UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE: OPANA ER ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** **All Direct Purchaser Class Actions**	**MDL DOCKET NO. 2580** **Case No. 1:14-cv-10150 (HDL)**

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Direct Purchaser Class Plaintiffs Value Drug Company ("Value Drug") and Meijer, Inc. and Meijer Distribution, Inc. ("Meijer") (collectively "Plaintiffs" or "Class Representatives") respectfully submit this memorandum in support of their Motion for Final Approval of Proposed Settlement.

I. INTRODUCTION

As the Court is aware, just before trial commenced, Class Counsel reached an agreement in principle with Defendant Impax Laboratories, Inc. ("Impax") to settle this matter for $145 million.[1] The parties submitted the signed settlement agreement to the Court on July 19, 2022, *see* ECF No. 1043-1 ("Settlement Agreement" or "Settlement"), and the Court granted preliminary approval on July 28, 2022. ECF No. 1054 ("Preliminary Approval Order"). Pursuant to the Preliminary Approval Order, notice of the Settlement was sent to all Class members by First Class mail on August 18, 2022. *See* Exhibit 1 to the Declaration of Bruce E. Gerstein ("Gerstein Decl."), Declaration of Tina Chiango, RG/2 Claims Administration LLC, Regarding Notice of the Proposed Settlement to the Direct Purchaser Class ("Administrator Decl."), at ¶ 4. On September 19, 2022, Class Counsel filed a Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards for the Class Representatives ("Fee Brief") seeking reimbursement of litigation expenses in the amount of $4,343,137.06, service awards in the amount of $150,000 each for Class Representatives Value Drug and Meijer, and an award of attorneys' fees in the amount of $50,528,470.66, *i.e.*, 36% of the settlement amount (including an equal percentage of any interest accrued since the settlement amount was escrowed), net of

[1] Under the terms of the Settlement Agreement, Impax will pay Plaintiffs $145,000,000 plus interest in three installments as follows: $58,000,000 was paid on June 22, 2022; $58,000,000 plus interest paid no later than January 17, 2023; and $29,000,000 plus interest paid no later than January 17, 2024. Settlement Agreement, ¶ 8 (ECF No. 1043-1).

reimbursed expenses and service awards granted by the Court pursuant to this motion. ECF No. 1072.

No objections to the Settlement or to Class Counsel's fee submission were filed by the October 3, 2022 deadline set by the Court, and none has been received since. *See* Administrator Decl., at ¶ 6. To the contrary, numerous class members have submitted letters to the Court affirmatively supporting the Settlement and Class Counsel's Fee Brief.[2] The $145 million settlement, which the Court praised as an "excellent" result for the Class,[3] is plainly fair, adequate and reasonable, and merits final approval under Rule 23(e)(2) and under the six factors articulated in *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014).

This highly-complex litigation took over eight years to resolve, and every issue in the case – whether pertaining to liability, causation, damages or class certification – was hotly contested at every stage through the conclusion of trial. Both Endo Health Solutions Inc., Endo Pharmaceuticals Inc., and Penwest Pharmaceuticals Co. (collectively, "Endo") and Impax presented sophisticated defenses to all of Plaintiffs' claims and the parties engaged in exhaustive fact and expert discovery, significant motion practice (under Federal Rules of Civil Procedure 12, 23, 56, and 702/*Daubert*, numerous motions to compel, numerous motions *in limine*, and motions regarding admissibility of evidence at trial), exchanges leading up to the filing of the Joint Final Pretrial Order (which included witness lists, exhibit lists, deposition designations, proposed jury instructions, and verdict forms), and, for Plaintiffs and Endo, a three-week jury trial. The jury's ultimate verdict in favor of Endo[4] evidences just how valuable

[2] *See* Exhibits 2-7 to the Gerstein Decl.

[3] *See* ECF No. 1072-2, Transcript of Preliminary Approval Hearing, dated July 28, 2022 ("Preliminary Approval Transcript") at 2, 6-7.

[4] The trial verdict is subject to a pending Post-Trial Motion for Judgment as a Matter of Law or for a New Trial (ECF No. 1048), which is stayed due to Endo's bankruptcy filing (ECF No. 1064).

the $145 million settlement is for the Class. Absent this Settlement, secured by Class Counsel as the trial commenced, the Class would not have received *any* compensation for the overcharges they paid.

As set forth in Plaintiffs' Fee Brief, the requested service awards for the Class Representatives are also appropriate and reasonable in light of the efforts and contributions they made, producing documents, sitting for depositions, and testifying at trial, as well as the risks they assumed in bringing suit as regular customers of the Defendants, which enabled all Class members to benefit from the Settlement. ECF No. 1072 at 31-32.

For the aforementioned reasons, and as detailed below, Plaintiffs, on behalf of themselves and the certified Class, respectfully request that the Court enter the accompanying proposed order which, *inter alia*: (a) grants final approval to the Settlement pursuant to Federal Rule of Civil Procedure 23(e); (b) approves Plaintiffs' plan of allocation, which provides a fair and reasonable method of determining each Claimant's allocated share based upon each Claimant's purchases of brand and generic Opana ER from Endo and Impax; (c) approves awards of attorneys' fees and reimbursement of expenses to Class Counsel; (d) approves service awards for the Class Representatives; and (e) enters a Final Judgment and Order terminating the litigation between Plaintiffs and Impax.

II. BACKGROUND

A. Relevant Procedural Background

On July 15, 2022, Plaintiffs and Impax entered into the Settlement Agreement, pursuant to which Impax agreed to pay $145 million—in three installments—into an escrow fund for the benefit of the Class in exchange for dismissal of the Class's claims against Impax with prejudice and certain releases. On July 19, 2022, Plaintiffs filed the Settlement Agreement with the Court

and requested that the Court grant preliminary approval of the Settlement and direct that notice of Settlement be given to Class members. *See* ECF Nos. 1041-1043.

On July 28, 2022, the Court concluded that the Settlement "was arrived at by arm's-length negotiations by highly experienced counsel after mediation, approximately eight years of litigation, and as a jury trial was beginning, falls within a reasonable range[]," and granted preliminary approval to the Settlement. *See* Preliminary Approval Order at ¶ 4, ECF No. 1054. The Court further directed that notice of same be given to Class members. *Id.* at ¶ 6.

On August 18, 2022, Class Counsel, through the Court-appointed claims administrator, caused notice of the Settlement to be given to Class members via direct mail. The notice detailed, *inter alia*: (a) the terms of the Settlement; (b) the procedures and deadline for objecting to the Settlement and/or Class Counsel's fee submission; and (c) the date and time of the Court's final fairness hearing. *See* Gerstein Decl. at Ex. 1, Administrator Decl. at ¶ 4 and Exhibit A thereto.

The deadline for Class members to object to the Settlement and/or Class Counsel's fee submission was October 3, 2022. No objections to either the Settlement or Class Counsel's Fee Brief were received by October 3, 2022 or thereafter. Administrator Decl. at ¶ 6.

III. THE PROPOSED SETTLEMENT MEETS THE STANDARD FOR FINAL APPROVAL

As the Seventh Circuit has recognized, "[f]ederal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). Settlement "minimizes the litigation expense of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *Lechuga v. Elite Eng'g, Inc.*, 559 F.Supp.3d 736, 744 (N.D. Ill. 2021) (internal citations omitted).

Under Federal Rule of Civil Procedure 23(e), a class action settlement may be finally approved if it is "fair, reasonable and adequate" after analysis of the factors outlined in Rule

23(e)(2). *See Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, 2012 WL 651727, at *1 (N.D. Ill. Feb. 28 2012). Under Rule 23(e)(2), a court must consider whether (1) the class representative and class counsel have adequately represented the class; (2) the settlement was negotiated at arm's length; (3) the settlement treats class members equitably relative to each other; and (4) the relief provided for the class is adequate. Fed. R. Civ. P. 23(e)(2); *see, e.g.*, *Snyder v. Ocwen Loan Servicing, LLC*, No. 14 c 8461, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019).

Here, all four pre-requisites for a determination of fairness under Rule 23(e)(2) are readily satisfied. First, Class Counsel and the Class Representatives have zealously represented the Class. Class Counsel aggressively litigated this hotly contested case for more than eight years through the conclusion of trial. The Class Representatives made meaningful contributions to the litigation and assumed significant risk by suing their suppliers. Second, the Settlement was the end-product of arm's-length negotiations between the parties presided over by the nationally renowned mediator Jonathan Marks. Third, the Settlement treats Class members equitably relative to each other, as the proposed Plan of Allocation submitted with the Settlement Agreement ensures that each Claimant receives their proportionate share of the recovery. Tellingly, to date no Class member has objected to the Settlement or the proposed Plan of Allocation. Rather, numerous class members have submitted letters to the Court supporting the Settlement. Finally, the relief provided to the Class is significant and, as the Court has recognized, is an "excellent" result for the Class.[5]

Further, the Seventh Circuit set forth a list of six factors for courts to evaluate in deciding whether a settlement warrants final approval: "(1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of

[5] *See* ECF No. 1072-2, at 2, 6-7.

further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed." *See Wong*, 773 F.3d at 863; *see also Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982).

As demonstrated below, consideration of the relevant factors further supports final approval the Settlement Agreement and distribution of the Net Settlement Fund to the Class.

A. Factor 1: The Strength of Plaintiffs' Case Compared to the Terms of the Settlement

"The primary consideration in deciding whether to approve a proposed settlement under *Wong* and Seventh Circuit precedent is 'the strength of the plaintiff's case on the merits balanced against the amount offered in settlement.'" *Snyder*, 2019 WL 2103379, at *6 (quoting *Wong*, 773 F.3d at 864). When there are no "suspicious circumstances" surrounding a settlement reached through arms' length negotiations by experienced counsel after the parties have sufficiently explored the merits of the case, a court may approve a settlement without quantifying the value of continued litigation. *Wong*, 773 F.3d at 864.

As the Court is aware, the parties thoroughly explored the merits of the case before reaching the Settlement. As noted herein and in Plaintiffs' prior submissions in support of preliminary approval of this Settlement and in Plaintiffs' Fee Brief,[6] the Settlement was negotiated just as trial was starting after more than eight years of fiercely contested litigation. The negotiations leading to the Settlement were engaged in at arm's length by highly experienced counsel with the involvement of a very experienced non-party mediator. No "suspicious circumstances" are present.

[6] *See* ECF Nos. 1042 and 1072.

Moreover, as the Court has noted, the $145 million settlement represents an "excellent" result for Class, particularly given the jury's verdict in Endo's favor at the conclusion of trial. Absent the Settlement, there would be no recovery at this time for the Class. Accordingly, this factor weighs in favor of final approval.

B. Factor 2: The Complexity, Length and Expense of Continued Litigation

When settlement enables the parties to avoid the costs and risks of litigating complex issues, this factor weighs in favor of final approval. *Isby,* 75 F.3d at 1199. In analyzing this factor, courts have noted that antitrust actions are "arguably the most complex action[s] to prosecute as [t]he legal and factual issues involved are always numerous and uncertain in outcome." *Glaberson v. Comcast Corp.,* 2015 WL 5582251, at *3 (E.D. Pa. Sept. 22, 2015) (citations and internal quotation marks omitted) (alterations in original). That is certainly true of this case. Here, the Settlement allowed the parties to avoid the costs associated with post-trial motion practice and appeal, at least as against each other. Given the size and complexity of the case, the appeals process might even include a petition for *certiorari* to the U.S. Supreme Court. Such prolonged litigation would require additional time and resources with no certainty of a favorable outcome. By contrast, the Settlement provides the Class with immediate, substantial, and definite relief and "represents an outcome at least comparable, if not far superior, to that which plaintiffs might achieve by proceeding to trial." *Taifa v. Bayh*, 846 F. Supp. 723, 728 (N.D. Ind. 1994).

Moreover, although Plaintiffs were unable to avoid the expenses associated with prosecuting the case through trial against Endo, the Settlement did permit Plaintiffs to narrow the number of adversaries at trial and avoid the risk of an adverse jury verdict resulting in no recovery at all for the Class. And Impax's agreement to provide cooperation reduced the expense

and challenge of Plaintiffs' case against Endo. Accordingly, this factor weighs in favor of final approval.

C. Factors 3 and 4: The Amount of Opposition to the Settlement and Reaction of Class Members to the Settlement

The absence of opposition to a class action settlement "indicates that the class members consider the settlement to be in their best interest." *Am. Int'l Grp., Inc.*, 2012 WL 651727, at *6. Here, the Class includes sophisticated, well-resourced pharmaceutical wholesalers with prior experience as Class members in similar pay-for-delay cases like this one and are therefore particularly well-positioned to determine whether this Settlement is in their best interest. The deadline for Class members to object to the Settlement (and the Fee Brief) was October 3, 2022. No Class member objected by the deadline (or anytime thereafter). In fact, six Class members submitted letters to the Court explicitly and affirmatively supporting the Settlement (and Class Counsel's Fee Brief). Accordingly, this factor weighs heavily in favor of final approval.

D. Factor 5: The Opinion of Competent Counsel

Courts are "entitled to rely heavily on the opinion of competent counsel" who have engaged in arm's-length negotiations, understanding that vigorous skilled negotiation protects against collusion and advances the fairness interests of Rule 23(e). *Gautreaux*, 690 F.2d at 631.

Class Counsel believe that the Settlement with Impax is fair and in the best interests of the Class. As discussed in Plaintiffs' preliminary approval brief, Class Counsel collectively have more experience with generic-delay cases than any other firm or group of firms, having pioneered such cases in the late 1990s.[7] Class Counsel applied that experience during settlement

[7] The following is a partial list of generic-delay and impeded generic market access cases that some or all of Class Counsel have previously handled on behalf of similar classes of direct purchasers: *In re Provigil Antitrust Litig.*, No. 06-1797 (E.D. Pa.); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340 (D. Del.); *In re Buspirone Antitrust Litig.*, No. 01-7951 (S.D.N.Y.); *In re Neurontin Antitrust Litig.*, No. 02-1830 (D.N.J.); *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass.); *In re Lidoderm Antitrust*

negotiations with Impax and believe that the Settlement represents an excellent result for the Class – a belief which the Court has stated it shares – and is corroborated by the jury's verdict in Endo's favor at trial. Accordingly, this factor weighs in favor of final approval.

E. Factor 6: The Stage of the Proceedings

"The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 325 (7th Cir. 1980); *accord In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 350 (N.D. Ill. 2010). Here, because Plaintiffs and Impax reached the proposed settlement just as trial began, the litigation was fully developed, and the parties had ample information with which to assess the strengths and weaknesses of the claims and defenses at issue to make an informed decision concerning settlement. Accordingly, this factor weighs in favor of final approval.

F. The Court Should Approve the Plan of Allocation

The Court preliminarily approved the proposed Plan of Allocation in its July 28, 2022 Order. ECF 1054 at ¶ 11. As set forth in Plaintiffs' brief supporting their motion for preliminary approval, the proposed Plan of Allocation (previously submitted as ECF No. 1043-2) would allocate the Net Settlement Fund on a *pro rata* basis based on each Claimant's weighted share of combined unit purchases of brand and generic Opana ER during the relevant time period. The proposed Plan of Allocation is fair, reasonable, and efficient. Similar plans of allocation have been repeatedly approved, and the proposed Plan of Allocation here should be approved as well.

Litig., No. 14-02521 (N.D. Cal.); *In re Aggrenox Antitrust Litig.*, No. 14-2516 (D. Conn.); *In re Cardizem Antitrust Litig.*, No. 99-1278 (E.D. Mich.); *In re Prograf Antitrust Litig.*, No. 11-2242 (D. Mass.); *In re Remeron Antitrust Litig.*, No. 02-02007 (D.N.J.); *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-1317 (S.D. Fla.); *In re K-Dur Antitrust Litig.*, No. 01-1652 (D.N.J.); *Meijer, Inc. v. Abbott Labs.*, No. 07-5985 (N.D. Cal.); *Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc.*, No. 07-0142 (D. Del.); *In re OxyContin Antitrust Litig.*, MDL No. 04-1603 (S.D.N.Y); and *In re Asacol Antitrust Litig.*, No. 15 – 12730 (D. Mass.).

"The same standards of fairness, reasonableness and adequacy that apply to the settlement apply to the Plan of Allocation." *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *3 (N.D. Ill. Dec. 10, 2001).[8] "Federal courts have held that an allocation plan that reimburses class members based on the extent of their injuries is generally reasonable." *Lucas v. Vee Pak, Inc*., 2017 WL 6733688, at *13 (N.D. Ill. Dec. 20, 2017) (collecting cases).[9]

As set forth in the proposed Plan of Allocation previously submitted to the Court, the Net Settlement Fund will be distributed on a *pro rata* basis, calculated from each Claimant's weighted share of combined unit purchases of branded and generic Opana ER (extended-release oxymorphone hydrochloride) in 5, 10, 20, 30, and/or 40 mg tablets purchased directly from Endo or Impax. *See* ECF No. 1043-2, Plan of Allocation § 2.1; *see also* ECF No. 1043-3, Leitzinger Allocation Decl. ¶ 5.[10] The Plan of Allocation reflects the amount of relative overcharges paid by each Class member,[11] and distributions based on the purchasers' respective *pro rata* shares are

[8] *See also Heekin v. Anthem, Inc*., 2012 WL 5472087, at *3 (S.D. Ind. Nov. 9, 2012) ("As with the approval of a settlement, courts must determine whether the plan for allocation of settlement funds is fair, reasonable, and adequate.") (citing *Summers v. UAL Corp. ESOP Comm*., 2005 WL 3159450, at *2 (N.D. Ill. Nov. 22, 2005)).

[9] *See also In re High-Tech Emp. Antitrust Litig*., 2015 WL 5159441, at *8 (N.D. Cal. Sept. 2, 2015) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable.") (quoting *In re Oracle Sec. Litig*., 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994)); *In re Packaged Ice Antitrust Litig*., 2011 WL 6209188, at *15 (E.D. Mich. Dec. 13, 2011) ("Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.") (citing *Meijer, Inc. v. 3M*, 2006 WL 2382718, at *17 (E.D. Pa. Aug. 14, 2006)); *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 328 (3d Cir. 2011) (same) (internal quotation omitted).

[10] The purchase "unit" refers to a milligram (mg) of Opana ER. So, for example, a 5mg branded Opana ER pill is 5 units and a 10mg pill is 10 units.

[11] 4 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 12.35, at 350 (4th ed. 2002) (noting that *pro-rata* allocation of a settlement fund "is the most common type of apportionment of lump sum settlement proceeds for a class of purchasers" and "has been accepted and used in allocating and distributing settlement proceeds in many antitrust class actions"); *Summers v. UAL Corp. ESOP Comm*., 2005 WL 3159450, at *2 (N.D. Ill. Nov. 22, 2005) ("Given that the settlement funds in the instant action will be disbursed on a pro rata basis to all class members, we find that the allocation plan is reasonable and, thus, we grant Plaintiffs' motion for approval of the allocation plan."); *Beneli v. BCA Fin. Servs., Inc*., 324 F.R.D. 89, 105-06 (D.N.J. 2018) ("In particular, *pro rata* distributions are consistently upheld,

commonly used in settlements in pharmaceutical antitrust cases.[12]

As Plaintiffs explained in their brief supporting preliminary approval, the Plan of Allocation ensures that each Claimant receives a *pro rata* share proportionate to the overcharges they paid. ECF No. 1043-3, Leitzinger Allocation Decl. ¶ 8. Each Claimant's *pro rata* share of the Net Settlement Fund will be determined by taking (a) each Claimant's weighted combined total net purchases of brand and generic Opana ER during the relevant period, (b) removing any purchases where the rights to damages have been assigned to others by agreement, and (c) dividing it by the weighted combined total purchases by all eligible Claimants.[13] ECF No. 1043-2, Plan of Allocation § 2.4; ECF No. 1043-3, Leitzinger Allocation Decl. ¶ 5. Using data

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and there is no requirement that a plan of allocation differentiat[e] within a class based on the strength or weakness of the theories of recovery.") (citation and internal quotation marks omitted); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *15 ("Typically, a class recovery in antitrust or securities suits will divide the common fund on a *pro rata* basis among all who timely file eligible claims, thus leaving no unclaimed funds.") (quoting 3 Newberg on Class Actions, § 8:45 (4th ed. 2011)).

[12] *See, e.g.*, *In re Aftermarket Filters Antitrust Litig.*, No. 08-cv-4883, ECF No. 1082 (N.D. Ill. Mar. 20, 2014) (ordering *pro rata* distribution of settlement funds); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 1:09-cv-07666, ECF No. 703 (N.D. Ill. Apr. 16, 2014) (approving *pro rata* Plan of Allocation, as described in ECF No. 696, Ex. 1, ¶¶ 18-19); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1999 WL 639173, at *4 (N.D. Ill. Aug.17, 1999) (approving *pro rata* distribution of funds in pharmaceutical antitrust settlement based on claimant's share of qualifying purchases of the drugs at issue); *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 309 (S.D.N.Y. 2020) (same); *In re Loestrin 24 FE Antitrust Litig.*, No. 1:13-md-02472, ECF No. 1462 (D.R.I. Sept. 1, 2020) (same); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, ECF No. 1179 (D. Mass. July 18, 2018) (same); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 752 (E.D. Pa. 2013) (same); *In re Lidoderm Antitrust Litig.*, No. 14-md-2521, ECF Nos. 1004-5, 1004-6, 1054 (N.D. Cal.) (same); *In re Aggrenox Antitrust Litig.*, No. 14-md-2516, ECF Nos. 733-1, 739 (D. Conn.) (same); *Mylan Pharms., Inc. v. Warner Chilcott Public Ltd.*, No. 12-cv-3824, ECF Nos. 452-3, 665 (E.D. Pa.) (same); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-340, ECF Nos. 536-1, 543 (D. Del.) (same); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *11 (D.N.J. Nov. 9, 2005) (same).

[13] On August 2, 2022 Plaintiffs submitted a Supplemental Declaration from Dr. Leitzinger (ECF No. 1058), responding to the Court's inquiry at the preliminary approval hearing regarding what effect, if any, there would be on the allocations to Class members if the allocation method were modified to account for variations in per-mg pricing between the different dosage strengths. Based on a preliminary analysis, Dr. Leitzinger concluded that making such an adjustment would not materially impact Class members' allocations and that the cost of performing a full-blown analysis would be $50,000 to $60,000 or more, which would be deducted from the funds available for Class members. No Class member has objected to the proposed Plan of Allocation.

produced by Defendants Endo and Impax in discovery, Dr. Leitzinger has already performed a preliminary computation of the percentage shares of the Net Settlement Fund due to each Class member. ECF No. 1043-3, Leitzinger Allocation Decl. ¶ 6. Class members therefore will be provided pre-populated Claims Forms listing the amounts of their purchases of brand and generic Opana ER from Endo and Impax. *Id.* Under the proposed Plan of Allocation, the claims administrator, working with Dr. Leitzinger and his staff at Econ One Research, Inc. and with Class Counsel, will prepare and send these individualized Claim Forms to each member of the Class. *Id.* Claimants will have the option to submit their own purchase data, which will be reviewed by the claims administrator and Dr. Leitzinger and his staff before finalizing calculations to determine each Claimant's *pro rata* share. *Id.* at ¶ 7.

Both Dr. Leitzinger and Class Counsel endorse the fairness of the Plan of Allocation. In Dr. Leitzinger's opinion, the proposed Plan of Allocation is fair, reasonable, and reflects the type and approximate extent of the injury alleged by Class members. ECF No. 1043-3, Leitzinger Allocation Decl. ¶ 8. ("[T]his method provides a fair and reasonable procedure, in my opinion, for distributing the Net Settlement Fund and reimbursing Claimants. It reflects the type and approximate extent of their injury as alleged (according to my prior overcharge calculations) and does not systematically favor recovery (relative to actual overcharges) on the part of potential Claimants who purchased brand Opana ER or generic Opana ER."). The Plan of Allocation was developed in conjunction with Class Counsel and is highly recommended by Class Counsel, which further supports approval. *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) ("When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel.").[14]

[14] *See also Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 5627171, at *6 (N.D. Ind. Sept. 18, 2020) ("When formulated by competent and experienced counsel, a plan for allocation of net settlement

The terms of the Settlement provide that Impax will pay in three installments as follows: $58,000,000 paid on June 22, 2022; $58,000,000 plus interest paid no later than January 17, 2023; and $29,000,000 plus interest paid no later than January 17, 2024. Settlement Agreement, ¶ 8 (ECF No. 1043-1). In other words, 80% of the total Settlement amount of $145 million (or $116 million, gross) will be available by January 17, 2023. Accordingly, Plaintiffs propose, and the Proposed Order submitted with this motion provides, that the $116 million (after deductions for fees and expenses as discussed below), be distributed to Claimants after the settlement payment from Impax due January 17, 2023, and a second distribution be made after the final Impax settlement payment of $29 million is made in January 2024.[15]

As the proposed Plan of Allocation is fair and reasonable, it should be finally approved by the Court.

IV. THE COURT SHOULD APPROVE PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES, REIMBURSEMENT OF COSTS AND SERVICE AWARDS

A. The Proposed Award of Attorneys' Fees is Fair and Reasonable

Class Counsel's request for an award of attorneys' fees in the amount of $50,528,470.66 (plus proportionate accrued interest), *i.e.*, 36% of the net settlement amount, is fair and reasonable. *See* ECF No. 1072. No Class member has objected to Class Counsel's request and in fact six Class members have provided letters affirmatively supporting Class Counsel's fee

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proceeds need have only a reasonable, rational basis in order to be fair and reasonable") (citation and internal quotation marks omitted); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.") (collecting cases) (internal quotations omitted); *accord In re Auto. Parts Antitrust Litig*., 2019 WL 7877812, at *1 (E.D. Mich. Dec. 20, 2019).

[15] Regarding Class Counsel's request for attorneys' fees, reimbursement of expenses and service awards for the Class Representatives, Class Counsel proposes (and the accompanying Proposed Order provides) that (1) all costs and expenses shall be reimbursed and the Class Representatives' service awards be paid immediately upon the Settlement becoming final; (2) 80% of the total attorneys' fees awarded shall be paid after Impax's second settlement installment payment in January 2023; and (3) the remaining 20% of attorneys' fees awarded shall be paid after Impax's final settlement payment is made in January 2024.

request.[16] Accordingly, Class Counsel respectfully request that the Court approve the requested attorneys' fees.

B. Class Counsel's Costs and Expenses Are Reasonable and Were Necessary to the Result

There has been no objection to Class Counsel's request for reimbursement of costs and expenses of $4,343,137.06. These expenses have been itemized by category for the Court's convenience. See ECF No. 1072-1 at ¶¶67-68. Accordingly, Class Counsel respectfully request that the Court approve reimbursement of Class Counsel's expenses in full.

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

There has been no objection to the service awards of $150,000 for each of the two Class Representatives, which are in line with awards in similar cases and appropriate in light of the services performed for the benefit of the entire Class. *See* ECF No. 1072-1 at ¶¶ 72-79. Accordingly, Class Counsel respectfully request that the Court approve the requested service awards.

V. NOTICE UNDER THE CLASS ACTION FAIRNESS ACT HAS BEEN PROVIDED

The Class Action Fairness Act, 28 U.S.C. § 1715 *et seq.* ("CAFA") requires that Impax notify appropriate state and federal officials of the proposed settlement and to allow 90 days to pass before final approval of the proposed settlement may be entered. *See* 28 U.S.C. § 1715(d). Class Counsel was informed that by July 28, 2022 such notification was given. As of the date of the Final Fairness Hearing—November 3, 2022—more than 90 days will have passed since the CAFA notice date.

[16] *See* Exhibits 2-7 to the Gerstein Decl.

VI. CONCLUSION

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

Dated: October 24, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, I caused the above to be filed by CM/ECF system.

Respectfully submitted,

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