. The Requested Fee in Relation to the Settlement

This factor ensures that the requested fee is "fair and reasonable in relation to the recovery and compares favorably to fee awards" in other common fund cases. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 149. *See also Velez*, 2010 U.S. Dist. LEXIS 125945 at *58-60 (examining whether fee requested was "consistent with awards made in other class actions"); *Caitflo, L.L.C.*, 2013 U.S. Dist. LEXIS 90858 at *8 (requested percentage was "well within the range of reasonable percentage-fee awards in this Circuit").

Here, Class Counsel's requested fee is consistent with the fee 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 K-Dur Antitrust Litig., No. 01-1652 (D.N.J. Oct. 5, 2017)	33⅓% of $60 million settlement
In re Provigil Antitrust Litig., No. 07-1979 (E.D. Pa. Oct. 16, 2015)	27.5% of $512 million settlement (partial settlement)
In re Prograf Antitrust Litig., No. 11-md-2242 (D. Mass. May 20, 2015)	33⅓% of $98 million 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. 07-5985 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

Further, Class Counsel's requested fee falls squarely within the range of fee awards granted within this Circuit. *See, e.g., Collins v. Olin Corp.*, 2010 U.S. Dist. LEXIS 39862, at *24 (D. Conn. Apr. 21, 2010)("[O]ne third of the total fund is in line with the percentage fees awarded in similar class action suits"); *In re Marsh ERISA Litig.*, 265 F.R.D. at 149 (approving one-third of the total fund and observing that many cases within the Second Circuit have awarded percentage fees equal to or greater than one third); *Velez*, 2010 U.S. Dist. LEXIS 125945 at *59-61 (observing that "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater" and collecting cases ranging from 28 percent to 38.26 percent); *Garcia,* 2012 U.S. Dist. LEXIS 144446 at *20-21 ("Class Counsel's request for one-third of the Fund is reasonable and 'consistent with the norms of class litigation in this circuit'")(internal quotation omitted).

Finally, to date, no class member has objected to the request, a factor that numerous courts in this Circuit have determined as being a supportive factor. *See Kiefer v. Moran Foods, LLC*, 2014 U.S. Dist. LEXIS 106924 at *53 (D. Conn. July 31, 2014)(in approving attorneys' fees of one-third of common fund in wage-and-hour class action, noting there were no objections to requested fee); *Stinson v. City of New York*, 2017 U.S. Dist. LEXIS 89844 at *26-27 (S.D.N.Y. June 7, 2017)(noting absence of any objections to requested fee); *Hall v. Prosource Techs.*, 2016 U.S.

Dist. LEXIS 53791 at *50-51 (E.D.N.Y. Apr. 11, 2016) (absence of any objection to requested fee "while [] not dispositive of the reasonableness of the fee request, 'does lend support for approval of the award.'")(internal quotation omitted).[8]

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

f. Public Policy Considerations

As the Supreme Court has held, "private suits are an important element of the Nation's antitrust enforcement effort." *Am. Soc'y of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 572 n. 10 (1982). In keeping with that rationale, a fee award "should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *52-53 (internal quotation omitted).

As one court has noted, "it is important to encourage top-tier litigators to pursue challenging antitrust cases…[because] [o]ur antitrust laws address issues that go to the heart of our economy." *In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *55 (S.D.N.Y. Apr. 25, 2016). Thus, public policy considerations warrant incentivizing Class Counsel – who have pursued litigating Hatch-Waxman pharmaceutical antitrust cases for almost two decades on purely a contingency basis – to persist in enforcing this nation's antitrust laws.

Accordingly, public policy considerations support Class Counsel's fee request.

[8] The deadline for class members to object to Class Counsel's fee application is November 3, 2017. If Class Counsel receives any objection(s) to its fee application between the date of this filing and November 3, 2017, Class Counsel will promptly inform the Court and address such objection(s) in its motion for final approval of the Settlement.

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

In assessing the reasonableness of a fee award, courts routinely compare the lodestar to the fees that would be awarded under the percentage-of-recovery method as a "cross-check." *See Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *53 (lodestar cross-check may be helpful in assessing reasonableness). Additionally, "counsel may be entitled to a 'multiplier' of their lodestar rate to compensate them for the risk they assumed, the quality of their work and the result achieved for the class." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008).

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 Declaration, Class Counsel worked 33,215.88 hours on this case, which is collectively $19,633,232.27 million in time based on current billing rates.[9] *See* Gerstein Dec. at ¶ 75. A 33⅓% fee award would equate to a lodestar multiplier of 2.48. Such a multiplier falls well within the range of lodestar multipliers routinely awarded by courts in this Circuit. *See, e.g., Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *54 (multiplier of 2.77 "well within the range of lodestar multipliers that are regularly approved by district courts in the Second Circuit"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 579, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multipliers of over 4 are routinely awarded by courts…"); *Maley v. Del Global Techs. Corp.*, 189 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (approving multiplier of 4.65).

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

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

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 In re Marsh ERISA Litig.*, 265 F.R.D. at 150; *Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *54-55.

Class Counsel's unreimbursed expenses were reasonably incurred and necessary to the representation of the Class. These expenses have been itemized by category for the Court's convenience. *See* Exs. 3-16 to the Gerstein Dec. These expenses include costs for computerized legal research, the creation and maintenance of an electronic document database, experts, travel and lodging expenses, copying, court reporters, deposition transcripts and mediation. *Id.*[10] Accordingly, Class Counsel respectfully request that the Court approve reimbursement of Class Counsel's expenses in full.

C. Incentive Awards for the Class Representatives are Appropriate and Reasonable

The purpose of incentive awards is to reimburse named plaintiffs, who "take on a variety of risks and tasks when they commence representative actions…" *Kemp-Delisser*, 2016 U.S. Dist. LEXIS 152496 at *55 (internal quotation omitted). Courts take into consideration the personal risk (if any) incurred by becoming and continuing as a litigant, the time and effort expended in assisting in the prosecution of the litigation, any other burdens sustained, and the ultimate recovery achieved. *See Dial Corp.*, 317 F.R.D. at 439.

[10]Such expenses are of the type routinely deemed reasonable and necessary. *See, e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. at 150 (deeming costs such as court reporters, expert fees, computer-assisted document organization, travel and copying are "ordinary and necessary").

Here, Class Counsel requests that the Court approve incentive awards in the amount of $75,000 for each of the class representatives – Miami Luken, RDC, American Sales and Castillo - in recognition of their commitment to, and participation in, this litigation. As class representatives, each actively pursued the class's interests by filing suit as a named plaintiff on behalf of all direct purchasers and undertaking the responsibilities attendant upon them as representative plaintiff. In particular, the class representatives undertook significant burden in this case in responding to Defendants' extensive discovery requests, which required the class representatives to perform repeated search and production. *See* Gerstein Dec. at ¶ 79. Moreover, courts have recognized the risks inherent in filing suit as a named plaintiff on behalf of a class against an entity with which all class members transact business. *See Dial Corp.*, 317 F.R.D. at 439 ("[T]he decision to fire the first shot on behalf of the Class was fraught with risks. Notably, the named Plaintiffs in this case assumed a substantial risk in antagonizing a longstanding, power business partner…"). Here, that risk is inherent inasmuch as the class members are direct purchasers who transact business with Defendants on a regular basis.

Finally, the amount requested here is in line with awards made to named representatives in other Hatch-Waxman cases that Class Counsel has litigated.[11] Class Counsel therefore respectfully

[11] *See, e.g., In re K-Dur Antitrust Litig.*, Civil Action No. 01-1652, Dkt No. 1057 at ¶ 12 (D.N.J. Oct. 5, 2017) (awarding $100,000 to class representative); *In re Provigil Antitrust Litig.*, Civil Action No. 2:06-cv-01797 (MSG), Dkt No. 870 at ¶ 30 (E.D. Pa. Oct. 15, 2015) (awarding $100,000 to each of four class representatives and $50,000 to each of two other class representatives); *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.

request that the Court 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 $48,666,666.70, *i.e.*, 33⅓% of the Settlement (including a *pro rata* share of the accrued interest), and reimbursement of expenses in the amount of $976,338.23. Class Counsel also respectfully request that this Court approve incentive awards of $75,000 for each of the class representatives for their efforts on behalf of the Class in the prosecution of this action.

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Respectfully submitted:

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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).

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