EXHIBIT A

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**

DECLARATION OF BRUCE E. GERSTEIN IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES

I. INTRODUCTION

I, Bruce E. Gerstein, a managing partner at the law firm of Garwin Gerstein & Fisher, L.L.P. ("GGF"), lead counsel for Direct Purchaser Class Plaintiffs ("DPCPs"), respectfully submit this declaration in support of Class Counsel's application for:

(1) an award of attorneys' fees totaling 33⅓% of DPCPs' settlement with the Defendants[1] ("the Settlement");

(2) reimbursement of expenses that were incurred in the prosecution of DPCPs' claims against Defendants; and

(3) incentive awards to the named class representatives Miami Luken Inc., ("Miami Luken"), Rochester Drug Co-Operative, Inc. ("RDC"), American Sales Company, LLC ("American Sales") and Cesar Castillo, Inc. ("Castillo").

GGF has been involved in all material aspects of this litigation from the pre-complaint investigation and filing of DPCPs' initial complaint in November 2013 through the time DPCPs' settlement with the Defendants was filed with the Court (and continuing), and I am therefore fully familiar with the litigation, the most significant aspects of which are outlined below for the Court's convenience.

II. COMMENCEMENT OF THE CASE AND INITIAL PROCEEDINGS

1. On November 8, 2013, Class Counsel,[2] on behalf of DPCPs, filed the first antitrust lawsuit on behalf of a putative class of direct purchasers challenging Defendants'

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[1] Defendants are Boehringer Ingelheim Pharma GmbH & Co KG, Boehringer Ingelheim International GmbH and Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer") Teva Pharmaceuticals USA, Inc., 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"). Teva Pharmaceutical Industries, Ltd. (hereinafter "Teva Israel") was initially a named defendant, but is no longer in the case.

[2] In June 2014, the Court entered an order concerning the organization of counsel for the direct purchaser class by appointing Interim Lead Counsel, Interim Liaison Counsel and an Executive Committee. *See* Dkt No. 94. In granting preliminary approval to the proposed settlement, the Court appointed Lead Counsel, Liaison Counsel and an Executive Committee consistent with its

conduct regarding the prescription pharmaceutical product Aggrenox, which treats stroke patients, as violative of the antitrust laws. *See* Civil Action No. 2:13-cv-06543-MSG (Eastern District of Pennsylvania) (Dkt No. 1).[3]

2. Broadly, DPCPs alleged that Boehringer, which marketed Aggrenox, settled patent infringement litigation it had brought against Barr (later acquired by Teva) concerning Aggrenox by entering into an unlawful "reverse payment" settlement agreement, by which Boehringer compensated Barr in exchange for its agreement to delay entering the market with a competing, less-expensive generic version of Aggrenox. Specifically, DPCPs contended that the unlawful payment for delay was disguised as being a purported $120 million co-promotion agreement pursuant to which Barr's subsidiary, Duramed, would promote Aggrenox to obstetricians and gynecologists.

3. Subsequently, other direct purchaser (class and individual) actions, as well as end-payor class actions, were filed in various jurisdictions, including in this district.[4]

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previous Order. *See* Dkt No. 685 at ¶ 8. As used herein, Class Counsel refers to Lead Counsel (GGF), Liaison Counsel (Roche Pia LLC and Brenner, Saltzman & Wallman LLP), the Executive Committee (Berger & Montague, P.C., Hagens Berman Sobol Shapiro LLP and Nussbaum Law Group, P.C.) and the other law firms that participated in the litigation at the request of Lead Counsel: Odom & Des Roches, LLP, Smith Segura & Raphael, LLP, Heim Payne & Chorush, LLP, Faruqi & Faruqi LLP, The Radice Law Firm, Taus Cebulash & Landau LLP, The Barrett Law Group, P.A, and Grant & Eisenhofer, P.A. On April 29, 2015, counsel for class representative Castillo filed a Notice of Change of Firm Affiliation from Grant & Eisenhofer, P.A. to Nussbaum Law Group, P.C. *See* Dkt No. 251.

[3] Previously, in 2009, the Federal Trade Commission ("FTC") opened an investigation into Defendants' settlement agreement. *See Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc.*, Case No. 1:09-mc-564-GMH (D.D.C.), Dkt No. 1.

[4] The first end-payor class action was filed in on November 13, 2013 in the Eastern District of Pennsylvania. Subsequently, in March and April 2015, certain non-class direct purchaser retailer plaintiffs also filed actions in the Middle District of Pennsylvania, which were transferred in to this Court by the Judicial Panel for Multidistrict Litigation (hereinafter "JPML").

4. On December 13, 2013, Defendants filed a motion with the JPML requesting that all actions be centralized in and transferred to the District of Connecticut. *See In re Aggrenox Antitrust Litig.*, MDL No. 2516 (J.P.M.L.)(Dkt No. 1). On April 3, 2014, after the parties engaged in further briefing on the issue and after a hearing session, the Panel directed that all actions be transferred to the District of Connecticut for coordinated or consolidated pretrial proceedings. *See* Dkt No. 1.[5]

5. On April 14, 2014, the named plaintiffs in three of the four direct purchaser actions moved for the entry of a case management order appointing their attorneys as interim co-lead and liaison counsel for the direct purchaser class, as well as an executive committee comprised of attorneys representing each named plaintiff. *See* Dkt No. 3. On April 29, 2014, the named plaintiff in the fourth direct purchaser action cross-moved for the appointment of its counsel as interim sole lead counsel, or in the alternative as co-lead counsel in association with one other direct purchaser counsel, as well as liaison counsel for the direct purchaser class. *See* Dkt No. 32.

6. On April 29, 2014, this Court entered a Practice and Procedure Order which, *inter alia*: (a) consolidated all direct purchaser actions for all pretrial proceedings; (b) directed the parties to confer concerning the establishment of lead counsel and/or a committee of lead counsel; (c) stayed discovery pending further order from the Court; (d) set a schedule for the filing of a consolidated amended complaint by DPCPs and Defendants' answer thereto; (e) scheduled an initial pretrial conference; and (f) directed counsel for all parties to meet and confer concerning a list of topics to be discussed at the pretrial conference. *See* Dkt No. 37.

[5] All further references to docket numbers are to the current docket unless otherwise indicated.

7. During May 2014, DPCPs engaged in further briefing concerning the establishment of lead and liaison counsel. *See* Dkt Nos. 55, 58 and 59. In late May 2014, DPCPs filed a lengthy and detailed initial pretrial conference report outlining for the Court the parties' areas of agreement and disagreement concerning discovery, briefing, scheduling and other topics identified by the Court in its Practice and Procedure Order. *See* Dkt No. 66. Defendants likewise filed a lengthy and detailed initial pretrial conference report. *See* Dkt No. 74.

8. On May 22, 2014, the Court held its initial pretrial conference, and on May 30, 2014, the Court entered a scheduling order operative through the filing of motions for summary judgment and established bi-monthly telephonic status conferences. *See* Dkt No. 83.

9. On June 16, 2014, the Court entered an order concerning the organization of counsel for the direct purchaser class, appointing Interim Lead Counsel, Interim Liaison Counsel and an Executive Committee. *See* Dkt No. 94; *supra* at n. 2.

10. Also on June 16, 2014, DPPCs filed their consolidated amended complaint, which included more detailed allegations concerning the compensation that DPCPs alleged constituted an unlawful reverse payment given in exchange for delayed generic entry. *See* Dkt Nos. 97-99. *See also* Dkt No. 105. On May 15, 2015, Defendants served their respective answers.

III. DEFENDANTS' MOTIONS TO DISMISS AND THE RESULTING INTERLOCUTORY APPEAL

11. On July 15, 2014, all Defendants (with the exception of Teva Israel) jointly moved to dismiss DPCPs' complaint. *See* Dkt No. 149. Defendants contended that dismissal was warranted on six grounds: (1) that DPCPs' claims were untimely because the statute of limitations had expired; (2) that DPCPs failed to adequately allege facts showing antitrust injury, *i.e.*, that Barr would have been able to enter the market with generic Aggrenox prior to the agreed-upon entry date in the settlement agreement; (3) that the co-promotion agreement did not

qualify as an unlawful reverse payment under *Actavis*; (4) that Boehringer did not agree not to market an authorized generic version of Aggrenox (and that, in any event, such an "exclusive license" would not raise antitrust concerns); (5) that DPCPs failed to adequately plead a relevant market; and (6) that DPCPs failed to adequately plead specific intent to monopolize. *Id.*

12. Separately, Teva Israel filed its own motion to dismiss, arguing that: (1) as a foreign corporation organized and existing under the laws of Israel with no United States presence, personal jurisdiction was lacking; and (2) in the alternative, dismissal was warranted on the basis that DPCPs had failed to allege any facts demonstrating that Teva Israel had any direct involvement in the allegedly unlawful conduct/unlawful conspiracy. *See* Dkt No. 150.

13. On August 22, 2014, DPCPs filed their opposition briefing. *See* Dkt Nos. 175-176.

14. DPCPs responded to Defendants' joint motion to dismiss by arguing that: (1) DPCPs' claims were timely; (2) DPCPs' complaint sufficiently alleged antitrust injury via allegations that, absent the reverse payment, Barr would have obtained an earlier entry date; (3) the co-promotion agreement qualified as a reverse payment under *Actavis*; (4) a brand company's agreement not to launch an authorized generic product ("no-AG agreement") constituted a payment under *Actavis* and could not instead be characterized as a lawful patent license immune from antitrust scrutiny; (5) DPCPs had adequately pled a proper relevant market; and (6) DPCPs had sufficiently alleged specific intent to monopolize. *See* Dkt No. 175.

15. Separately, DPCPs filed a brief in opposition to Teva Israel's motion to dismiss. DPCPs argued that they had made the necessary *prima facie* showing of personal jurisdiction over Teva Israel and that DPCPs had clearly and adequately connected Teva Israel to the

challenged reverse payment agreement and conspiracy. Alternatively, DPCPs requested jurisdictional discovery. *See* Dkt No. 176.

16. On September 19, 2014, all plaintiff groups submitted a supplemental brief in order to discuss four district court decisions from various jurisdictions concerning reverse payment agreements that had been issued since plaintiffs' opposition briefing on Defendants' motions to dismiss had been submitted. *See* Dkt No. 205 (discussing *In re Nexium Antitrust Litig.*, 42 F. Supp. 3d 231 (D. Mass. 2014); *In re Loestrin 24 FE Antitrust Litig.*, 2014 U.S. Dist. LEXIS 123322 (D.R.I. Sept. 4, 2014; *In re Niaspan Antitrust Litig.*, 2014 U.S. Dist. LEXIS 124818 (E.D. Pa. Sept. 5, 2014); *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523 (D.N.J. 2014)).

17. On September 26, 2014, Defendants filed reply briefing in further support of their joint motion to dismiss. *See* Dkt Nos. 211, 213. Additionally, on October 8, 2014, Defendants jointly submitted a notice of supplemental authority concerning another recent decision concerning reverse payment agreements. *See* Dkt No. 218 (discussing *In re Effexor XR Antitrust Litig.*, 2014 U.S. Dist. LEXIS 142206 (D.N.J. Oct. 6, 2014), *rev'd sub nom, In re Lipitor Antitrust Litig.*, 2017 U.S. App. LEXIS 15825 (3d Cir. Aug. 21, 2017).

18. Oral argument on Defendants' motions was held on October 27, 2014. *See* Dkt No. 219.

19. Subsequent to oral argument, and while a decision on Defendants' motions remained pending, all plaintiff groups jointly submitted additional supplemental authority, to which Defendants responded. *See* Dkt No. 223 (plaintiffs' November 19, 2014 notice of supplemental authority discussing *United Food & Comm. Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoko Pharma USA, Inc.*, 2014 U.S. Dist. LEXIS 161069 (N.D. Cal. Nov. 17, 2014)) and Dkt No. 224 (Defendants' November 21, 2014 response). *See*

also Dkt No. 226 (plaintiffs' February 4, 2015 notice of supplemental authority discussing *In re Provigil Antitrust Litig.*, 2015 U.S. Dist. LEXIS 9545 (E.D. Pa. Jan. 28, 2015)) and Dkt No. 227 (Defendants' February 6, 2015 response).

20. On March 23, 2015, the Court issued its decision and order on Defendants' motions to dismiss. *See* Dkt No. 229; *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224 (D. Conn. 2015). In its opinion, the Court acknowledged that several district courts had issued opinions applying *Actavis* with "not entirely consistent results." *In re Aggrenox,* 94 F. Supp. 3d at 235. After ruling that DPCPs' claims were timely so long as they were incurred within the four years preceding DPCPs' filing, and that DPCPs had adequately pled antitrust injury, the Court rejected the argument that only reverse payment agreements made in cash were actionable, concluding that if such were true than *Actavis* would "stand for nothing." *Id.* at 242. The Court then went on to conclude that DPCPs' allegations concerning the co-promotion agreement and no-AG agreement sufficiently pled the existence of a large and unjustified reverse payment. In doing so, the Court rejected Defendants' argument that a no-AG agreement could be characterized as merely a lawful exclusive license immune from antitrust scrutiny, observing that the issue "is not whether the *form* of the payment was legal, but whether the *purpose* of the payment was legal." *Id.* at 244-45 (emphasis in original). Finally, the Court concluded that DPCPs had plausibly pled a relevant market and specific intent to monopolize. *Id.* at 246-47. Separately, the Court granted Teva Israel's motion to dismiss, concluding that DPCPs' complaint did not allege any action by Teva Israel that was specifically connected with the litigation, subject to permitting DPCPs to later seek leave to replead if evidence of Teva Israel's participation was uncovered during discovery taken from the other defendants. *Id.* at 257.

21. Immediately after this Court issued its order denying Defendants' motion to dismiss, Defendants moved to certify the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See* Dkt No. 236. In their April 2, 2015 motion to certify, Defendants argued that two issues satisfied the requirements for interlocutory review by the Second Circuit: (1) whether the Court was correct in ruling that the statute of limitations period restarted with each purchase of Aggrenox when the claimed overcharges commenced more than four years before suit was filed and where (in Defendants' view) the alleged harm resulted merely from adherence to a contractual agreement rather than a price-fixing conspiracy; and (2) whether the Court was correct in ruling that DPCPs' adequately pled causation, because the Court's rationale for that conclusion was unconnected to DPCPs' causation burden under Section 4 of the Clayton Act, which Defendants claimed DPCPs did not satisfy. In their motion, Defendants argued that both of the above holdings presented controlling and case-dispositive questions of law, *i.e.*, that if the Second Circuit were to disagree with the Court's decision on either issue, then DPCPs' claims would be terminated. *Id.*

22. On April 23, 2015, DPCPs filed their opposition to Defendants' motion. *See* Dkt No. 246. In their opposition, DPCPs argued that in denying Defendants' motion for dismissal on statute of limitations grounds, the Court had properly applied controlling Second Circuit precedent and thus there could be no claim of substantial grounds for difference of opinion that would justify interlocutory review. *Id.* DPCPs likewise argued that the Court's conclusion with respect to causation also failed to provide a basis for certification, inasmuch as DPCPs were merely required to plead – not prove – causation at the pleading stage. DPCPs also argued that Defendants misunderstood this Court's interpretation of *Actavis*, and that, in any event, even if

Defendants were correct, their mere disagreement with the Court's application of *Actavis* could only be appealed from a final judgment, not through interlocutory appeal. *Id.*

23. On May 7, 2015, Defendants filed their reply brief, in which they reiterated their opening arguments and asserted that so long as the Court's order did not reject the concept that DPCPs were required to plead and prove causation, Defendants would not pursue interlocutory review on the causation issue. *See* Dkt No. 258.

24. On July 21, 2015, the Court issued a memorandum and order granting Defendants' motion to certify. *See* Dkt No. 311. On the statute of limitations issue, the Court agreed that the issue presented a controlling question of law and that an immediate appeal could be dispositive of the litigation, but disagreed that there was substantial ground for difference of opinion concerning the Court's interpretation or applicability of Second Circuit precedent that would justify interlocutory review. On the causation issue, the Court amended and clarified its previous opinion to the extent it was not explicit in recognizing that DPCPs had the burden at trial to prove causation. Despite the foregoing, however, the Court concluded that interlocutory review by the Second Circuit could be useful because *Actavis* was then new Supreme Court precedent, and had at that point only been addressed by one federal court of appeals (the Third Circuit).

25. On July 31, 2015, Defendants filed a petition for permission to appeal with the Second Circuit. *See In re Aggrenox Antitrust Litig.*, Case No. 15-2416, Dkt No. 1. Despite the district court's order limiting potential interlocutory review to the causation question, (*see id.* at n. 3), Defendants focused solely on the statute of limitations issue. Defendants largely reiterated the arguments they had made before the district court.

26. On August 13, 2015, DPCPs submitted their opposition to Defendants' petition. *See In re Aggrenox Antitrust Litig.*, Case No. 15-2416, Dkt Nos. 45, 48. In that opposition, DPCPs first argued that Defendants' appeal was impermissible because Defendants had not satisfied the requirements for interlocutory appeal. Specifically, DPCPs pointed out that the district court had explicitly stated that its decision on the statute of limitations issue did not involve a controlling question of law as to which there was a substantial ground for difference of opinion, and instead certified its order for appellate review for a different reason, *i.e.*, to seek guidance on *Actavis. Id.* DPCPs then advanced substantive arguments as to why there was no substantial ground for difference of opinion regarding the district court's ruling on the statute of limitations issue. *Id.*

27. On August 21, 2015, Defendants moved for leave to file a reply brief in further support of their petition, arguing, *inter alia*, that the district court's decision to certify its order for interlocutory review entitled the Second Circuit to review any issue raised in the order, including the statute of limitations issue. *See In re Aggrenox Antitrust Litig.*, Case No. 15-2416, Dkt No. 55-1.

28. On August 31, 2015, DPCPs filed a motion for leave to file a sur-reply, reiterating their arguments as to why the requirements for interlocutory review were not satisfied and making the additional argument that DPCPs' alternative accrual date raised disputed issues of fact that rendered interlocutory review inappropriate. *In re Aggrenox Antitrust Litig.*, Case No. 15-2416, Dkt No. 67.

29. On September 16, 2015, the Second Circuit denied Defendants' petition for leave to appeal as unwarranted. *In re Aggrenox Antitrust Litig.*, Case No. 15-2416, Dkt Nos. 77-78. The Second Circuit concluded that although the district court, in certifying its order for

interlocutory review, had identified, *sua sponte*, an issue on which it thought that guidance from the Second Circuit could be useful (*i.e., Actavis*), the better practice would be to wait until a more developed record arose. *Id.*

IV. DOCUMENT AND DEPOSITION DISCOVERY

30. With the commencement of discovery, Class Counsel obtained and reviewed the entire record from the FTC proceedings, which consisted of correspondence, documents, and investigational hearing transcripts. Class Counsel then served additional discovery related to DPCPs' own theories of liability, causation and damages. Class Counsel served three sets of document requests on Defendants, and received voluminous responsive document productions. Class Counsel loaded the documents into a computerized database to perform an efficient and focused review, using database searches targeting specific concepts and custodians. This culminated in the DPCPs creating an extensively organized database that proved invaluable in identifying key issues, documents, deponents, and potential future topics of discovery. Throughout the litigation, Class Counsel continuously used the database as DPCPs developed and refined their theories of liability, causation and damages and prepared for and engaged in depositions and motion practice.

31. In addition to document requests, Class Counsel served two sets of interrogatories on Defendants, which also covered a wide variety of topics.

32. Likewise, Defendants served DPCPs with two sets of document requests and two sets of interrogatories.

33. Class Counsel served objections to Defendants' discovery, and met-and-conferred extensively with defense counsel on the scope of this discovery. As those discussions occurred, Class Counsel worked with the named plaintiffs to gather potentially responsive documents and data for production. Class Counsel met and communicated with knowledgeable employees who

collected, sorted and compiled documents and data for eventual production to Defendants. Class Counsel reviewed the named plaintiffs' documents for responsiveness and privilege, and then produced documents in response to Defendants' document requests. Class Counsel also responded to interrogatories.

34. In addition to Class Counsel's document-discovery efforts, Class Counsel identified and then deposed numerous fact witnesses. After serving notices of deposition, Class Counsel engaged in meet-and-confers with Defendants' counsel about the timing and other logistics of those depositions. In total, 6 fact depositions were taken of Defendants' current and former employees and/or corporate representatives. Those witnesses were examined on a wide variety of topics.

35. The following chart reflects the fact witness depositions DPCPs took a leading or substantive role in:

#	Name	Company	Date(s)	Location(s)
1	Frederick J. Killion	Barr/Teva	February 27, 2017	Washington, D.C.
2	Elizabeth Keating	Boehringer Ingelheim	March 1, 2017	Southbury, CT
3	Lauren Rabinovic (30(b)(6))	Barr/Teva	March 21, 2017	North Wales, PA
4	Michael Morris (30(b)(6))	Boehringer Ingelheim	March 29, 2017	New York, NY
5	William Mok	Boehringer Ingelheim	April 14, 2017	Southbury, CT
6	Alan Stempel	Boehringer Ingelheim	April 18, 2017	Danbury, CT

V. DISCOVERY-RELATED MOTION PRACTICE

36. Throughout the litigation, though the parties met and conferred concerning discovery-related issues and reached agreement whenever possible, a large number of such disputes required motion practice and/or other intervention by the Court.

37. *Defendants' Motion to Stay Discovery*: in August 2014, when Defendants' motions to dismiss were pending, Defendants moved to stay discovery, arguing, *inter alia*, that

requiring them to engage in burdensome and costly discovery would be inappropriate in view of the fact that their motions to dismiss, if granted, would be case dispositive. *See* Dkt No. 195. In September 2014, before further briefing occurred, the Court requested that the parties address the issue during a status conference. *See* Dkt No. 203. Ultimately, because oral argument on motions to dismiss was then just six weeks away, the Court elected to largely stay discovery until that point, with the exception of ordering Defendants to produce certain materials from the FTC proceedings in the interim. *See* Dkt No. 202.

38. *The Protective Order*: in July 2014, the parties, having otherwise agreed on the content of a protective order, submitted competing motions on the issue of whether Defendants should be permitted to redact responsive documents for reasons other than privilege. *See* Dkt Nos. 160-162. DPCPs argued that such a provision was inconsistent with the Federal Rules of Civil Procedure, would be likely to spawn disputes over the propriety of redactions and was unnecessary in light of other agreed-to terms protecting Defendants' information. *See* Dkt No. 160. Defendants argued that a redaction provision was necessary to protect sensitive information concerning other pharmaceutical products that were not relevant to the litigation. *See* Dkt No. 161-162. Oral argument was held during a September 2014 status conference, after which the Court concluded that it agreed with Defendants' position, with certain language clarifications. *See* Dkt Nos. 203, 198-199.

39. *The Order Governing Electronically Stored Information ("ESI")*: in August 2014, the parties submitted competing motions concerning an ESI order. Broadly, the parties disagreed as to whether Defendants should be required to disclose: (1) the existence of document deletions; (2) the data sources to be searched; and (3) the search terms to be used. *See* Dkt Nos. 165, 166, 183, 190. DPCPs contended that more fulsome disclosures from Defendants were required to

insure that thorough, non-duplicative, discovery could be efficiently completed. The parties argued their competing motions during a September 2014 status conference during which the Court provided guidance on the ESI dispute, and instructed that the parties submit a revised ESI order in accordance with the Court's instructions.

40. *DPCPs' Motion for a Protective Order Quashing Subpoenas:* on June 19, 2015, DPCPs moved to quash thirteen subpoenas that Defendants served on absent class members seeking document discovery and depositions (*i.e.*, "downstream discovery"). *See* Dkt No. 285. DPCPs argued that Defendants had not demonstrated the strong showing of need required by the Federal Rules to take discovery of absent class members and that, in any event, compliance with the subpoenas would be unduly burdensome. *Id.* On July 14, 2015, Defendants filed their opposition, arguing, *inter alia*, that the requested discovery was necessary, narrowly tailored, and not unduly burdensome. *See* Dkt No. 307. On August 4, 2015, DPCPs submitted reply briefing. *See* Dkt No. 316. Defendants then submitted a notice of supplemental authority on August 14, 2015, (*see* Dkt No. 332), to which DPCPs responded on August 17, 2015. *See* Dkt No. 333. The Court held oral argument on August 18, 2015, during which a resolution of the issue was reached, and resulting in the Court denying the motion as moot due to such resolution. *See* Dkt No. 338.

41. *Defendants' Motion to Compel Product Market Discovery:* on August 29, 2015, Defendants moved to compel DPCPs to provide discovery concerning various other drugs that Defendants contended were substitutes for Aggrenox, arguing that such discovery was relevant to developing a defense regarding the relevant market. *See* Dkt No. 348. On September 21, 2015, DPCPs filed their opposition, arguing, *inter alia*, that DPCPs' intent to offer direct evidence of market power – *i.e.*, through demonstrating either the existence of a payment and/or that

Boehringer had the ability to control prices and maintain them at supracompetitive levels simply by delaying generic entry. *See* Dkt No. 367. On October 9, 2015, Defendants filed reply briefing, arguing that it was not a given that DPCPs would be able to prove market power through direct evidence, and that product market discovery was also relevant to class certification questions of commonality, typicality and adequacy. *See* Dkt No. 386. On October 23, 2015, DPCPs filed a sur-reply to, in part, address Defendants' new argument concerning class certification issues. *See* Dkt No. 396.

42. *Defendants' Motion to Compel Discovery of Plaintiffs' Sales, Pricing and Premium Information*: on September 19, 2015, Defendants moved to compel discovery related to the sales and pricing of branded Aggrenox, generic Aggrenox and other antiplatelet drugs, arguing that such discovery was relevant for the same reasons as outlined in Defendants' prior motion to compel, *supra*, as well as for damage purposes. *See* Dkt No. 363. On October 16, 2015, DPCPs filed their opposition, arguing that the discovery was legally irrelevant to damage issues pursuant to Supreme Court precedent, legally irrelevant to class certification issues pursuant to the overwhelming majority of circuit court precedent, and unnecessary and/or irrelevant for market power/relevant market issues. *See* Dkt No. 393. On November 2, 2015, Defendants filed reply briefing. *See* Dkt No. 400.

43. *Defendants' Motion to Compel DPCPs' Use of Additional Search Terms and Reasonable Search Tools & the Order to Show Cause:* on November 13, 2015, Defendants moved to compel DPCPs to use additional search terms to identify documents responsive to Defendants' discovery requests, and to reapply those search terms using tools that would reach all searchable content (or at the least confirm that existing search tools had already done so). *See* Dkt No. 411. On November 23, 2015, DPCPs filed their opposition, arguing that its searches

were adequate and that Defendants proposed additional search terms would not yield additional relevant evidence, either because the search terms themselves were irrelevant or were aimed at documents that were already the subject of Defendants' motions to compel. *See* Dkt No. 417.

44. On November 30, 2015, the Court held oral argument on Defendants' three motions to compel, *supra* at ¶¶ 41-43. *See* Dkt No. 423. During oral argument, the Court proposed that, since a decision on relevant market issues could have a potentially dispositive impact on the litigation, and, *a fortiori*, on Defendants' discovery motions, the parties should discuss whether they would be amenable to the Court making a predicate ruling on DPCPs' market power allegations. *Id.* On December 8, 2015, the parties filed submissions concerning their positions on such a course of action. *See* Dkt Nos. 425-426. DPCPs stated their agreement with a predicate ruling on market power, but requested that all other discovery be permitted to proceed, including through any resulting interlocutory appeal, until the issue was ultimately resolved. *See* Dkt No. 425. Conversely, Defendants stated their belief that a predicate ruling on market power would be premature in view of Defendants' still-pending discovery requests, but that if the Court elected to order briefing, that DPCPs, the party with the burden of proving market power, be the one to file a motion. *See* Dkt No. 426.

45. On January 8, 2016, the Court issued an Order to Show Cause. In the Order, the Court stated that because DPCPs sought to proffer direct evidence of market power, Defendants were instructed to show cause, including by answering three specific questions outlined by the Court, as to why the Court should not restrict discovery and evidence to a market of Aggrenox and any AB-rated substitutes for Aggrenox, and DPCPs were instructed to provide responsive briefing. *See* Dkt No. 432.

46. On February 5, 2016, Defendants filed their response to the Order to Show Cause. *See* Dkt No. 439. In their response, Defendants argued that the Court should not limit product market discovery to just Aggrenox and its generic equivalents, because even in the event that DPCPs were able to make a *prima facie* case of market power through direct evidence, Defendants would still be entitled to pursue the relevant market discovery sought from DPCPs to demonstrate that Aggrenox faced competition in a broader market, thereby negating the existence of market power. *Id.*

47. On February 26, 2016, DPCPs filed their response to Defendants' submission. *See* Dkt No. 452. In their response, DPCPs argued that because DPCPs intended to prove market power through direct evidence, no relevant market needed to be defined, and *a fortiori*, no Defendants' sought discovery regarding relevant market was not needed. *Id.* DPCPs asserted that, under Actavis, the large reverse payment at issue in this case was itself direct evidence of market power. DPCPs further argued that actual evidence of Aggrenox's price before and after the entry of generic competition was ample, under the law, to demonstrate the exercise of market power. In support of their response, DPCPs submitted a declaration from expert economist Dr. Jeffrey Leitzinger.

48. On March 15, 2016, Defendants filed a reply in further response to the Order to Show Cause. *See* Dkt No. 461.

49. On March 31, 2016, the Court held oral argument on its Order to Show Cause. *See* Dkt No. 468. On August 8, 2016, the Court issued its decision and order, agreeing with DPCPs that the relevant market was Aggrenox and its generic equivalents, and that no discovery or evidence related to other drugs as potential substitutes was relevant. Consequently, the Court denied Defendants' three related motions to compel to the extent that they sought information

concerning other antiplatelet drugs, and directed the parties to meet and confer in order to attempt to resolve the remaining aspects of the motions. *Id.* The Court concluded by certifying its order for interlocutory appeal. *Id.*

50. On August 18, 2016, Defendants filed a petition for permission to appeal the Court's order concerning relevant market with the Second Circuit. *See In re Aggrenox Antitrust Litig.*, Case No. 16-2864, Dkt No. 1. In their petition, Defendants largely reiterated the arguments they had made before the district court. *Id.*

51. On August 31, 2016, DPCPs filed their opposition to Defendants' petition. *See In re Aggrenox Antitrust Litig.*, Case No. 16-2864, Dkt No. 36. In that opposition, DPCPs argued that Defendants' appeal was impermissible because Defendants had not satisfied the stringent requirements for interlocutory appeal. Specifically, DPCPs first argued that the Court's order did not involve a controlling question of law because the Court had not reached any definitive conclusion as to market power, but instead only determined that DPCPs were entitled to put on their direct proof of such, and that Defendants were not entitled to discovery to rebut a method of proving market power that DPCPs had no intent of using. Relatedly, DPCPs next argued there was no substantial ground for difference of opinion regarding the use of direct evidence to prove market power, since such a proposition was well-settled authority. *Id.*

52. On September 29, 2016, Defendants filed a letter of supplemental authority concerning a new Third Circuit decision that had deemed a relevant market to be broader just than the brand and the generic, arguing that the decision further demonstrated a substantial ground for difference of opinion concerning the order at issue. *See In re Aggrenox Antitrust Litig.*, Case No. 16-2864, Dkt No. 53.

53. On October 3, 2016, DPCPs filed a responsive letter outlining various reasons as to why the Third Circuit decision cited by Defendants did not support Defendants' petition, including because it was an out-of-circuit case that did not involve a reverse payment agreement. *See In re Aggrenox Antitrust Litig.*, Case No. 16-2864, Dkt No. 57.

54. On January 9, 2017, the Second Circuit denied Defendants' petition for leave to appeal without opinion. *In re Aggrenox Antitrust Litig.*, Case No. 16-2864, Dkt Nos. 78-79.

55. *Defendants' Renewed Motion to Compel Discovery of Plaintiffs' Sales, Pricing and Premium Information:* on September 13, 2016, during the pendency of Defendants' interlocutory appeal of the Court's order concerning relevant market, (*see supra* at ¶ 50), Defendants filed a renewed motion to compel discovery of DPCPs' sales and pricing information, arguing that such was necessary for damages purposes. *See* Dkt No. 524. On September 30, 2016, DPCPs filed their opposition, arguing that Defendants' motion was moot because DPCPs had already offered to produce all of the responsive information that they possessed and that, in any event, even if DPCPs had the sought-after information, there was no legal basis entitling Defendants to such information. *See* Dkt No. 542. On October 7, 2016, Defendants filed reply briefing. *See* Dkt No. 556. On October 14, 2017, the Court held oral argument on the motion, during which the Court ruled that the motion was granted in part and denied in part. *See* Dkt Nos. 569, 573.

56. *Defendants' Motion to Compel Direct Purchaser Plaintiffs to Conduct a Reasonable Search for Responsive Documents*: on September 13, 2016, Defendants moved to compel DPCPs to perform further searches for documents using certain terms/searches proposed by Defendants. *See* Dkt No. 525. On September 30, 2016, DPCPs filed their opposition, arguing that the searches that they had performed were reasonable and comprehensive, and that DPCPs

had already articulated to Defendants why additional searches would be unlikely to uncover additional material. *Id.* On October 7, 2016, Defendants filed reply briefing. *See* Dkt No. 551. On October 14, 2016, the Court held oral argument on the motion, during which the Court ruled that the motion was granted in part and denied in part. *See* Dkt Nos. 569, 573.

57. Separately, DPCPs also engaged in motion practice with non-party Gyma Laboratories of America, Inc. ("Gyma"), a company which was engaged in the manufacture of the active pharmaceutical ingredient used by Barr in the manufacture of its generic version of Aggrenox. On August 17, 2016, after unsuccessful meet and confers concerning DPCPs' document requests to Gyma (which were made by DPCPs for purposes of pursuing their causation theories), DPCPs moved to compel, and Gyma cross-moved for all costs in the event the Court granted DPCPs' motion. The parties fully briefed the motions and oral argument was held, with the parties agreeing to further meet and confer. *See* Dkt Nos. 500, 535, 562, 569, 573. Subsequently, Gyma filed a motion for attorneys' fees associated with its document production, which was also fully briefed and argued. *See* Dkt Nos. 585, 594, 601, 602, 609. On September 29, 2017, DPCPs wrote to the Court concerning the pendency of this motion, and respectfully requested that the Court rule on the motion prior to the filing of Class Counsel's application for attorneys' fees and costs, or alternatively, grant Class Counsel leave to supplement their application once Gyma's motion was decided, if necessary. *See* Dkt No. 691.

VI. EXPERT DISCOVERY

58. Class Counsel consulted with and/or retained four expert witnesses to provide consulting expertise, reports and/or testimony that would support DPCPs' claims and rebut Defendants' defenses. These experts were in the areas of pharmaceutical patents, drug product development, pharmaceutical business development and licensing and antitrust economics. Class Counsel spent significant time communicating with these experts, particularly with expert

economist Dr. Jeffrey Leitzinger, who submitted a declaration on behalf of DPCPs during the parties' briefing on the Order to Show Cause, discussed *supra* at ¶ 47.

VII. MEDIATION AND SETTLEMENT IN PRINCIPLE

59. In 2017, the parties agreed to engage the services of private mediator Hon. Layn R. Phillips, formerly of the Western District of Oklahoma.

60. Prior to the mediation, the parties exchanged lengthy and detailed confidential mediation statements in which, broadly speaking, they set forth their evaluation of the claims and defenses at issue in the litigation.

61. The mediation occurred on May 8-9, 2017 in New York City. Negotiations were hard-fought and at arms-length and lasted late into the evening of the second day, with the result being an agreement to a settlement in principle. The parties also agreed to suspend discovery while the final terms were negotiated. The settlement in principle, and agreement regarding the suspension of discovery pending the execution of a final settlement agreement, were reported to the Court. *See* Dkt No. 639.

62. Throughout the summer, counsel for DPCPs and Defendants worked to negotiate the full terms of a settlement agreement, with various points of contention requiring protracted negotiations. The final settlement agreement was executed on August 15, 2017.

VIII. THE SETTLEMENT WITH THE DEFENDANTS

63. On September 6, 2017, DPCPs filed the settlement agreement between Defendants and DPCPs with the Court. *See* Dkt No. 667. The settlement provides for the payment by Defendants of $146 million into an interest-bearing escrow account for the benefit of all direct purchaser class members. *Id.*

64. In their filing, Class Counsel requested that the Court preliminarily approve the settlement, approve notice to the Class, and set a schedule leading up to and including a Fairness

Hearing. *Id.* In preparation for filing the motion, Class Counsel engaged a proposed escrow agent for maintenance of the settlement funds and entered into an escrow agreement with same, and engaged a proposed claims administrator to assist with the notice process. *Id.* Class Counsel's request for preliminary approval was also posted on the GGF website.

65. On September 19, 2017, the Court concluded that that the settlement between DPCPs and the Defendants was arrived at by arms-length negotiations by highly experienced counsel after years of litigation and fell within the range of possibly approvable settlements, and preliminarily approved it. *See* Dkt No. 685. Concurrently, the Court appointed an escrow agent and claims administrator, approved a form of notice to the class and set a schedule. *Id.*

66. Thereafter: (1) Defendants deposited the settlement proceeds into an escrow account held in trust that is earning interest for the benefit of the Class; and (2) the claims administrator duly mailed the written notice to class members. *See* Ex. 1 (Affidavit of Michael Rosenbaum re: Escrow Account); *See* Ex. 2 (Affidavit of Michael Rosenbaum re: Mailing of Notice). The notice to class members was also posted on the GGF website.

67. Class members have until November 3, 2017 to exclude themselves from the class or object to the settlement or any of its terms and/or to Class Counsel's request for attorneys' fees, unreimbursed expenses and an incentive awards to the class representatives. As of the date of this Declaration, no objections have been received. If any objections are received between the date of this Declaration and November 3, 2017, the Court will promptly be notified, and such objections will be addressed in DPCPs' upcoming submission for final approval of the settlement, due on November 24, 2017.

IX. SUMMARY OF ATTORNEYS' FEES AND UNREIMBURSED EXPENSES

68. Class Counsel are highly experienced and nationally respected law firms that have almost two decades of extensive experience prosecuting and trying Hatch-Waxman antitrust cases on behalf of the same core class of direct purchaser plaintiffs.

69. At all junctures of this litigation, Class Counsel faced risk. As an initial matter, when Class Counsel initiated the litigation in November 2013, the Supreme Court had just issued its landmark decision in *Actavis* concerning the appropriate antitrust standard under which to analyze reverse payment agreements. Consequently, at the time, it was not known how district and appellate courts would interpret and implement the Supreme Court's opinion. Indeed, as noted herein, throughout this litigation, various courts around the country have issued decisions interpreting *Actavis,* necessitating that Class Counsel (who has also served, and continues to serve, as class counsel on behalf of direct purchases cases in numerous other delayed generic entry cases) litigated the case in step with rapidly evolving law on reverse payment agreements, including through Defendants' interlocutory appeals. Thus, Class Counsel were acutely aware not only of the inherent risks that come with prosecuting a complex antitrust case and bringing it towards trial, but also of the additional risks of litigating such a case in an area of law that is newly developing subsequent to the issuance of a landmark Supreme Court decision.

70. DPCPs' claims could have been dismissed in their entirety at any time, particularly in view of the rapidly evolving law, which forced Class Counsel to continuously refine their case theories and strategies. Further, absent the settlement with Defendants, Class Counsel would have to: (1) proceed with expert discovery, including taking and defending expert depositions and filing and defending *Daubert* motions; (2) litigate class certification; and (3) litigate any summary judgment motions**.** And, absent the settlement with Defendants, Class Counsel still would have had to take the case to trial. If a jury had found in favor of Defendants

at that trial, Class Counsel's lengthy and protracted efforts, undertaken at great time and expense, would have been for naught. Even if successful before a jury, appellate risks would remain.

71. Despite the risks outlined above, Class Counsel diligently prosecuted this case for almost four years. In doing so, Class Counsel: (a) reviewed a voluminous amount of documents; (b) successfully defeated Defendants' motion to dismiss; (c) took 6 fact depositions; (d) consulted with and retained 4 experts; (e) briefed and argued extensive discovery motions pertaining to numerous topics, most significantly, on issues pertaining to market power and relevant market; (f) successfully prevailed in two interlocutory appeals filed by Defendants; (g) participated in mediation and (h) engaged in protracted negotiations concerning the execution of a settlement agreement that embodied the parties' agreement in principle.

72. Litigating this case has involved significant effort on Class Counsel's part, both in terms of time and resources spent. Class Counsel had to constantly formulate and refine their theories of liability, causation and damages both in response to legal developments and in anticipation of arguments that Defendants were likely to raise – and in some instances did raise – throughout stages of the litigation.

73. Defendants have been represented by some of the country's leading law firms and have vigorously defended against DPCPs' claims at all junctures.

74. Class Counsel believe that the settlement with the Defendants represents a highly successful outcome for the class both financially and in bringing this case to a close.

75. The following chart summarizes the aggregate time and necessary and incidental expenses of all Class Counsel, as set forth in more detail in the separate firm declarations of Class Counsel, appended here as Exhibits 3-16:

Ex.	Firm Name	Hours	Lodestar	Expenses[6]
3	The Barrett Law Group, P.A.	24.30	$15,482.50	$7,114.08
4	Berger & Montague, P.C.	6,159.60	$3,078,433.86	$157,370.47
5	Brenner, Saltzman & Wallman LLP	85.50	$32,500.00	$1,889.96
6	Faruqi & Faruqi LLP	4,657.90	$3,089,177.50	$101,775.58
7	Garwin Gerstein & Fisher LLP	6,641.13	$4,719,859.91	$170,526.84
8	Grant & Eisenhofer, P.A.[7]	736.60	$471,399.00	$27,650.90
9	Hagens Berman Sobol Shapiro LLP	3,977.45	$2,601,733.50	$64,611.96
10	Heim Payne & Chorush LLP	991.80	$517,844.00	$86,244.94
11	Nussbaum Law Group, P.C.	704.20	$509,760.00	$51,691.48
12	Odom & Des Roches	5,343.00	$2,716,812.50	$108,745.79
13	Smith Segura & Raphael LLP	3,322.00	$1,643,465.50	$117,327.13
14	The Radice Law Firm	16.20	$9,435.00	$5,000.00
15	Roche Pia LLC	184.20	$56,964.00	$1,196.07
16	Taus Cebulash & Landau LLP	372.00	$170,365.00	$75,209.58
	TOTALS	33,215.88	$19,633,232.27	$976,354.78

76. Accordingly, Class Counsel's total expenses of $976,354.78 - minus the $16.55 that is currently remaining in Class Counsel's litigation fund, (*see* n. 6), - results in a figure of **$976,338.23** of incurred, unreimbursed expenses.

77. Based upon the lodestar set forth above, the requested 33⅓% fee results in a multiplier of 2.48.

78. Detailed time records and expense vouchers/receipts are available to the Court *in camera* should the Court wish to examine them.

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[6] Certain of the individual declarations of Class Counsel may list "contribution to litigation fund" (or similar phrase) as an expense. Lead Counsel established a litigation fund used to pay certain of the reasonable expenses listed herein. Various firms made regular contributions throughout the litigation.

[7] As noted *supra* at n. 2, class representative Castillo was initially represented in the litigation by Grant & Eisenhofer, P.A., and subsequently by Nussbaum Law Group, P.C.

X. THE EFFORTS OF THE CLASS REPRESENTATIVES ON BEHALF OF THE CLASS

79. The four class representatives – Miami Luken, RDC, American Sales and Castillo – each made a significant contribution in prosecuting DPCPs' claims against Defendants for the benefit of all class members. The class representatives each actively protected the Class's interests by filing the suit on behalf of the Class and undertaking all the responsibilities involved in being a named plaintiff, including monitoring the progress of the case, and responding to discovery requests. Discovery was a significant burden to the class representatives in this case. Specifically, in accordance with the ESI order, each class member executed broad document searches and collections, based on keywords negotiated with Defendants, and the resulting document productions were thousands of pages. Following various discovery disputes and related motion practice, detailed *supra*, the class representatives then had to perform further searches for documents using additional terms and searches proposed by Defendants. In addition, some of the class representatives had to re-run these searches to bring their document productions forward to a specified time period and/or to comply with certain ESI parameters. Each of the class representatives also searched for and collected almost eight years of transactional data reflecting invoice-level purchases, chargebacks, and sales. These discovery efforts required that employees of the class representatives take time away from their regular job functions in order to comply. The class representatives were required to expend time and effort that was not compensated over the several years that DPCPs pressed their claims against Defendants.

80. In recognition of its time and effort expended for the benefit of the Class, Class Counsel have requested an incentive award of $75,000.00 for each of the four class representatives.

I, Bruce E. Gerstein, declare under penalty of perjury that the above is true and correct.

/s/ Bruce E. Gerstein
Bruce E. Gerstein