UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE OPANA ER ANTITRUST LITIGATION	MDL No. 2580 Lead Case No. 14-cv-10150
THIS DOCUMENT RELATES TO: All Actions	Hon. Harry D. Leinenweber

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

I. INTRODUCTION

I, Bruce E. Gerstein, partner at Garwin Gerstein & Fisher and co-lead counsel for Direct Purchaser Class Plaintiffs ("Plaintiffs"), respectfully submit this declaration in support of Class counsel's application for:

(1) an award of attorneys' fees from the Settlement with Impax Laboratories, Inc. ("Impax");

(2) reimbursement of expenses incurred in the prosecution of Plaintiffs' claims against Impax; and

(3) service awards to the named Class representatives, Value Drug Company ("Value Drug"), Meijer, Inc., and Meijer Distribution, Inc. (together, "Meijer").

Garwin Gerstein & Fisher has been involved in all material aspects of this litigation from the pre-complaint investigation and filing of Plaintiffs' initial complaint in June 2014 through the filing of the Settlement with the Court (and continuing). I am therefore fully familiar with the litigation, the most significant aspects of which are outlined below.

II. COMMENCEMENT OF THE CASE

1. Class counsel[1] began investigating the delayed launch of generic Opana ER in earnest in early 2014. That investigation included gathering information regarding the market availability of generic versions of Opana ER, reviewing and analyzing the Opana ER patent litigation proceedings, and researching and reviewing publicly available information regarding the terms and conditions of Endo's settlements with Impax and the other would-be generic competitors.

[1] Class counsel includes attorneys from Berger Montague PC, Garwin Gerstein & Fisher, LLP., Odom & Des Roches, LLC, Smith Segura Raphael & Leger, LLP, Taus, Cebulash & Landau, LLP, Faruqi & Faruqi LLP, Taus, Cebulash & Landau, LLP, Kaplan Fox & Kilsheimer LLP, Sperling & Slater, PC., Law Offices of Jordan M. Cramer, PC and Vanek Vickers & Masini.

2. On June 4, 2014, Class counsel filed the first lawsuit on behalf of their client, Rochester Drug Co-Operative, alleging that Defendants Endo Health Solutions Inc., Endo Pharmaceuticals Inc., Penwest Pharmaceuticals Co. (collectively, "Endo") and Impax Laboratories, Inc. ("Impax") engaged in an unlawful scheme to unreasonably delay competition for extended release oxymorphone hydrochloride, which Endo sells under the brand name Opana ER. Class counsel filed on behalf of a putative class of direct purchasers.[2] Soon thereafter, Class counsel filed complaints on behalf of Value Drug[3] and Meijer[4] with substantially similar allegations.

3. On December 12, 2014, the United States Judicial Panel on Multidistrict Litigation issued an order transferring the direct purchaser class actions (as well as indirect purchaser class actions) to the Northern District of Illinois.[5]

4. This Court issued Case Management Order No. 1 on April 16, 2015, consolidating all of the direct purchaser actions and appointing Garwin Gerstein & Fisher, LLP ("GGF") and Berger Montague PC ("Berger") Interim Co-Lead Counsel and Kaplan Fox & Kilsheimer, LLP interim liaison counsel.[6]

5. Class counsel filed the First Amended Consolidated Class Action Complaint ("Amended Complaint") on May 4, 2015, which remained the operative complaint for the

[2] *Rochester Drug Co-Operative, Inc. v. Endo Health Solutions Inc. et al*., No. 14-cv-3185 (E.D. Pa.) (filed June 4, 2014) (now No. 14-cv-10151 (N.D. Ill.))

[3] *Value Drug Company v. Endo Health Solutions Inc. et al*., No. 14-cv-5416 (N.D. Ill.) (complaint filed on July 16, 2014).

[4] *Meijer, Inc., et al. v. Endo Health Solutions Inc. et al*., No. 14-cv-7320 (N.D. Ill.) (complaint filed on Sept. 19, 2014).

[5] *See* Transfer Order, *In re: Opana ER Antitrust Litigation*, MDL No. 2580, ECF No. 54 (Dec. 12, 2014).

[6] ECF No. 86.

duration of litigation.[7] The Amended Complaint brought three claims for relief for violations of Section 1 and Section 2 of the Sherman Act, 15 U.S.C. § 1-2.

6. The Amended Complaint alleged that Endo paid Impax to stay off the market with a three-part payment: (a) a promise by Endo not to compete with Impax using Endo's own authorized generic of Opana ER when Impax belatedly came to market (the "No AG agreement"), (b) a cash payment to compensate Impax if the market for Opana ER (and, thus, the market for Impax's generic) diminished before Impax's delayed launch (the "Endo Credit"), and (c) an immediate $10 million cash payment under the Development and Co-Promotion Agreement ("DCA").

7. Class counsel alleged that Endo's reverse payment to Impax delayed market entry of generic Opana ER, causing direct purchasers to pay overcharges on their brand and generic Opana ER purchases.

8. This litigation was the first to allege that Defendants Endo and Impax violated Sections 1 and 2 of the Sherman Act by entering into an unlawful reverse payment, as set forth in *Actavis*,[8] to settle patent infringement litigation. The FTC eventually pursued litigation under a similar legal theory, filing a complaint in March 2016, almost two years after Class counsel filed the first complaint. *FTC v. Endo, et. al*, No. 16-cv-01440 (E.D. Pa.) (complaint filed on Mar. 30, 2016).

9. Class counsel investigated and developed this case independently, without the benefit of publicly filed complaints or public information on investigations or indictments brought by government agencies. Class counsel filed this case, on a fully contingent basis, with

[7] ECF No. 101.

[8] *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

the real risk of nonpayment and without the assurance of liability that often confers when a civil case follows criminal or civil indictments or guilty pleas in an earlier government action. Class counsel took that risk knowing it could take a decade to fully prosecute and millions of dollars and tens of thousands of attorney hours to properly resource.

10. Class counsel and their clients, Meijer and Value Drug (and RDC before its dismissal), did not agree to a contingent fee award in advance.

11. The direct purchasers in the DPP Class consist of sophisticated business entities who have served as Class members and recovered settlements from numerous pharmaceutical pay-for-delay antitrust cases like this one. Class counsel are largely the same legal team that have been litigating direct purchaser delayed generic entry antitrust cases since 1998. As a result of Class counsel's historical efforts, the largest members of these classes – the three national wholesalers AmerisourceBergen Corp., Cardinal Health, Inc. and McKesson Corp. – have received substantial recoveries in prior pharmaceutical pay-for-delay cases. These same entities have provided letters and declarations in previous cases affirmatively supporting fee applications, where Class counsel requested a fee of one-third (33.3%) of the settlement. *See* Ex. A. None of these cases, however, was litigated through trial and none involved a significant settlement with one defendant during a trial that ended with a verdict for the other defendant, as is the case here.

III. DEFENDANT'S MOTION TO DISMISS

12. On July 3, 2015, Endo and Impax filed a 29-page motion to dismiss Plaintiffs' claims. ECF Nos. 117-18. Defendants argued that (1) the "Endo Credit," no-AG agreement, and Endo's non-refundable upfront $10 million cash payment under the DCA did not constitute large reverse payments under *Actavis*; and (2) because other generic manufacturers were still

embroiled in patent infringement litigation on later-issued patents, DPPs could not plausibly allege that Impax would have launched its generic Opana ER earlier absent the reverse payment agreement, which contained a so-called "broad license." ECF No. 118.

13. Class counsel responded in sixty pages on August 21, 2015, raising, among other things, a newly issued decision in the Third Circuit which directly refuted Defendants' theory that a no-AG agreement should not constitute a large, reverse payment actionable under *Actavis*. ECF No. 129 at 3, n.6 (*citing King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp*., 791 F.3d 388, 395 (3d Cir. 2015)).

14. The Court denied Defendants' motion to dismiss in a 40-page opinion issued on February 10, 2016, acknowledging that, among other things, Plaintiffs' claims about the value of the alleged reverse payments "may be an issue for summary judgment or trial." *In re Opana ER Antitrust Litig*., 162 F. Supp. 3d 704, 719-20 (N.D. Ill. 2016).

IV. WRITTEN DISCOVERY

15. Following the denial of Defendants' motion to dismiss, Class counsel, on behalf of DPPs, served their First Set of Requests for Production of Documents ("RFPs") on Endo and Impax on April 19, 2016. By October 2017, Class counsel had served each Defendant with over 100 RFPs. Class counsel also responded to more than 80 RFPs served on Plaintiffs by Defendants.

16. By January of 2018, Class counsel served Endo and Impax with sixteen and fifteen interrogatories, respectively, and responded to ten interrogatories on behalf of Plaintiffs.

17. In September 2018, Class counsel served Defendants with Requests for Admission.

18. Class counsel also served a subpoena, consisting of six document requests, on

non-party, Actavis Pharma, Inc. (*see* ECF No. 279-1) and sought document discovery form other non-parties as well.

19. Class counsel was required to file numerous motions to compel compliance with document requests, interrogatories, and deposition requests served on Endo, Impax, and third parties. *See e.g.* ECF Nos. 262 & 268 (motion to compel Endo to produce documents), 279 (motion to compel non-party, Actavis, to comply with subpoena), 281 (motion to compel 30(b)(6) testimony and interrogatory responses from Endo), 285 (motion to compel testimony and document productions from Endo and Impax), 291 (motion to compel testimony and interrogatory responses from Impax), 347 & 361 (motion to compel Endo to produce forecasting documents withheld for privilege), 359 & 365 (motion to compel Impax to provide responses to interrogatories 14 and 15 and produce relevant documents), 372 (motion to compel Endo to provide responses to interrogatories 15 and 16).

20. All told, thousands of documents were produced in this case, from Endo, Impax, and the third parties combined. In addition, hundreds of thousands of lines of transactional data were produced, reflecting sales, credits, returns, chargebacks, and price adjustments. Class counsel, in subject-matter teams, analyzed all such productions, creating a variety of work product memoranda.

V. DEPOSITIONS OF FACT WITNESSES

21. Based on their review of documents, Class counsel identified and deposed 20 fact witnesses, from both parties and non-parties, all of which required extensive preparation. These depositions are catalogued in the table below.

Deponent Name	Employer	Deposition Date	Location
1. Bingol, Demir	Endo	10/23/2018	Philadelphia, PA
2. Chapman, Tara	Endo	2/7/2018	Philadelphia, PA

3. Cobuzzi, Robert	Endo	10/11/2018	New York, NY
4. Cuca, Robert	Endo	9/6/2018	Philadelphia, PA
5. Donatiello, Guy	Endo	9/28/2018	Philadelphia, PA
6. Levin, Alan	Endo	9/20/2018	New York, NY
7. Lortie, Brian	Endo	10/26/2018	Philadelphia, PA
8. Lortie, Brian	Endo	11/7/2018	Philadelphia, PA
9. Manogue, Caroline	Endo	3/16/2018	Philadelphia, PA
10. Anthony, John	Impax	5/22/2018	Wayne, PA
11. Berman, David	Impax	9/5/2018	San Francisco, CA
12. Bradley, Mark	Impax	10/18/2018	Philadelphia, PA
13. Camargo, Joseph	Impax	9/7/2018	Menlo Park, CA
14. Engle, Todd	Impax	6/14/2018	Philadelphia, PA
15. Hsu, Larry	Impax	12/18/2018	Menlo Park, CA
16. Koch, Arthur	Impax	6/21/2018	Philadelphia, PA
17. Mengler, Christopher	Impax	8/1/2018	New York, NY
18. Sica, Kevin	Impax	2/23/2018	Philadelphia, PA
19. Smolenski, Theodore	Impax	5/11/2018	Philadelphia, PA
20. Snowden, Margaret	Impax	12/19/2018	Menlo Park, CA
21. Snowden, Margaret	Impax	12/20/2018	Menlo Park CA
22. Myers, David	Actavis (Teva)	4/25/2018	Roseland, NJ

VI. EXPERT DISCOVERY

22. Plaintiffs retained eleven experts, who collectively issued 22 reports, catalogued in the table below.

Plaintiff Expert Name:	**Main Topic(s):**	**Number of Reports:**
Glen P. Belvis	(1) A reasonable and experienced patent litigator would have concluded that it was very likely there would be a final determination of no infringement and invalidity in the *Endo v. Impax* litigation; (2) A reasonable and experienced patent litigator would have concluded that Impax had an overall greater than 85% likelihood of success in prevailing in the *Endo v. Impax* litigation; (3) Timing of a final decision (December 17, 2010) and appeal (December 17, 2011) in the *Endo v. Impax* litigation; and (4) Endo's and Impax's expected litigation costs saved by settling the *Endo v. Impax* litigation.	2
James R. Bruno	(1) Impax (from manufacture and supply	2

	perspective) could have launched all strengths of Opana ER as early as December 2010 and could have continued to sell thereafter; (2) Endo could have launched an AG simultaneously with an earlier Impax launch and stayed on the market thereafter; (3) Actavis could have launched 181 days after Impax's launch and stayed on the market; and (4) Endo could have used its DEA API quota for Opana ER to manufacture Opana ER AG.	
Stephen R. Byrn	The patent claims Endo asserted against Impax in the *Endo v. Impax* litigation were invalid and not infringed.	2
Janet K. DeLeon	(1) When Impax and Actavis would have obtained final regulatory approval for their generic versions of Opana ER; (2) The lack of regulatory hurdles Impax would have faced in the event of an earlier launch; and (3) The lack of regulatory hurdles preventing Endo from launching an authorized generic version at any time.	2
Jeffrey J. Leitzinger	(1) Endo had market power in the market for brand and generic Opana ER; (2) Antitrust injury for the DPP Class; and (3) Quantification of the DPP Class's aggregate overcharge damages.	3
Martin A. Lessem	(1) It would be reasonable for Impax to launch its generic Opana ER product even if an FDA-approved risk management program (i.e., a RiskMAP or REMS) was not put in place until a later date; (2) The reasonable timeline for Impax to put a risk management plan into place.	1
Thomas G. McGuire	(1) The large unexplained value of the reverse payments from Endo to Impax is anticompetitive and there were no procompetitive benefits; and (2) Economic evidence predicts that absent the reverse payments it would have been economically rational for profit-seeking companies like Endo and Impax to have reached a settlement without a reverse payment and with an earlier generic entry (April – July 2011), including an Endo AG followed by Actavis.	2

Luis A. Molina	The lack of reliable therapeutic interchangeability of Opana ER with other drugs.	2
Seddon R. Savage	The significant differences between Opana ER and other opioid drugs, including both short- and long-acting opioids, that can be clinically important in treating patients.	2
John R. Tupman, Jr.	(1) The DCA (development and co-promotion agreement) was not subject to typical due diligence; (2) The structure of the DCA disproportionately favored Impax; and (3) No reasonable pharmaceutical company would have entered into the DCA, and its $10M upfront payment is a conservative estimate of Endo's overpayment for the DCA.	2
Patricia J. Zettler	The FDA's risk management efforts and requirements would not have impeded launch (or continued sales) by Impax of its generic Opana ER product after final approval of Impax's ANDA.	2

The need for eleven experts illustrates the complexities of this case. This case required Class counsel to grapple with and overcome numerous obstacles, including:

a. a settlement agreement that contained a purported "broad license" for later-issued patents;

b. Endo's success litigating patent infringement lawsuits against other generic manufacturers for those later-issued patents (evidence of which was admitted at trial over Plaintiffs' objection);

c. a complicated payment provision called the "Endo Credit" contained in the settlement agreement;

d. the DCA signed in conjunction with the settlement agreement and disputes over its related payments;

e. Endo's efforts to convert the market from original Opana ER to reformulated Opana ER and disputes over each product's safety and abuse deterrence, related petitions filed with and decisions issued by the FDA, and Endo's ultimate decision to remove reformulated Opana ER from the market.

23. Each of Class counsel's experts was deposed, in most cases twice. In all, Plaintiffs defended 22 expert depositions.

24. Class counsel ultimately prepared eight[9] of their eleven witnesses to testify at trial, including extensive sessions to prepare for lengthy direct and cross-examinations on very complex topics that would need to be delivered to a lay jury in a clear and comprehensible fashion.

25. Meanwhile, Defendants proffered twelve experts:

Defense Expert Name:	**Main Topics:**
Sumanth Addanki	(1) The relevant market for the rule-of-reason analysis; (2) Endo's purported lack of monopoly power; (3) The purported lack of anticompetitive effects from the settlement between Endo and Impax; (4) The claimed absence of a "large, unjustified payment" between Endo and Impax; (5) The supposed procompetitive effects of the settlement between Endo and Impax
Louis P. Berneman	The commercial reasonableness of the DCA.
Reza Fassihi	(1) Overview of the science and background concerning the claimed inventions of the '456, '933, '122, '216, and '779 patents. (2) The claimed validity of the '933 and '456 patents. (3) irrelevant opinion concerning infringement of Impax's generic oxymorphone hydrochloride product(s) of the '122, '216, and '779 patents.
E. Anthony Figg	(1) Impax's decision to settle the litigation with Endo; (2) The likely result of the Impax-Endo patent litigation; (3) Saved litigation costs from settling the Impax-Endo patent litigation; (4) At-risk launches
Christopher J. Gilligan	(1) The substitutability of long-acting opioid analgesics for almost all patients.
Jody L. Green	(1) Assertion that contrary to the findings of the FDA, reformulated Opana ER was safer than original Opana ER; (2) The FDA's decision to ask Endo to withdraw reformulated Opana ER from the market
Margaret E. Guerin-Calvert	Damages
John H. Johnson, IV	Class certification
Anthony Lowman	(1) Overview of the science and background concerning

[9] Plaintiffs prepared the eight experts named on their Second Amended Trial Witness List: Glen Belvis, James Bruno, Stephen Byrn, Janet DeLeon, Jeffrey J. Leitzinger, Thomas McGuire, Seddon Savage, and John Tupman. *See* ECF No. 895-3. All but Mr. Bruno and Ms. DeLeon did testify at trial.

	the claimed inventions of the '456 and '933 patents. (2) The supposed infringement of Impax's generic oxymorphone hydrochloride product(s) of the '456 and '933 patents.
Edward Michna	(1) The therapeutic substitutability of ER Opioids; (2) Reasons that prescribers choose between ER Opioid options.
Nita U. Patel	The risk management and regulatory requirements related to Impax's generic Opana ER product.
Jonathan Singer	(1) Endo's chance of winning the underlying patent litigation. (2) response to the opinions of Glen Belvis. (3) Litigation timing and timeline. (4) Opinions concerning the effect of the purported broad license to the later-issued patents

26. Plaintiffs took or participated in the depositions of each of Defendants' twelve experts, obtaining admissions needed for class certification, to oppose summary judgment, to potentially cross examine them at trial and limit their testimony prior to trial.

VII. CLASS CERTIFICATION

27. Class certification was extensively briefed and hotly contested in this case. *See* ECF Nos. 436-37, 450, 457, 468, 472. It included notices of supplemental authority, ECF Nos. 483, 503, a sur-reply, ECF Nos. 485, 492, and a response to the sur-reply. ECF Nos. 490, 495. This Court certified the Class, Class counsel oversaw notice to the Class, and no Class members opted out other than the Retailer Plaintiffs[10] that previously filed their own individual actions in the case. ECF Nos. 726, 738, 749, 751, 768.

VIII. SUMMARY JUDGMENT AND *DAUBERT* MOTIONS

28. Class counsel simultaneously managed summary judgment and *Daubert* motions, filing and responding to hundreds of pages of briefing across a variety of complex issues over the

[10] "Retailer Plaintiffs" refer to Albertson's LLC, CVS Pharmacy, Inc., HEB Grocery Company L.P., The Kroger Co., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Safeway Inc., and Walgreen Co.

course of six months.

29. Defendants filed a summary judgment motion on causation and damages, arguing that Plaintiffs suffered no antitrust injury because the settlement agreement allegedly promoted competition and hastened generic entry by granting Impax a purported broad license that permitted Impax to continue selling generic Opana ER after Endo acquired the later-issued patents and enforced them against other generics. ECF Nos. 539, 540. Endo also moved for partial summary judgment on several complex patent issues related to the prior patent litigation, seeking to prevent Plaintiffs (a) from recovering damages after the issuance of its two later-issued patents; and (b) from presenting certain arguments and defenses related to Impax's purported patent infringement. ECF Nos. 532, 533. Along with its summary judgment motions and replies, Defendants collectively submitted 160 pages of undisputed facts and 138 exhibits. ECF Nos. 562, 581.

30. Defendants also filed ten *Daubert* motions, totaling another 216 pages of briefing (including replies) and an additional 105 exhibits. ECF Nos. 510 & 512 (Tupman), 513 & 515 (DeLeon), 516 (Molina), 529 (Leitzinger), 537 & 542 (Bruno), 541 & 544 (Belvis), 546 & 549 (Byrn), 550 & 554 (Zettler and Lessem), 556 & 559 (McGuire), 757 & 758 (Leitzinger, renewed).

31. Plaintiffs filed 10 *Daubert* motions of their own, totaling 222 pages in briefing (including opening and replies) and supported by 98 exhibits. ECF Nos. 519 (Patel), 520 (Singer), 521 (Figg), 522 (Lowman), 523 (Post-date), 524 (Fassihi), 525 (Gilligan), 526 (Addanki), 527 (Green), 528 (Berneman), 534 (Declaration and Exhibits in support of *Daubert* motions) 565 (Patel reply) 566 (Singer reply), 568 (Figg reply), 569 (Lowman reply), 571 (Post-date reply), 572 (Fassihi reply), 573 (Gilligan reply), 575 (Addanki reply), 576 (Green reply),

577 (Berneman reply).

32. Class counsel had two months to respond to both summary judgment motions and all ten *Daubert* motions. Class counsel opposed Defendants' summary judgment motion with their own statements of undisputed facts and replies to Defendants' statements, with briefing that totaled 150 pages, accompanied by 138 exhibits. ECF Nos. 615 & 617-21, 639, 644.

33. Plaintiffs opposed each of Defendants' ten *Daubert* motions in another 135 pages of briefing and supported by 57 exhibits. ECF Nos. 600 (Tupman), 602 (DeLeon), 603 (Molina), 604 (Bruno), 605 (Belvis), 609 (Leitzinger), 613 (McGuire), 614 (Zettler & Lessem), 616 (Byrn), 762 (Leitzinger renewed).

34. In a comprehensive opinion, the Court denied Defendants' summary judgment motions and denied, at least in part, all but one of Defendants' *Daubert* motions, while granting several of Plaintiffs' *Daubert* motions to exclude or partially exclude testimony by Dr. Patel, Mr. Singer, Mr. Figg, Dr. Fassihi, Dr. Green, and Dr. Berneman. *In re Opana ER Antitrust Litig.*, 2021 WL 2291067 (N.D. Ill. June 4, 2021).

IX. TRIAL PREPARATION

35. With the Court's opinion on June 4, 2021, expert discovery, summary judgment, and *Daubert* were resolved, and Class counsel began final preparations for trial. The Court's July 29, 2021 Order set trial for June 7, 2022, with a pretrial conference on June 2, 2022. ECF No. 744.

36. On May 3, 2022, a month before trial, Class counsel filed seven motions *in limine*, totaling 82 pages. ECF Nos. 806-12. Defendants filed 23 motions *in limine*, comprising 174 pages of briefing. ECF Nos. 801-05, 814-15, 817-20, 822, 824-25, 827, 829, 831. Two weeks later, Class counsel filed 91 pages of briefing in opposition. ECF Nos. 839, 842-43, 845-

46, 848, 865.

37. In preparation for trial and the joint pretrial order, the parties exchanged witness lists, deposition designations, exhibit lists, proposed jury instructions, and proposed verdict forms on at least twelve dates from March 22 through June 3, 2022, objecting to each other's submissions and trying to narrow areas of dispute. The Joint Final Pretrial Order was ultimately filed on May 24, 2022. ECF No. 895.

38. Class counsel, on behalf of Plaintiffs, named 35 fact witnesses and eight expert witnesses, which Class counsel prepared to examine or present via video depositions at trial. ECF No. 895-3. Endo and Impax named 44 witnesses, which Class counsel prepared to cross-examine or present via counter-designated video depositions at trial. ECF Nos. 895-4, 895-5.

39. Class counsel submitted a 186-page spreadsheet of deposition designations, to which Defendants objected and counter-designated deposition testimony. ECF No. 895-6. Class counsel responded to Defendants' objections, objecting and providing reply-designations in response to Defendants' counter-designations. *Id.* Endo submitted a 104-page spreadsheet of deposition designations and Impax submitted a 105-page spreadsheet. ECF Nos. 895-7, 895-8. For each, Class counsel responded with objections and counter-designations. *Id.*

40. Class counsel prepared a final exhibit list with 1,664 exhibits, while Endo offered 618 and Impax offered 190, which Class counsel responded to with objections as appropriate. ECF Nos. 895-9, 895-10, 895-11.

41. Class counsel prepared general jury instructions, Phase I jury instructions, and Phase II jury instructions, as well as statements for the Court in support of their jury instructions, totaling more than 250 pages. ECF Nos. 895-12, 895-13, 895-14, 895-15. Class counsel also prepared objections to Endo's and Impax's separate, opposing jury instructions and responses to

Endo's and Impax's objections to Plaintiffs' proposed jury instructions. ECF Nos. 895-16, 895-17, 895-18, 895-19, 895-20. Last, Class counsel prepared proposed verdict forms for Phase I and Phase II, along with a supportive statement and objections to Endo's and Impax's separate proposed verdict forms, which collectively totaled 23 pages. ECF Nos. 895-21, 895-22, 895-23.

X. TRIAL

42. With the final pre-trial conference scheduled for June 2, 2022, Class counsel travelled to Chicago a few days beforehand to submit to court-mandated COVID testing and further coordinate with co-counsel and the other Plaintiff groups on trial strategy. Class counsel telephonically attended the pretrial conference, where the Court ruled on motions *in limine* and provided instructions related to jury selection and trial logistics, among other things.

43. Class counsel also prepared for jury selection by reviewing more than 200 pages of juror information and questionnaire responses.

44. The trial began on June 9, 2022 with *voir dire*. A jury was selected that morning and Class counsel offered opening arguments that afternoon.

45. Throughout trial, which would continue against Endo until July 1, 2022, Class counsel attended trial during the day, examining witnesses, countering any objections raised by Defendants, and proffering objections of their own. Each evening, based on the Parties' arrangement, Class counsel exchanged exhibit lists, deposition designations, related objections, counter-designations, and reply-designations with Defendants for witnesses whose deposition testimony was presented at trial by video.

46. Just before opening statements on June 9, 2022, Impax and Class counsel announced a settlement with Impax, who also settled with the Retailer plaintiffs. Impax had not settled with the end-payors, however, so the trial continued against both Impax and Endo. Impax

then announced a settlement with the end-payors on June 15th. The trial continued thereafter against Endo, and the jury ultimately returned a jury verdict in favor of Endo on July 1, 2022. ECF No. 1047 (amended in ECF Nos. 1053, 1067). Plaintiffs' post-trial motions are pending, ECF No. 1048, though stayed due to Endo's bankruptcy filing. ECF No. 1064.

XI. MEDIATION AND SETTLEMENT

47. In May 2022, Class counsel and Impax engaged in mediation to attempt to resolve this case, retaining Jonathan Marks, one of the preeminent mediators in the nation. An initial, full-day mediation continued with multiple individual virtual sessions in May and early June, laying the groundwork for the parties' ultimate settlement just as trial started.

48. DPPs and Impax reached an agreement in principle on June 8, 2022, just as the parties prepared for opening statements. After the jury verdict, Class counsel negotiated the ultimate settlement agreement with Impax, which was executed on July 15, 2022, just two weeks after the jury's verdict in Endo's favor.

XII. THE SETTLEMENT

49. On July 19, 2022, Class counsel filed a fully-executed settlement agreement with the Court. ECF No. 1043-1. The settlement provides for Impax to pay $145,000,000 (one hundred and forty-five million dollars) in cash for the benefit of all Class members in exchange for dismissal of the litigation between Plaintiffs and Impax with prejudice and certain releases. The settlement is payable in three installments: $58,000,000 was paid by June 22, 2022; $58,000,000 (plus 3% annualized interest) no later than January 17, 2023; and $29,000,000 (plus 3% annualized interest) no later than January 17, 2024.

50. In their Motion for Preliminary Approval (ECF No. 1043), 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. In preparation for filing that motion, Class counsel entered into an escrow agreement with a proposed escrow agent for maintenance of the settlement fund and engaged a proposed claims administrator to assist with the notice process. Class counsel's request for preliminary approval was also posted on the GGF and Berger websites.

51. On July 28, 2022, the Court concluded that that the settlement between the Class and Impax 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. ECF No. 1054. Concurrently, the Court appointed an escrow agent and claims administrator, approved a form of notice to the class, and set a schedule. *Id.* During the preliminary approval hearing, the Court described the settlement with Impax as "excellent" and "great." *See* Transcript of Preliminary Approval Hearing, dated July 28, 2022 at 2, 6-7.[11]

52. Impax made its initial settlement deposit of $58 million into an escrow account that is earning interest for the benefit of the Class, and the claims administrator duly mailed the written notice to class members on August 18, 2022.

53. Class members have until October 3, 2022 to object to the settlement or any of its terms and/or to Class counsel's request for attorneys' fees, unreimbursed expenses, and service 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 October 3, 2022, the Court will promptly be notified, and such objections will be addressed in Plaintiffs' upcoming submission for final approval of the settlement, due on October 24, 2022.

XIII. SUMMARY OF ATTORNEYS' FEES AND UNREIMBURSED EXPENSES

[11] A copy of the Preliminary Approval Transcript is attached as Exhibit B.

54. Class counsel are highly-skilled and nationally-respected law firms and have over two decades of extensive experience prosecuting and trying pharmaceutical antitrust cases (including cases challenging reverse-payment settlements of patent litigation) on behalf of the same core class of direct purchasers.

55. At all junctures of this litigation, Class counsel faced substantial risk. Other reverse payment cases have lost at the motion to dismiss or summary judgment stage. *See e.g., Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98 (2d Cir.), *reh'g denied*, 625 F.3d 779 (2d Cir. 2010) (affirming summary judgment for defendants in reverse payment case); *In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734 (E.D. Pa. 2015) (same); *In re Actos End Payor Antitrust Litig.*, 2015 WL 5610752 (S.D.N.Y. Sept. 22, 2015) (pre-answer dismissal in reverse payment case); *In re Effexor XR Antitrust Litig.*, 2014 WL 4988410 (D.N.J. Oct. 6, 2014) (same); *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523 (D.N.J. 2014) (same); *In re Loestrin 24 Fe Antitrust Litig.*, 45 F. Supp. 3d 180 (D.R.I. 2014) (same); *In re Lamictal Direct Purchaser Antitrust Litig*., 18 F. Supp. 3d 560 (D.N.J. 2014) (same). *See also Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421 (3d Cir. 2016) (affirming summary disposition of product hop case). Some of these dismissals were affirmed in whole or part, while others were reversed.

56. Direct purchasers in reverse payment cases have also occasionally been denied class certification. *See e.g. In re Lamictal Direct Purchaser Antitrust Litig.*, 2021 WL 2349828 (D.N.J. June 7, 2021) (denying class certification in reverse payment case); *King Drug Co. of Florence, Inc. v. Cephalon, Inc*., 2017 WL 3705715 (E.D. Pa. Aug. 28, 2017) (same); *In re AndroGel Antitrust Litig*., 2018 WL 3424612, at *3-4 (N.D. Ga. July 16, 2018) (same); *In re Zetia (Ezetimibe) Antitrust Litig*., 2022 WL 1117100 (E.D. Va. Apr. 13, 2022) (same).

57. Certainly, once the case goes to trial, there is no guarantee of success, as

demonstrated most concretely by the jury's verdict in favor of Endo in this case. Even without the benefit of hindsight in this case, however, antitrust cases alleging delayed generic entry have proven difficult for plaintiffs to win at trial. *See e.g.*, *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 39 (1st Cir. 2016) (upholding jury verdict "that although the plaintiffs had proved an antitrust violation in the form of a large and unjustified reverse payment from AstraZeneca to Ranbaxy, the plaintiffs had not shown that they had suffered an antitrust injury that entitled them to damages"); *Louisiana Wholesale Drug Co. v. Sanofi-Aventis*, 2009 WL 2708110, at *3 (S.D.N.Y. Aug. 28, 2009) (upholding jury verdict in favor of defendants where plaintiffs alleged defendant's sham petitions filed with the FDA resulted in delayed generic entry, but jury found petitioning of FDA was not "objectively baseless").

58. Antitrust cases tend to be risky and complex. Hatch-Waxman antitrust cases, which Class counsel have decades of experience prosecuting, require an understanding of intricate FDA regulations and the drug application approval process; expertise in patent law and patent litigation, including substantive analyses of patents and patent infringement allegations; economic expertise to evaluate the contours of monopoly power, which sometimes includes analysis of the relevant market; the development of factual evidence and an economic model to demonstrate a "but-for world" devoid of the alleged anticompetitive behavior; and the calculation of damages to the Class caused by the alleged misconduct. These cases, including this one, also require substantial attorney (and support staff) hours and incurrence of substantial expenses and costs.

59. Even for Class counsel, with decades of experience prosecuting antitrust cases and reverse payment cases in particular, this case proved to be one of the most challenging cases Class counsel have encountered. Class counsel had to grapple with and overcome numerous

factual obstacles, including: a settlement agreement that contained a so-called "broad license" for later-issued patents; Endo's success litigating patent infringement lawsuits against other generic manufacturers for those later-issued patents; a complicated payment provision called the "Endo Credit" contained in the settlement agreement; the Development and Co-Promotion Agreement ("DCA") signed in conjunction with the settlement agreement and disputes over its related payments; Endo's efforts to convert the market from original Opana ER to reformulated Opana ER and disputes over each product's safety and abuse deterrence, related petitions filed with and decisions issued by the FDA, and Endo's ultimate decision to remove reformulated Opana ER from the market at the FDA's request. Class counsel had to understand the due diligence typically involved in drug investment partnerships and conduct an investigation into the due diligence analysis (or lack thereof) undertaken by the Defendants for the DCA at issue. Class counsel also had to investigate and understand the safety and dangers associated with different formulations of Opana ER for abuse deterrence and analyze Endo's claims of safety associated with its reformulated Opana ER. It is hard to overstate the challenge Class counsel faced in making the complexities that this massive litigation presented comprehensible to a lay jury.

60. 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 was still developing when Class counsel filed this case in 2014, just a year after the issuance of the landmark Supreme Court decision in *Actavis* the year prior. *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

61. Plaintiffs' claims could have been dismissed in their entirety at any time, and, absent this settlement with Impax, the Class would be left without any recovery whatsoever (pending any reversal on appeal) in light of the jury's verdict in favor of Endo.

62. Despite the risks outlined above, Class counsel diligently prosecuted this case for eight years. In doing so, Class counsel: (a) reviewed a voluminous amount of documents; (b) successfully defeated Defendants' motions to dismiss and for summary judgment; (c) took or coordinated taking 32 depositions (20 fact depositions and 12 expert depositions), defended experts in 22 depositions and defended two depositions of the class representatives; (d) consulted with and retained 11 experts; (e) briefed and argued several discovery motions pertaining to numerous topics; (f) obtained class certification; (g) prepared the case for trial, including all fact witness, expert witness, and exhibit work; (h) briefed 30 motions *in limine*; (i) presented the full case to a jury; and (j) engaged in negotiations concerning the execution of a settlement agreement that embodied the parties' agreement in principle.

63. Litigating this case 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 often did raise — throughout the stages of the litigation.

64. Impax and Endo have been represented by some of the country's leading law firms, with extensive experience in pharmaceutical antitrust litigation, who have vigorously defended against Plaintiffs' claims at all junctures.

65. Class counsel believe that the settlement with Impax represents an outstanding outcome for the Class, on a risk-adjusted basis and otherwise. The value cannot be overstated in light of the now certain alternative – loss at trial and no recovery whatsoever (absent reversal on appeal).

66. The total expenses incurred by Class Counsel are $4,343,137.06. This includes

$3,068,525.64 in expenses incurred by Class counsel to date and $1,274,611.42 in expenses currently owed by Class counsel, which are in the process of being paid. This also includes $160,166.69 that Class counsel have set aside for their share of potential taxed costs sought by Endo, which are currently the subject of motion practice that is subject to an automatic stay in view of Endo's suggestion of bankruptcy. ECF No. 1064.

67. The following chart summarizes the aggregate time and necessary incidental expenses of all Class counsel, as set forth in more detail in the separate firm declarations of Class counsel, appended here as Exhibits B-K:

Ex.	Firm Name	Hours	Lodestar	Expenses (Litigation Fund Contributions and Otherwise)
C	Berger Montague PC	20627.8	$13,723,939.42	$829.057.98
D	Garwin Gerstein & Fisher, LLP	7900.2	$6,197,338.49	$460,544.38
E	Heim Payne & Chorush LLP	6087.85	$2,988,707.00	$299,290.78
F	Kaplan Fox & Kilsheimer LLP	3000.2	$2,035,542.50	$174,651.59
G	Smith Segura Raphael & Leger, LLP	7178.3	$4,022,697.00	$373,701.99
H	Taus, Cebulash & Landau, LLP	4261.1	$2,839,973.00	$221,212.77
I	Faruqi & Faruqi LLP	1538.2	$1,153,155.50	$200,575.48
J	Odom & Des Roches, LLC	14457	$8,310,962.50	$466,017.03
K	Vanek Vickers & Masini (disbanded)	727.8	$362,538.50	$11,244.42
K	Sperling & Slater, PC	176.5	$108,764.50	$32,229.22
L	Law Offices of Jordan M. Cramer, PC	38	$19,000.00	$0
	TOTALS	**65,992.35**	**$41,762,618.41**	**$3,068,525.64**

68. There is currently a balance in the litigation fund in the amount of $1,429.17. The expenses paid or to be paid from the litigation fund are as follows:

LITIGATION FUND DISBURSEMENTS	
Expense Category	**Amount**
Experts	$2,984,895.50
Transcripts	$47,519.90

LITIGATION FUND DISBURSEMENTS	
Expense Category	**Amount**
Data	$33,356
Trial Support, including conference space	$233,839.51
Class Notice	$2,000
Document Database	$169,974.80
Mediation	$12,426.50
TOTAL	**$3,479,725.32**

69. These expenses were all reasonably incurred and necessary to the representation of the Class. They include costs for computerized legal research, the creation and maintenance of an electronic document database, expert costs, travel and lodging expenses, copying, court reporters, transcripts, and mediation. They also include trial expenses, such as a jury consultant and various other trial-related costs, such as a workspace in Chicago for almost two months.

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

71. Class counsel respectfully request attorneys' fees in the amount of $50,528,470.66 or 36% of the settlement amount (including an equal percentage of any interest accrued since the settlement amount was escrowed), net of reimbursed expenses and service awards granted by the Court pursuant to this motion. The 36% fee is therefore calculated by subtracting $4,343,137.06 in expenses and $300,000 in service awards from the $145 million settlement and multiplying the difference by .36. Based on Class counsel's lodestar of $41,762,618.41, the requested $50,528,470.66 fee represents a multiplier of 1.21 ($50,528,470.66 dived by $41,762,618.41).

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

72. The two class representatives – Value Drug and Meijer – both made a significant contribution in prosecuting Plaintiffs' 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.

73. Value Drug and Meijer took the risk of filing and prosecuting this case despite their status as regular customers of the Defendants, routinely purchasing products from both Impax and Endo.

74. Discovery was a significant burden to the class representatives in this case. Specifically, in accordance with the ESI order, each class representative executed broad document searches and collections based on keywords negotiated with Defendants, resulting in substantial document and data productions, including thousands of pages of documents and several sets of purchase and chargeback data.

75. These discovery efforts required that employees of the class representatives take time away from their regular job functions in order to comply.

76. Each of the class representatives was also deposed, which required preparation as well as a full day of attendance at the deposition.

77. Because this case went to trial, both class representatives prepared for trial. J. Mark Bover, on behalf of Value Drug, travelled to Chicago and testified on behalf of the Class.

78. Throughout the course of the litigation, each class representative spent dozens of hours consulting with Class counsel, staying apprised of the litigation, responding to discovery, preparing and sitting for depositions, and preparing and testifying at trial. The class representatives were required to expend this time and effort without compensation over the several years that Class counsel pressed Plaintiffs' claims against the Defendants.

79. In recognition of its time and effort expended for the benefit of the Class, Class counsel request a service award of $150,000 each for Value Drug and Meijer.

I, Bruce E. Gerstein, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the above is true and correct.

/s/ Bruce E. Gerstein
Bruce E. Gerstein