UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE SUBOXONE (BUPRENORPHINE HYDROCHLORIDE AND NALOXONE) ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** *All Direct Purchaser Class Actions*	**MDL No. 2445** **Master File No. 2:13-MD-2445-MSG**

DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Direct Purchaser Class Plaintiffs Burlington Drug Company, Inc. ("BDC"), Rochester Drug Co-Operative, Inc. ("RDC"), and Meijer, Inc. and Meijer Distribution, Inc. (collectively "Meijer") (BDC, RDC and Meijer are collectively "Plaintiffs"), on behalf of the certified direct purchaser class,[1] respectfully submit this Memorandum of Law in Support of their Motion for Final Approval of Settlement.

I. INTRODUCTION

The $385 million settlement agreement with Indivior f/k/a Reckitt Benckiser Pharmaceuticals, Inc. ("Indivior" or "Defendant") (the "Settlement") — reached just 3.5 weeks before the commencement of a jury trial and during a third round of mediation with this Court serving as mediator — is the product of more than a decade of intense and hard-fought litigation by Plaintiffs and their counsel. While Plaintiffs were fully prepared to go to trial, the Settlement provides a substantial and immediate cash recovery while eliminating the risks of trial and appeals, and thus represents an outstanding result for the Class.

Pursuant to the Preliminary Approval Order entered by the Court on October 30, 2023 (*see* ECF No. 984), members of the Class had until January 12, 2024, to object to either the Settlement and/or Class Counsel's request for attorneys' fees, reimbursement of expenses and service awards to the class representatives. *See* ECF No. 992 ("Fee Submission").

[1] The settlement is on behalf of Plaintiffs and the class defined as follows ("Direct Purchaser Class" or "Class"):

> All persons or entities in the United States and its territories who purchased branded Suboxone tablets directly from Reckitt Benckiser Pharmaceuticals, Inc. (now known as Indivior, Inc.) at any time during the period January 1, 2012 through March 14, 2013 ("the Class"). Excluded from the Class are Indivior Inc. (formerly known as Reckitt Benckiser Pharmaceuticals, Inc.) its officers, directors, management, employees, subsidiaries, and affiliates, and all federal governmental entities.

See generally ECF No. 588 (Order) (certifying the Class) at ¶ 1.a; ECF No. 984 (Order) at ¶ 1 n. 1 (defining Class identically in granting preliminary approval).

There have been no objections to the Settlement, Class Counsel's Fee Submission[2] or Class Counsel's Revised Fee Submission. To the contrary, numerous class members have submitted letters to the Court affirmatively supporting the Settlement and/or Class Counsel's Revised Fee Submission. *See* Declaration of Bruce E. Gerstein ("Gerstein Decl.") at Exs. 1-7. This includes the three largest class members (which represent approximately 93% of the direct purchases that constitute Plaintiffs' damages claims), which advised Class Counsel that Class Counsel may represent to the Court that the Revised Fee Submission is acceptable to them. *Id.* at Ex. 6 (ECF No. 993).

The fairness, reasonableness, and adequacy of the Settlement is also strongly supported by the application of Rule 23 and the "*Girsh/Prudential*" factors derived from *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) and *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998), which courts use to determine whether a proposed class action settlement warrants final approval. Each of these factors is addressed below.

For the reasons detailed herein, Plaintiffs respectfully request that the Court enter the accompanying proposed Order which, *inter alia*: (a) grants final approval to the Settlement; (b) approves the plan of allocation, which provides for a fair and reasonable method of determining each Class member's recovery based on their respective purchases; and (c) grants Class Fee Submission (with respect to reimbursement of costs and service awards) and Counsel's Revised Fee Submission (with respect to attorneys' fees).

[2] Class Counsel's Fee Submission was filed on December 29, 2023. *See* ECF No. 992. On January 16, 2024, Class Counsel filed a supplemental submission seeking a downward revision concerning just one aspect of Class Counsel's Fee Submission – attorneys' fees. *See* ECF No. 993 ("Revised Fee Submission"). *See also infra* at Section II.

II. RELEVANT BACKGROUND

For the convenience of the Court, Plaintiffs incorporate by reference the procedural history of this litigation, including the negotiations that led to the Settlement, as described in Class Counsel's Memorandum of Law and accompanying Declaration of Bruce E. Gerstein that accompanied Class Counsel's Fee Submission (ECF No. 992).

On October 4, 2023, just 3.5 weeks before trial was set to commence, and with the assistance of this Court as mediator, Plaintiffs and Indivior reached an agreement-in-principle by which Indivior would pay $385 million in cash for the benefit of all Class members in exchange for dismissal of the litigation between Plaintiffs and Indivior with prejudice and certain releases.

On October 25, 2023, after several weeks of further negotiations over specific terms, the proposed Settlement was executed and filed with the Court, with Plaintiffs requesting that, *inter alia*, the Court grant preliminary approval to the Settlement and direct that notice of the Settlement be provided to all members of the Class. *See* ECF No. 982.

On October 30, 2023, the Court held that "all [Rule 23] factors weigh in favor of preliminarily approving the settlement," concluding that the Settlement "was arrived at by arm's-length negotiations by highly experienced counsel, after extensive mediation, more than a decade of litigation, and as a jury trial was imminent [and] falls within a reasonable range." ECF No. 984 (Preliminary Approval Order) at ¶ 3. The Court further directed that notice of same be given to the Class. *Id.* at ¶ 5.

On November 6, 2023, counsel for Indivior notified Class Counsel that Indivior had timely served the required notices pursuant to the Class Action Fairness Act of 2005. *See* 28

U.S.C. § 1715. As of the date of this filing, Class Counsel is unaware that any CAFA recipient has informed the Court (or counsel for any of the parties) that it objects to the Settlement.[3]

On November 20, 2023, in accordance with the terms of the Settlement, Indivior deposited $385 million into a Court-approved escrow account that has been earning interest for the benefit of the Class.

On November 20, 2023, Class Counsel, through the Court-appointed claims administrator, caused notice to be given to class members via first-class mail. The notice detailed, *inter alia*: (a) the terms of the Settlement; (b) the procedures and deadline for objecting to either the Settlement and/or Class Counsel's Fee Submission; (c) the procedures and deadlines for submitting claim forms and/or receiving Settlement funds; and (d) the location, date and time of the Court's final fairness hearing. *See* Gerstein Decl. at Ex. 8 (Declaration of Tina Chiango, RG/2 Claims Administration LLC, Regarding Notice of the Proposed Settlement to the Direct Purchaser Class) at Ex. A thereto (Notice). Additionally, contemporaneously with the notice, Class Counsel provided each Class member with a pre-populated claim form listing the amounts of each Class member's purchases of brand Suboxone Tablets and brand Suboxone Film, with Class members having the option to submit their own purchase data for review (though Class members were not required to do so and could instead simply verify that those provided numbers were correct). *Id.* Both the notice and an exemplar claim form were posted on the websites of Lead Class Counsel.

[3] As noted in Plaintiffs' motion for preliminary approval, a court may not finally approve a proposed settlement until 90 days from service of the CAFA notices. *See* ECF No. 982-1 at p. 19 n. 6. Here, the expiration of that 90-day period will occur on February 4, 2024.

On December 29, 2023, Class Counsel filed their Fee Submission, which addressed attorneys' fees, reimbursement of costs, and service awards to the named plaintiffs. *See* ECF No. 992. The Fee Submission was posted on the websites of Co-Lead Class Counsel.

On January 12, 2024, the deadline for Class members to object to the Settlement and/or Class Counsel's Fee Submission expired. No objections to either the Settlement or Class Counsel's Fee Submission were received. *See* Gerstein Decl. at Ex. 8 (Declaration of Tina Chiango, RG/2 Claims Administration LLC, Regarding Notice of the Proposed Settlement to the Direct Purchaser Class) at p. 2 and Ex. A thereto (Notice) at Question 12 (instructions for Class members on how to object).

On January 16, 2024, Class Counsel filed their Revised Fee Submission, which addressed just one aspect of Class Counsel's Fee Submission by reducing Class Counsel's request for attorneys' fees from 33⅓ percent to 32 percent. The Revised Fee Submission was posted on the websites of Co-Lead Class Counsel. No objections to the Revised Fee Submission have been received. To the contrary, as aforementioned, numerous Class members have submitted letters to the Court affirmatively supporting the Revised Fee Submission, and the three largest Class members advised Class Counsel that Class Counsel may represent to the Court that the Revised Fee Submission is acceptable to them. *See* Gerstein Decl. at Exs. 1-7.

III. ARGUMENT

A. THE SETTLEMENT IS ENTITLED TO AN INITIAL PRESUMPTION OF FAIRNESS

"A district court may approve a settlement agreement only 'after a hearing and on finding that it is fair, reasonable and adequate.'" *In re Suboxone (Buprenorphine and Naloxone) Antitrust Litig.*, 2023 U.S. Dist. LEXIS 215754, at *6-7 (E.D. Pa. Dec. 4, 2023) (Goldberg, J.) (internal quotation omitted). *See also* Fed. R. Civ. P. 23(e)(2).

To further the policy of favoring settlement, the Third Circuit has "instructed district courts to apply a presumption of fairness to a proposed settlement when: '(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Ahrendsen v. Prudent Fiduciary Servs., LLC*, 2023 U.S. Dist. LEXIS 107802, at *9-10 (E.D. Pa. Jun. 22, 2023) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004)). *See also In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *10 (acknowledging that an "initial presumption of fairness" applies when factors are met).

Here, all four factors are readily met. As to the first three factors, in granting Plaintiffs' motion for preliminary approval, this Court previously determined that the Settlement was "arrived at by arm's-length negotiations by highly experienced counsel, after extensive mediation [and] more than a decade of litigation[.]" ECF No. 984 (Preliminary Approval Order) at ¶ 3.[4] *See also* ECF No. 992-1 (Mem. of Law in Supp. of Fee Submission) and 992-1 (Decl. of Bruce E. Gerstein in Supp. of Fee Submission) (detailing the procedural history of the litigation, including the extensive discovery that took place, the negotiations that led to the Settlement, and the experience and skill of Class Counsel). As to the fourth and final factor, there have been no objections to the Settlement by any Class member, as noted above.

Accordingly, the Court should apply an initial presumption of fairness to the Settlement. When the presumption is found to apply, it "does not obviate the need for scrupulous analysis under the *Girsh*, *Prudential*, and *Baby Product* factors, [but] it does skew the analysis in favor of approving [a] [s]ettlement." *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *15.

[4] *See also* FRCP 23(e)(2)(A) ("the class representatives and class counsel have adequately represented the class") and FRCP 23(e)(2)(B) ("the proposal was negotiated at arm's length").

B. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE UPON APPLICATION OF THE *GIRSH/PRUDENTIAL* FACTORS

Federal Rule of Civil Procedure 23(e)(2), as amended in 2018, lists four factors that courts must consider in determining whether a settlement is fair, reasonable, and adequate and, therefore, warranting final approval. As courts in this Circuit recognize, these four factors largely overlap with the "traditional" *Girsh/Prudential* factors utilized within the Third Circuit for evaluating the fairness of a proposed settlement for final approval purposes. *See Ahrendsen*, 2023 U.S. Dist. LEXIS 107082, at *16 (noting overlap); *O'Hern v. Vida Longevity Fund, LP*, 2023 U.S. Dist. LEXIS 76789, at *13 (D. Del. May 2, 2023) ("Courts in the Third Circuit also continue to apply the *Girsh* factors, which include procedural and substantive considerations similar to those in the 2018 amendments to Rule 23(e)").

In *Girsh*, the Third Circuit "identified certain factors which district courts may employ in informing their discretion before granting final approval to a class action settlement." *Id.* at *10 (internal quotation omitted). *See also Ahrendsen*, 2023 U.S. Dist. LEXIS 107082, at *9 (noting that the *Girsh* factors are the "traditional" factors used to assess fairness). Subsequently, in *Prudential*, the Third Circuit "advised that 'it may be useful to expand the traditional *Girsh* factors'" and articulated additional factors for district courts to consider. *In re Suboxone*, 2023 U.S. Dist. LEXIS 215784, at *11-12 (internal quotation omitted). *See also McIntyre v. Realpage, Inc.*, 2023 U.S. Dist. LEXIS 53732, at *4 n.4 (E.D. Pa. Mar. 24, 2023) (acknowledging overlap between *Girsh* and *Prudential* factors but observing that analysis of both is useful to perform a thorough analysis). "Only the *Prudential* factors relevant to the litigation in question need be addressed." *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *25. *See also Corra v. ACTS Ret. Servs.*, 2024 U.S. Dist. LEXIS 500, at *27 (E.D. Pa. Jan. 2, 2024) (deeming it appropriate to consider some of the *Prudential* factors).

As demonstrated below, analysis of each of the *Girsh/Prudential* factors strongly supports final approval of the Settlement.

1. *Girsh* Factor 1: The Complexity, Expense, and Likely Duration of the Litigation[5]

"The first factor 'captures the probable costs, in both time and money, of continued litigation.'" *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *15 (internal quotations omitted). As this Court has recognized, antitrust cases are expensive to litigate due to their inherent complexity. *Id.* at *15-16. Here, continued litigation would have entailed further trial preparation costs, the costs of a multi-week jury trial (including multiple expert witnesses' testimonial fees), and the costs of an inevitable appeal, regardless of which side prevailed. The Settlement eliminated these costs while providing a substantial and immediate recovery to the Class. *Id.* at *16 (settlement reduced expense of continued litigation, including trial costs); *McIntyre*, 2023 U.S. Dist. LEXIS 53732, at *4 n.4 (avoiding costs of summary judgment briefing, trial preparation, trial and appeal weighed in favor of approving settlement).

Accordingly, this factor strongly supports final approval of the Settlement.

2. *Girsh* Factor 2: The Reaction of the Class to the Settlement

This factor "attempts to gauge whether members of the class support the settlement." *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *17 (internal quotation omitted). In examining this factor, courts look to how many class members have chosen to opt out of a settlement and whether any class members objected to the settlement. *Id.* at *17 (no objections to settlement and only 37 opt outs as compared to the almost 110,000 class members who filed claims); *McIntyre*, 2023 U.S. Dist. LEXIS 53732, at *4 n.4 (only one opt out and one objection out of thousands of class members). Here, despite the opportunity to do so, not a single class member has objected to

[5] *See also* FRCP 23(e)(2)(C)(1) ("the costs, risks, and delay of trial and appeal").

the Settlement, and numerous Class members have submitted letters to the Court affirmatively supporting the Settlement. *See* Gerstein Decl. at Exs. 1-7.[6]

Accordingly, this factor strongly supports final approval of the Settlement.

3. *Girsh* Factor 3: The Stage of the Proceedings and the Amount of Discovery Completed

By examining the stage of the proceedings and the amount of discovery completed, courts seek to determine "whether counsel had an 'adequate appreciation of the merits of the case before negotiating.'" *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *17 (internal quotation omitted). Because the Settlement was reached just weeks prior to trial after more than a decade of litigation in which extensive discovery, motion practice, and trial preparation took place, and during a third round of mediation presided over by this Court, there can be no question that Class Counsel had a deep and comprehensive understanding of the nature of Plaintiffs' claims and Indivior's defenses. *See* ECF No. 984 (Preliminary Approval Order) at ¶ 3 (noting settlement reached "after extensive mediation [and] more than a decade of litigation); *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *17-18 ("ten years of active litigation transpired during which extensive discovery was exchanged…vigorous motion practice was pursued [and] [o]nly after [rulings on class certification, *Daubert* motions and summary judgment] did the parties reach the settlement. Given this record, I find that that the parties had a well-developed appreciation of the merits of the case prior to negotiation"); *McIntyre*, 2023 U.S. Dist. LEXIS 53732, at *4 n.4 (four-year litigation with substantial discovery and briefing on merits issues allowed parties to appreciate merits of case before negotiating settlement).

[6] No analysis of how many class members elected to opt out of the settlement needs to be performed since the Court previously (and correctly) determined that a second opt out period was not needed due to Class members' prior notice of class certification containing an opt out period. *See* ECF No. 984 (Preliminary Approval Order) at ¶ 6.

Accordingly, this factor strongly supports final approval of the Settlement.

4. *Girsh* Factors 4 and 5: The Risks of Establishing Liability and Damages

These two factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *In re Suboxone*, 2023 U.S. Dist. LEXIS 215784, at *18 (internal quotation omitted). Here, absent the Settlement, the case was just 3.5 weeks away from trial. While Class Counsel was confident in the Class's claims, and remain so, a favorable jury verdict in the face of Indivior's numerous defenses was not guaranteed (nor was a favorable result upon an inevitable appeal by Indivior). Moreover, due to Indivior's financial condition, there was an additional layer of risk involved. As this Court has articulated in analyzing the fairness of the End-Payor Plaintiffs' settlement, "[u]ltimately, the EPPs faced the risk of a lower or zero recovery had they pursued trial over settlement." *Id.* at 19. *See also McIntyre*, 2023 U.S. Dist. LEXIS 53732, at *4 n.4 (cash payments to class members versus risks of defense verdict or inability to prove damages favored settlement). So too here. Ultimately, the Settlement provides the Class with a substantial and immediate recovery without the risks of litigating the case through a jury trial and appeals against a defendant with financial issues.

Accordingly, this factor strongly supports final approval of the Settlement.

5. *Girsh* Factor 6: The Risks of Maintaining the Class Action Through Trial

This factor "'measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial' in light of the fact that 'the prospects for obtaining certification [purportedly] have a great impact on the range of recovery one can expect to reap from the class action.'" *In re Suboxone*, 2023 U.S. Dist. LEXIS 215784, at *19 (internal quotation omitted).

Though "there is always some risk of full or partial decertification" in any class action (*McIntyre*, 2023 U.S. Dist. LEXIS 53732 at *4 n.4), the Court's grant of class certification in this case was unanimously affirmed on appeal in a precedential opinion by the Third Circuit. Thus, "there is no reason to assume that this case would not proceed as a viable class action through trial." *Id*.

Accordingly, this factor is neutral.

6. *Girsh* Factor 7: The Ability of the Defendant to Withstand a Greater Judgment

"This factor is most relevant when a settlement is 'less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement.'" *McIntyre*, 2023 U.S. Dist. LEXIS 53732, at *4 n.4 (internal quotation omitted); *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *20 (same). As noted above, Indivior's financial condition was an issue at various points in this case including at the time of settlement negotiations. As is publicly known, Indivior agreed to pay $600 million in 2020 to federal and state governmental entities to resolve certain claims, and agreed to pay a separate and additional $102.5 million and $30 million in mid-2023 to settle the claims of other plaintiff groups that were formerly part of the instant multi-district litigation. Consequently, while Plaintiffs do not possess the requisite information to say with certainty that Indivior's financial circumstances could not have allowed for a greater settlement, the Settlement here – which was overseen by this Court as mediator – provides for substantial and immediate financial recovery to Plaintiffs as compared to the risk of not being able to fully recover on their claims due to Indivior's financial condition. *See In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *21 (noting that while End Payor Plaintiffs "did not know precisely what [Indivior's] financial situation was" their settlement "provided a greater guarantee that they would be able to collect on their judgment"). *See also Ahrendsen*, 2023 U.S. Dist.

LEXIS 107802, at *17-18 (even when court assumes defendant's resources exceed settlement amount, ability to pay more does not weigh against approval if other factors indicate the fairness, reasonableness and adequacy of the settlement).

Accordingly, this factor strongly supports final approval of the Settlement.

7. *Girsh* Factors 8 and 9: The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of the Risks of Litigation

"The last two *Girsh* factors evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case. The factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *21-22 (internal quotation omitted). Courts compare the amount of the settlement with "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing[.]" *Id.* at 22 (internal quotation omitted). In performing this comparison, courts recognize that a settlement is a compromise and even if the settlement "may only amount to a fraction of the potential recovery [that] does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved. The percentage recovery, rather, must represent a material percentage recovery to plaintiff in light of all the risks considered under *Girsh*." *Id.*

Plaintiffs' expert economist, Dr. Russell L. Lamb, performed an estimation of the Class's aggregate damages. Plaintiffs' ultimate recovery was premised not only on Plaintiffs prevailing on liability at trial but was also dependent upon certain critical variables and determinations, including the timing of generic Suboxone market entry (a jury issue) and the outcome of highly contested legal issues, such as the impact of chargebacks on Plaintiffs' damages, which was the

subject of a pending motion *in limine*. Nevertheless, the Settlement represents more than 10% of the damages calculated by Plaintiff's expert economist, and is reasonable in the context of the risks Plaintiffs faced with respect to both continued litigation and considering Indivior's financial condition at the time of settlement negotiations. *See generally* Sections III.B.4 and III.B.6, *supra*. *See also In re Suboxone*, 2023 U.S. Dist. LEXIS 215784, at *23.

Accordingly, this factor strongly supports final approval of the Settlement.

8. *Prudential* Factor 1: The Maturity of the Underlying Substantive Issues

The first *Prudential* factor – "the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages" (*In re Prudential*, 148 F.3d at 323) – "substantially mirrors *Girsh* factor three, the stage of the proceedings." *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *25. *See also McIntyre*, 2023 U.S. Dist. LEXIS 53732, at *4 n.4 ("There is substantial overlap between the *Girsh* and *Prudential* factors"). For the reasons detailed above with respect to *Girsh* factor three, "the advanced developed of the record weighs in favor of approval." *Id.* *See generally* Section III.B.3, *supra*.

Accordingly, this factor strongly supports final approval of the Settlement.

9. *Prudential* Factors 2 and 3: The Existence and Probable Outcome of Claims by Other Classes and a Comparison Between the Results Achieved by the Settlement of Results to Other Claimants

Prudential factors two and three "look at the outcomes of claims by other classes and other claimants." *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *26. *See also Utah Ret. Sys. v. Healthcare Servs. Grp., Inc.*, 2022 U.S. Dist. LEXIS 5841, at *27 (E.D. Pa. Jan. 12, 2022)

(factor examines "whether other classes or subclasses are getting a better deal" in order to ascertain whether there are disparities in the success obtained by various claimants). As noted above, various other claimants (the Department of Justice, the State Plaintiffs and the End Payor Plaintiffs) each reached settlements with Indivior prior to the Settlement here, with the Department of Justice settlement associated with criminal proceedings being numerically larger and the purely civil settlements of the State Plaintiffs and the End Payor Plaintiffs being numerically smaller.[7] Plaintiffs submit that no disparities in success exist. Though the claims asserted by the various plaintiff groups generally stemmed from the same conduct of Indivior concerning Suboxone, the various cases and claims were distinct in many important ways, and Plaintiffs — who filed the first complaint against Indivior prior to any government or other private plaintiff complaint — negotiated the Settlement here entirely independently from the settlements reached by other claimants. Ultimately, Plaintiffs believe that the proposed Settlement represents an outstanding resolution of Plaintiffs' claims and that no disparities in success exist, as this Court previously found in granting final approval to the End Payor settlement. *See In re Suboxone*, 2023 U.S. Dist. LEXIS 215784, at *26-27.

Accordingly, this factor strongly supports final approval of the Settlement.

10. *Prudential* Factor 4: The Right of Class Members to Opt Out of the Settlement

For the reasons discussed above, this factor need not be considered. *See* n. 6, *supra*; *In re Suboxone*, 2023 U.S. Dist. LEXIS 215754, at *25 ("Only the *Prudential* factors relevant to the

[7] Plaintiffs are aware that a small number of large insurers elected to opt out of the End Payor Plaintiff litigation and pursue their claims in state courts in Virginia and Kentucky, but Plaintiffs do not know the current status of those litigations. *See generally* ECF No. 978 (End Payor Plaintiffs' Mem. Of Law. In Supp. Of Unopposed Mot. for Final Approval of the End Payor Settlement and for Related Relief) at pp. 18-19 (noting that litigations still pending as of October 16, 2023).

litigation in question need be addressed").

11. *Prudential* Factor 5: The Reasonableness of Requested Attorneys' Fees[8]

This factor examines whether Class members were given reasonable notice of the attorney fees and costs that would be sought. Here, pursuant to the Court's Preliminary Approval Order, Class Counsel disseminated notice to Class members advising them that Class Counsel "intend to seek attorneys' fees of up to 33⅓% of the Settlement Fund plus court-approved expenses and service awards, including a proportionate share of any accrued interest." *See* Gerstein Decl. at Ex. 8 (Declaration of Tina Chiango, RG/2 Claims Administration LLC, Regarding Notice of the Proposed Settlement to the Direct Purchaser Class) at Ex. A thereto (Notice) at Question 11.[9] The notice also informed Class members that any request for attorneys' fees would be filed with the Court and posted on the websites of Lead Class Counsel, which was done. Accordingly, notice to Class members about the requested fees was reasonable. *See In re Suboxone,* 2023 U.S. Dist. LEXIS 215784, at *28 (finding that notice sent to class members specifically advising class members what fees would be requested was reasonable). *See also Calhoun v. Invention Submission Corp.*, 2023 U.S. Dist. LEXIS 41177, at *46 (W.D. Pa. Mar. 8, 2023) (same).

Concerning the substantive reasonableness of the requested fees, Class Counsel's Fee Submission and Revised Fee Submission demonstrate their reasonableness. As noted herein, not only has no Class member objected to the requested attorneys' fees, but numerous Class members have submitted letters to the Court affirmatively supporting the Revised Fee

[8] *See also* FRCP 23(e)(2)(C)(iii) ("the terms of any proposed award of attorney's fees, including timing of payment").

[9] As described in Plaintiffs' Revised Fee Submission, Class Counsel requested fee award of 32% of the settlement amount is net of reimbursed expenses and service awards to the class representatives. *See* ECF No. 993.

Submission, and the three largest Class members advised Class Counsel that Class Counsel may represent to the Court that the Revised Fee Submission is acceptable to them.

Accordingly, this factor strongly supports final approval of the proposed Settlement.

12. *Prudential* Factor 6: The Reasonableness of the Procedure for Processing Claims Under the Settlement[10]

The final *Prudential* factor examines whether the procedure for processing Class members' claims under the Settlement is reasonable. *In re Suboxone*, 2023 U.S. Dist. LEXIS 215784, at *28. Here, in conjunction with their motion for preliminary approval, Plaintiffs submitted a proposed Plan of Allocation, which described the method for processing Class members' claims and is consistent with allocation plans that have been previously approved in similar cases. *See* ECF No. 982-4 (Plan of Allocation). The Court preliminarily approved the Plan of Allocation as fair and reasonable. *See* ECF No. 984 (Preliminary Approval Order) at ¶ 10.

Under the Plan of Allocation, Class members are compensated based on their respective *pro rata* share of weighted combined net unit purchases of branded Suboxone Tablets and branded Suboxone Film purchased directly from Indivior. *See* ECF No. 982-4 at pp. 1-2. Using data produced by Indivior during discovery, Plaintiffs' expert economist performed preliminary computations, which were inserted into individualized, pre-populated claim forms, with Class members having the option of either accepting the numbers in those forms or submitting their own purchase data. *Id.* Consequently, there was little to no burden on Class members, who needed only to complete and return their claims form by January 12, 2024 – which the notice to Class members and claim form prominently noted was the last date by which all claim forms

[10] *See also* FRCP 23(e)(2)(C)(ii) ("the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims").

must be postmarked. *See* Gerstein Decl. at Ex. 8 (Declaration of Tina Chiango, RG/2 Claims Administration LLC, Regarding Notice of the Proposed Settlement to the Direct Purchaser Class) at ¶ 5 and Ex. A thereto (Notice) at p. 2 and Questions 8, 12 and 16.

The claims process is currently ongoing as of the date of this filing; the claims administrator and Plaintiffs' expert economist will review all of the claim forms submitted and finalize each Class member's *pro rata* share of the Net Settlement Fund (*i.e.*, the Settlement Fund (including any interest earned) net of Court-approved attorneys' fees, expenses (including settlement-related costs and expenses) and service awards to the named plaintiffs), after which the claims administrator will prepare a final report for the Court's review and approval. *See generally* ECF No. 982-4 at pp. 1, 4-11. Upon Court approval, the claims administrator will issue payment to Class members. *Id.* at p. 11. To the extent any monies remain unclaimed (which, in the experience of Class Counsel, is unlikely) and it is economically feasible to do so, Plaintiffs will seek court approval concerning the distribution of any such unclaimed funds. *Id.* In sum, the Plan of Allocation is straightforward and non-burdensome to Class members and will ensure timely processing of claims and distribution of settlement funds.

Accordingly, this factor strongly supports final approval of the proposed Settlement.

C. THE SETTLEMENT PROVIDES A SUBSTANTIAL AND IMMEDIATE DIRECT FINANCIAL BENEFIT TO CLASS MEMBERS

In *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013), the Third Circuit stated that "one of the additional inquires for a thorough analysis of settlement terms is the degree of direct benefit provided to the class." *Id.* at 174. *See also In re Suboxone*, 2023 U.S. Dist. LEXIS 215784, at *12 (recognizing this factor). As the Third Circuit explained, "[i]n making this determination, a district court may consider, among other things, the number of individual awards compared to both the number of claims and the estimated number of class

members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards." *In re Baby Products*, 708 F.3d at 174.

The first *Baby Products* consideration is not relevant where, as here, "each class member who submit[s] a valid claim is eligible to receive an individual award." *Ward v. Flagship Credit Acceptance LLC*, 2020 U.S. Dist. LEXIS 25612, at *65 (E.D. Pa. Feb. 13, 2020).

The second *Baby Products* consideration favors approval of the Settlement. While the Settlement represents a compromise of the full amount of Plaintiffs' damages and thus necessarily represents a discounted value of the Class's total damages, there can be no question that the Settlement allows Class members to receive a substantial economic recovery - *i.e.*, a substantial direct benefit - while avoiding the risks of jury trial and appeals. *See generally id.* at *66-67.

Finally, the third *Baby Products* consideration also demonstrates direct benefit to Class members. As detailed above, the claims process outlined in the Plan of Allocation will ensure that each Class member's recovery will be based on their respective direct purchases from Indivior, meaning that each Class member's recovery will fairly track the type and extent of their respective damages. *See also* Section III.D, *infra*.

Accordingly, this factor strongly supports final approval of the proposed Settlement.

D. THE PLAN OF ALLOCATION SHOULD BE APPROVED

In assessing plans of allocation, the same standards of review applicable to the Court's review of the settlement itself apply: courts consider whether an allocation plan is fair, reasonable, and adequate. *See In re Remicade Antitrust Litig.*, 2022 U.S. Dist. LEXIS 136774, at *36 (E.D. Pa. Aug. 2, 2022).[11]

[11] *See also* FRCP 23(e)(2)(D) ("the proposal treats class members equitably relative to each other").

The Plan of Allocation (ECF No. 982-4), which was preliminarily approved by this Court as in compliance with Rule 23(e) and "otherwise fair and reasonable" (*see* ECF No. 984 (Preliminary Approval Order) at ¶ 10), meets this standard. As set forth more fully in the Plan of Allocation and accompanying Declaration of Dr. Russell L. Lamb that accompanied Plaintiffs' preliminary approval papers, (ECF Nos. 982-4 and 982-5), Plaintiffs will allocate the Net Settlement Fund in proportion to each claimant's[12] respective purchases of branded Suboxone Tablets and branded Suboxone Film from Indivior. *See* ECF No. 982-5 at pp. 11-12. This method of allocation, which reimburses class members based on the type and extent of their injuries, is inherently reasonable. *See* ECF No. 982-1 at pp. 10-12. *See also O'Hern*, 2023 U.S. Dist. LEXIS 76789, at *20 (where allocation plan provided each class member would receive a *pro rata* share of the net settlement "based on the relative losses they sustained" there "can be no dispute that the settlement treats all class members equitably"). Further, as detailed above, the submission of claims by Class members is a simple matter of each Class member verifying the purchase totals provided to each of them in pre-populated, individualized claims forms (or submitting their own purchase data with their claim form, if they wish). Similar plans of allocation have been repeatedly approved in similar pharmaceutical antitrust actions, including by this Court and in other cases challenging unlawful "product hops." *See* ECF No. 982-1 at p. 11 n.2 (listing cases). Finally, Class Counsel highly recommend the Plan of Allocation, which further supports approval. *See In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, 2021 U.S. Dist. LEXIS 18894, at *35 (D.N.J. Feb. 1, 2021) ("In determining whether a plan of allocation is fair, reasonable and adequate, courts give great weight to the opinion of qualified counsel"). No Class member objected to the Plan of Allocation.

[12] Claimants are Class members or Class members' assignees that timely submitted completed claim forms. *See* Plan of Allocation (ECF No. 982-4) at p. 2 n.4.

Accordingly, the Plan of Allocation should be approved as fair, reasonable and adequate.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the accompanying proposed Order.

Dated: February 2, 2024

Respectfully Submitted,

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