UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

In re REMICADE ANTITRUST LITIGATION This Document Relates To: INDIRECT PURCHASER ACTIONS.	Civil Action No. 2:17-cv-04326-KSM **(Consolidated)** CLASS ACTION The Honorable Karen S. Marston PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR (1) FINAL APPROVAL OF SETTLEMENT; (2) PLAN OF ALLOCATION AND DISTRIBUTION; (3) AWARD OF ATTORNEYS' FEES AND EXPENSES; AND (4) SERVICE AWARDS

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STATUTES, RULES AND REGULATIONS

Named Plaintiffs Local 295 IBT Employer Group Welfare Fund ("Local 295") and National Employees Health Plan ("NEHP") ("Plaintiffs")[1] respectfully submit this memorandum of law in support of their motion for final approval of the $25 million all-cash settlement (the "Settlement"), the Plan of Allocation and Distribution, and an award of attorneys' fees, litigation expenses, and service awards to Plaintiffs for their work on behalf of the Class.

I. OVERVIEW

Under Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs seek final approval of Settlement of this Action in the amount of $25 million. This Settlement represents an exceptional recovery for the Class and should be approved. The Settlement follows lengthy and hard-fought litigation, including voluminous document discovery, numerous depositions, extensive expert work, and more. Through these efforts and the Court's comprehensive decision at the motion to dismiss stage, Plaintiffs' counsel gained a full understanding of all of the relevant issues, which they brought to bear in negotiating and ultimately agreeing to the Settlement.

The Settlement easily satisfies the requirements of Rule 23(e)(2), meets each of the *Girsh* factors,[2] and balances the objective of attaining the highest possible recovery against the risks and costs of continued litigation. This includes the risk that, as in any complex case, the Class could receive nothing or a far lower sum after class certification, summary judgment or trial, and any appeals. Additionally, the Plan of Allocation and Distribution should be approved because it treats

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[1] Unless otherwise stated or defined, all capitalized terms used herein have the meanings provided in the Stipulation of Class Action Settlement (the "Settlement Agreement"), dated April 15, 2022 (ECF 172-4). All citations are omitted and emphasis is added, unless otherwise indicated. All references to the "Bernay Decl." are to the Declaration of Alexandra S. Bernay in Support of Plaintiffs' Motion for (1) Final Approval of Settlement; (2) Plan of Allocation and Distribution; (3) Award of Attorneys' Fees and Expenses; and (4) Service Awards, filed concurrently.

[2] *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *see also Erby v. Allstate Fire & Cas. Ins. Co.*, 2022 WL 14103669, at *12 (E.D. Pa. Oct. 24, 2022) (Marston J.) ("The Settlement is fair, reasonable, and adequate. It is entitled to a presumption of fairness, and that presumption is supported by the *Girsh* factors . . . .").

Class Members equitably and ensures that each Class Member that properly submits a valid Proof of Claim will share in the monetary relief obtained. That there is only one objection received to date – which does not object to the amount of the settlement, attorneys' fees, expenses, or service awards – also advises for granting final approval.

Plaintiffs' counsel's request for an award of attorneys' fees and litigation expenses, and Plaintiffs' requests for service awards, are reasonable, well within the range approved in similar matters, and should be approved, as well. Plaintiffs' counsel advanced costs and devoted substantial time on a contingent basis to this complex matter, despite not knowing how long the Action might last or whether there would ultimately be any recovery. At each stage of the litigation, Plaintiffs' counsel also faced off against highly sophisticated defense counsel.

Since this suit was filed five years ago, Class Counsel successfully opposed Defendants Johnson & Johnson and Janssen Biotech, Inc.'s (collectively, the "Defendants") motion to dismiss as to the bulk of Plaintiffs' claims, and completed sweeping discovery from Defendants and numerous third-parties. Over the course of the Action, the Parties engaged in extensive fact and expert discovery, including exchanging and analyzing in excess of approximately 18 million pages of party and non-party documents and data, serving and responding to 32 interrogatories and numerous requests for admission, responding to multiple requests for production of documents, conducting 32 depositions of Parties and non-parties (including depositions of representatives of Plaintiffs Local 295 and NEHP), and preparing to exchange expert reports and disclosures. All of this work resulted in the excellent result presented here for final approval.

Plaintiffs respectfully request final approval of the proposed Settlement, Plan of Allocation and Distribution, and award of the requested attorney's fees, litigation expenses, and service awards.

II. PROCEDURAL HISTORY

In late summer and early autumn 2017, three putative class indirect-purchaser antitrust actions were filed against Defendants, alleging violations of various state and federal antitrust and state consumer-protection laws related to Defendants' alleged anticompetitive conduct in the market for its infliximab biologic, Remicade. On November 21, 2017, these actions were consolidated under the caption *In re Remicade Antitrust Litigation*, No. 2:17-cv-04326-KSM (E.D. Pa.). On January 22, 2018, the Court appointed Interim Class and Interim Liaison Counsel for the putative indirect-purchaser class. On February 21, 2018, a comprehensive Consolidated Amended Complaint was filed on behalf of the putative class. On December 7, 2018, the Court denied in part and granted in part Defendants' motion to dismiss the Consolidated Amended Complaint.

Remicade was approved by the U.S. Food and Drug Administration ("FDA") in 1998 to treat Crohn's disease. Since its initial FDA approval, Remicade has also been approved for the treatment of other autoimmune disorders including ulcerative colitis, rheumatoid arthritis, ankylosing spondylitis, arthritis, and plaque psoriasis. For almost two decades while being protected by patent, Remicade was the only infliximab product on the U.S. market. Plaintiffs' central allegation is that Remicade had a dominant market position and that, following biosimilar entry, Defendants abused that dominant position to suppress competition in the infliximab market through exclusionary contracts with health insurers and healthcare providers, alongside additional alleged anticompetitive conduct. Defendants deny Plaintiffs' allegations and maintain that they acted appropriately to compete in the market for Remicade at all times, and did not engage in any anticompetitive conduct.

Over the course of the Action, the Parties engaged in large-scale fact and expert discovery. Discovery was consolidated with two related actions, *Pfizer Inc. v. Johnson & Johnson*, No. 2:17-cv-04180-KSM (E.D. Pa.) (the "*Pfizer* Action"), and *Walgreen Co. v. Johnson & Johnson*, No. 2:18-cv-02357-KSM (E.D. Pa.) (the "*Retailer* Action").

The Settlement Agreement was arrived at only after extensive direct negotiations with Defendants, during which the strengths and weaknesses of the respective Parties' positions were assessed, evaluated, and deliberated.[3] *See* Declaration of Alexandra S. Bernay in Support of Plaintiffs' Uncontested Motion for an Order: (1) Certifying a Settlement Class; (2) Granting Preliminary Approval of the Settlement Agreement; (3) Appointing Class Counsel; (4) Appointing a Settlement Administrator and Escrow Agent; (5) Approving the Form and Manner of Notice to the Settlement Class; (6) Preliminarily Approving the Plan of Allocation and Distribution; and (7) Scheduling Fairness Hearing (ECF 172-3), ¶¶6-7. These negotiations occurred when discovery was near completion, allowing Class Counsel to continue meaningful discussions after having reviewed millions of pages of documents, taking dozens of depositions, and evaluating detailed expert information and financial data, this Court's prior rulings, and the resolution of the *Pfizer* and *Retailer* Actions. *Id.*, ¶6.

On April 15, 2022, Plaintiffs filed a Motion for Preliminary Approval of Settlement, along with supporting papers, including the Settlement Agreement, Class Notice, and the Plan of Allocation and Distribution. ECF 172. The Court entered a Memorandum Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order") on August 2, 2022. ECF 177. As detailed below, notice has been provided to the Class in accordance with the Court's Preliminary Approval Order. Counsel for Defendants mailed the required notices under the Class Action Fairness Act, 28 U.S.C. §1715, on April 25, 2022. Bernay Decl., Ex. 1. Objections to, or requests to be excluded from, the Settlement are due by November 30, 2022, and the Court will hold the Settlement Hearing on February 27, 2023. ECF 177.

[3] As the Parties noted during the Court's preliminary approval hearing, the Settlement was negotiated and, ultimately, reached directly between the Parties, without the use of a mediator. July 28, 2022 Preliminary Approval of Class Action Settlement Hearing Tr. at 10:24-11:9. The *Pfizer* and *Retailer Actions* are private settlements that were resolved on undisclosed terms. *See* Stipulation of Dismissal (*Pfizer* ECF 167); *see also* Stipulation of Dismissal (*Retailer* ECF 103).

III. NOTICE HAS BEEN PROVIDED TO THE CLASS IN COMPLIANCE WITH RULE 23, DUE PROCESS, AND THE COURT'S PRELIMINARY APPROVAL ORDER

Rule 23(e), which governs notice requirements for class action settlements, provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). In addition, Rule 23(c)(2)(B) requires that a certified class receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

Here, the Notice and Summary Notice were approved by the Court in the Preliminary Approval Order, and fully comply with Rule 23. ECF 177 at 23-25 ("[T]he Court is satisfied that the content of the short-form and long-form notices satisfy Rule 23 and due process."). Among other disclosures, the Notice apprises Class Members of the nature of this Action, the definition of the Class, the claims and issues in the Action, and the claims that will be released in the Settlement. The Notice also: (i) advises that a Class Member may enter an appearance through counsel; (ii) describes the binding effect of a judgment on Class Members; (iii) states the procedures and deadline for Class Members to exclude themselves from the Class or to object to the proposed Settlement, the Plan of Allocation and Distribution, or the requested attorneys' fees and expenses; (iv) states the procedures and deadline for submitting a Proof of Claim; and (v) provides the date, time, and location of the Settlement Hearing. The contents of the Notice and Summary Notice, therefore, satisfy all applicable requirements.

The Notice Program here has since been carried out. The Settlement Administrator, Gilardi & Co., LLC 's ("Gilardi") declaration details the manner of Notice dissemination to third-party payor ("TPP") and consumer Class Members.[4] *See* Smith Decl., ¶¶9-12. Based on Gilardi's

[4] *See* Declaration of Derek Smith in Support of Settlement Notice Plan ("Smith Decl."), attached as Ex. 2 to the Bernay Decl.

proprietary contact database, roughly 23,509 TPPs were contacted directly via U.S. Mail with a Notice of the Settlement. Smith Decl., ¶9. Substantial efforts to reach TPP Class Members were also undertaken via trade website advertising, relevant daily subscriber-based trade newsletters and through nationwide media distribution via PRNewswire. *Id.*, ¶¶13-15. The trade websites Society for Human Resources Management ("SHRM") and Think Advisor's Life/Health channel – both calculated to reach TPP administrators – posted the notice 75,000 and 60,000 times, respectively. *Id.*, ¶13. These two organizations' subscriber-based daily newsletters, which reach 458,000 SHRM subscribers and 37,000 Think Advisor subscribers daily, contained notice of the Settlement collectively over seven separate dates spread over a roughly one-month period of time. *Id.*, ¶14.

In addition, in an effort to target consumer Class Members, notice was distributed via a nationally distributed weekly periodical, targeted impression delivery via online website and Facebook, and via direct contact to a variety of relevant clinical and healthcare organizations and support groups. *Id.*, ¶¶16-18. Notice was published in *People* magazine, which has an estimated reach approaching 100 million persons. *Id*., ¶16; *see also People*, Media Kit, http://static.people.com/media-kit/phone/index.html (last visited Oct. 30, 2022) (*People* audience "96 million consumers"). Targeted Facebook and other relevant website notices-delivered directly to consumers via desktop and mobile devices exceeded 73.18 million impressions. *Id.*, ¶17. Organizations, such as the Crohn's & Colitis Foundation, The Arthritis Foundation, American Juvenile Arthritis Foundation, and Rheumatoid Arthritis Foundation, were contacted along with support groups on social media and through blogs and forums, including such groups as the REMICADE (infliximab) Users and Support and Remicade Moms groups on Facebook, and online groups Crohn's Forum, My Crohn's and Colitis Team, and My RATeam. *Id.*, ¶18.

Finally, the dedicated Settlement Notice and online claim website – www.RemicadeSettlement.com – has been active since the beginning of September 2022. *Id.*, ¶19.

The website address was provided in all printed notice materials and accessible through an embedded link in the digital Notices. *Id.* At this website, both consumer and TPP Settlement Class Members are able to file claims. *Id.* Class Members are also able to obtain Court documents, including: the Settlement Agreement, Preliminary Approval Order, Consumer Notice; TPP Notice; a list of the national drug codes associated with the Settlement; the Proposed Plan of Allocation and Distribution; a list of Excluded Entities; and contact information for the Settlement Administrator. *Id.*

This combination of notice by mail to all Class Members who could be identified with reasonable effort, supplemented by publication in a widely-circulated periodical, over a newswire, and on a website, is typical of notice plans in antitrust class actions, and constitutes "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also, e.g.*, *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at *5 (E.D. Pa. Jan. 25, 2016). Moreover, the Notice Program here went a step further by providing notice through social media and targeted online advertisements, as well as though relevant clinic, healthcare, and user support organizations and groups.

IV. THE SETTLEMENT WARRANTS THE COURT'S FINAL APPROVAL

It is well established that the settlement of class action litigation is favored. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010) (noting that the "strong presumption in favor of voluntary settlement agreements" is "especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation'"); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *In re CIGNA Corp. Sec. Litig.*, 2007 WL 2071898, at *3 (E.D. Pa. July 13, 2007) ("Settlement of complex class

action litigation conserves valuable judicial resources, avoids the expense of formal litigation, and resolves disputes that otherwise could linger for years.").

Rule 23(e)(2) identifies the following factors to be considered at final approval:

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on a finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
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> (C) the relief provided for the class is adequate, taking into account:
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> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

These factors are considered alongside, and largely overlap with, those set forth by the Third Circuit in *Girsh*:

> "(1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . ."

521 F.2d at 157.[5] The Third Circuit has also explained that there is an initial presumption that a settlement is fair if: "'(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.'" *Warfarin*, 391 F.3d at 535.

As detailed below, each of these factors supports final approval of the Settlement.

A. Plaintiffs and Class Counsel Have More Than Adequately Represented the Class

The first factor under Rule 23(e)(2) concerns the adequacy of representation provided by the class representatives and class counsel. *See* Rule 23(e)(2)(A). This overlaps with the third *Girsh* factor, which focuses on the stage of the proceedings and the amount of discovery completed. *See Girsh*, 521 F.2d at 157; *see also Warfarin*, 391 F.3d at 535 (noting similar considerations for applying presumption of fairness).

Here, the Court has expressed confidence in the abilities of Plaintiffs and Class Counsel, to pursue this Action, first by appointing each to their respective positions, and then by explicit findings when preliminarily certifying the settlement Class, including an assessment that Plaintiffs and Class Counsel have fairly and adequately represented the Class's interests. ECF 177. Specifically, with regard to Plaintiffs, the Court found:

> Named Plaintiffs have represented the class capably and diligently. In addition to retaining competent counsel, Named Plaintiffs actively participated in extensive discovery and routinely communicated with counsel regarding the status of the action, and they were reportedly involved in important litigation decisions.

[5] The *Girsh* factors "'are a guide and the absence of one or more does not automatically render the settlement unfair.'" *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *5 (D.N.J. Mar. 26, 2010) ("*Schering-Plough I*").

Id. at 14 (citing *Wood v. Saroj & Manju Invs. Phila. LLC*, 2020 WL 7711409, at *5 (E.D. Pa. Dec. 28, 2020)). In addition, Named Plaintiffs Local 295 and NEHP are sophisticated entities and the funds' support for the Settlement carries substantial weight, as well.[6]

The Court also found, regarding Class Counsel:

> Not only is Robbins Geller well qualified to pursue this suit, but the firm has done so with vigor [including], . . . initial investigation and commencement of the action, . . . engag[ing] in extensive discovery, . . . [t]hroughout the various phases of the suit, . . . "research[ing], analyz[ing], and evaluat[ing] many contested legal and factual issues," . . . [and] engag[ing] in "numerous rounds of [settlement] discussions," which were "conducted at arm's-length and in good faith, and were informed and approved by Plaintiffs."

ECF 177 at 16.[7]

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[6] *See* Declaration of Linda A. Kellner on Behalf of Local 295 IBT Employer Group Welfare Fund Filed in Support of Plaintiffs' Motion for (1) Final Approval of Settlement; (2) Plan of Allocation and Distribution; (3) Award of Attorneys' Fees and Expenses; and (4) Service Awards ("Kellner Decl."), attached as Ex. 3 to the Bernay Decl.; *see* Declaration of Steven W. Nobles on Behalf of National Employees Health Plan in Support of Plaintiffs' Motion for (1) Final Approval of Settlement; (2) Plan of Allocation and Distribution; (3) Award of Attorneys' Fees and Expenses; and (4) Service Awards ("Nobles Decl."), attached as Ex. 4 to the Bernay Decl.

[7] As the Court noted in its Order, Class Counsel "is qualified to 'fairly and adequately represent the interests of the class[,]' . . . [having] extensive experience handling complex class action litigation generally, and cases in the antitrust class action context specifically." ECF 177 at 15. Further, Robbins Geller has successfully prosecuted hundreds of class actions. *See, e.g.*, *McDermid v. Inovio Pharms., Inc.*, 467 F. Supp. 3d 270, 281 (E.D. Pa. 2020) (approving Robbins Geller as lead counsel stating that "Robbins Geller is a preeminent litigation firm with a record of winning complex securities class actions"); *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, 2019 WL 4877563, at *3 (D.N.J. Oct. 3, 2019) (noting that Robbins Geller is "capable of adequately representing the class, both based on their prior experience in class action lawsuits and based on their capable advocacy on behalf of the class in this action"); Exhibit G (Robbins Geller Firm résumé) to the Declaration of Alexandra S. Bernay Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application For Award of Attorneys' Fees and Expenses, filed concurrently ("Bernay Fee Decl."), attached as Ex. 5 to the Bernay Decl.; Exhibit E (Freedman Boyd Hollander & Goldberg, PA firm résumé) to the Declaration of Joseph Goldberg Filed on Behalf of Freedman Boyd Hollander & Goldberg, PA, in Support of Application for Award of Attorneys' Fees and Expenses ("Goldberg Decl."), attached as Ex. 6 to the Bernay Decl.; Exhibit C (Gustafson Gluek PLLC firm résumé) to the Declaration of Michelle J. Looby Filed on Behalf of Gustafson Gluek PLLC in Support of Application for Award of Attorneys' Fees and Expenses ("Looby Decl."), attached as Ex. 7 to the Bernay Decl.; and Exhibit E (Miller Shah, LLP firm résumé) to the Declaration of Natalie Finkelman Bennett Filed on Behalf of Miller Shah, LLP in

The Court's confidence is well placed. Plaintiffs and Class Counsel have, indeed, vigorously pursued this Action. Among many other undertakings, they advanced the Class's claims in a thoroughly researched and investigated Consolidated Amended Complaint, overcame Defendants' voluminous motion-to-dismiss challenges, engaged in extensive discovery practice and document review (including millions of pages of documents), took more than 30 depositions of Defendants and third-parties, and defended the depositions of the class representatives. At each of these stages, Plaintiffs' counsel successfully advanced this Action. As the Court noted, the Class's "interests have been advanced by experienced, dedicated counsel, working at arm's length from Defendants." *Id.* at 16.

Plaintiffs and Class Counsel have, thus, adequately represented the Class under Rule 23(e)(2)(A), and have secured "an adequate appreciation of the merits of the case" by means of substantial discovery and litigation. *Warfarin*, 391 F.3d at 537. "[C]ourts in this Circuit traditionally 'attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class.'" *Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012), *aff'd*, 559 F. App'x 151 (3d Cir. 2014); *see also Viropharma*, 2016 WL 312108, at *11 (stating that courts "'afford[] considerable weight to the views of experienced counsel regarding the merits of the settlement'"); *In re Nat'l Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 387 (E.D. Pa. 2015) ("'[A] presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.'"), *amended*, 2015 WL 12827803 (E.D. Pa. May 8, 2015), *aff'd*, 821 F.3d 410 (3d. Cir. 2016).[8]

Support of Application for Award of Attorneys' Fees and Expenses ("Bennett Decl."), attached as Ex. 8 to the Bernay Decl.

[8] *See also In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998) (identifying "the extent of discovery on the merits" as a relevant factor in evaluating class action settlements); *In re Philips/Magnavox Television Litig.*, 2012 WL 1677244, at *11 (D.N.J.

Bringing their experience and knowledge of this Action to bear, Plaintiffs and Class Counsel believe that the Settlement is in the best interests of the Class. Bernay Decl., ¶19; Nobles Decl., ¶6; Kellner Decl., ¶6.

B. The Settlement Negotiations Were Conducted at Arm's-Length

The second factor under Rule 23(e)(2) considers whether the Settlement was negotiated at arm's-length. *See* Fed. R. Civ. P. 23(e)(2)(B); *see also Warfarin*, 391 F.3d at 535 (citing arm's-length negotiations as a factor in assessing presumption of fairness).

Here, the record reflects that the extensive negotiations resulting in the Settlement were conducted at arm's-length by advocates experienced in antitrust litigation and committed to the representation of the Class as demonstrated by their aggressive litigation of this Action. As demonstrated above, Class Counsel are highly qualified and experienced. Moreover, negotiations over the terms of the Settlement Agreement involved numerous telephone calls and email exchanges. For its part, Class Counsel analyzed the legal and factual challenges the Class faced going forward and conducted an in-depth analysis of the data, documents, and other discovery produced by Defendants, including the review of over 18 million pages of documents, as well as extensive additional written discovery and depositions. This allowed Class Counsel to make informed demands and evaluate the strengths and weaknesses of Defendants' positions.

In addition, throughout the Action, Plaintiffs Local 295 and NEHP have remained committed to the Action and to advancing the interests of the Class. They provided responses to discovery requests, remained abreast of the Action, sat for deposition, and carefully considered the terms of the

May 14, 2012) ("'Where this negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent.'").

Settlement, which they support. Nobles Decl., ¶¶2-6; Kellner Decl., ¶¶2-6. In sum, the factors identified in Rule 23(e)(2) weigh strongly in favor of final approval.[9]

C. The Settlement Is Adequate in Light of the Costs, Risks, and Delay of Trial and Appeal

The third factor under Rule 23(e)(2), which overlaps with several of the *Girsh* factors (*i.e.*, factors 1, 4-9), concerns the adequacy of the Settlement in light of the costs, risks, and delay that trial and appeal would impose. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). "This factor 'captures the probable costs, in both time and money, of continued litigation.'" *In re Comcast Corp. Set-Top Television Box Antitrust Litig.*, 333 F.R.D. 364, 380 (E.D. Pa. Sept. 24, 2019) (quoting *Warfarin*, 391 F.3d at 535-36 (quoting *In re Cendant Corp. Litig*., 264 F.3d 201, 233 (3d Cir. 2001)). Notably, it is well recognized that antitrust cases, such as this one, are particularly complex making them among the most lengthy and expensive to prosecute. *See id.* (citing *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008); *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)).

This is the case here, where the action has already spanned five years. Continued prosecution of the claims would be extensive. Class certification would have been hotly contested and summary judgment briefing would have included extensive expert opinions and attendant additional discovery would have been required. If Plaintiffs had succeeded, which by no means would have been assured, a lengthy trial preceded by complicated and time-consuming pretrial proceedings addressing, *inter alia*, *Daubert*, and *in limine* motions would have been required. The trial itself would likely span

[9] Additionally, Class Counsel believe the Settlement is a fair resolution of the putative Class's claims against Defendants – a determination which has traditionally carried "'considerable weight'" with the court. *Esslinger v. HSBC Bank, Nev., N.A.*, 2012 WL 5866074, at *8 (E.D. Pa. Nov. 20, 2012) (quoting *McAlarnen v. Swift Transp. Co., Inc.*, 2010 WL 365823 (E.D. Pa. Jan. 29, 2010)); *see also In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001) ("Significant weight should be attributed to the belief of experienced counsel that the settlement is in the best interests of the class.").

weeks and be expensive, involving not only fact witnesses, but also the presentation of many experts at substantial cost. At a minimum, proceeding through these stages of litigation would significantly prolong the time until any Class Member receives a financial recovery, if they would have received any recovery at all.

Accordingly, the complexity, length, and likely duration of this Action weigh heavily in favor of approving the Settlement.

1. Risks of Establishing Liability and Damages

Plaintiffs and Class Counsel believe that this case is strong but acknowledge that there would be risks involved in further litigation. Defendants would have, for example, argued against class certification (the next big case milestone) on the basis that professionally advised and complicated purchasing relationships in the pharmaceutical industry, for example, make it impossible to either ascertain membership in the proposed class or prove that common issues predominate. Because Plaintiffs would be seeking certification in a number of states under various state laws, they would also likely face arguments that common questions of law do not predominate and that manageability problems preclude certification.

In addition to this, the challenged exclusive contracting practices and J&J's bundling of various products with Remicade present complex legal issues. Recent federal case law involving similar rebate arrangements in the pharmaceutical sector have found that such arrangements encourage competition rather than inhibit it. For example, in recent litigation involving Mylan's exclusionary rebate deals with pharmacy benefit managers ("PBM") for the EpiPen, the court there specifically found, after applying exclusive-dealing factors relied on by courts in the Third Circuit, that such contracts are routinely utilized in the pharmaceutical industry and had a pro-competitive

effect.[10] The *EpiPen* court's logic is that the promise of exclusive placement on formulary is an incentive for manufacturers to compete by increasing rebates, thus decreasing drug costs. This was sure to be a line of legal reasoning the Defendants here would have pursued.

Other material challenges include showing sufficient uniformity in the terms of contracts between J&J and payers and providers (including types and amount of rebates, what other J&J products Remicade was bundled with, length of contracts, the size of any alleged foreclosures, etc.) and issues surrounding brand loyalty/non-medical switching. Recent Eastern District of Pennsylvania authority also introduces potential manageability road blocks, including finding specific class-wide manageability problems in distinguishing between end-payor class members and intermediaries, including fully insured plans. *See In re Niaspan Antitrust Litig.*, 555 F. Supp. 3d 155 (E.D. Pa. 2021).

While there are strong responses to these arguments, they pose undeniable risks. Any one of these arguments, if successful, could have resulted in the claims at issue being severely curtailed or even eliminated. *See Huffman v. Prudential Ins. Co. of Am.*, 2019 WL 1499475, at *4 (E.D. Pa. Apr. 5, 2019) (Courts should "'give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may

[10] *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 545 F. Supp. 3d 922, 1008-11 (D. Kan. 2021). In *EpiPen*, the court found no antitrust liability where short-term one-to-three year PBM contracts for exclusive placement based on high rebates are the established competitive norm in the pharmaceutical industry and that competitors could and did negotiate such contracts during the relevant period. *Id.* The court found these circumstances are actually procompetitive. *Id.*; *see also ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) ("Exclusive dealing agreements are often entered into for entirely procompetitive reasons . . . . "); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.,* 614 F.3d 57, 76 (3d Cir. 2010) ("'[I]t is widely recognized that in many circumstances [exclusive dealing arrangements] may be highly efficient – to assure supply, price stability, outlets, investment, best efforts or the like – and pose no competitive threat at all.'") (some alterations in original); *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 403 (3d Cir. 2016) (acknowledging that exclusive dealing arrangements may have potential to confer "economic benefits" on consumers – not coercion to offer higher discounts in exchange for better formulary placement).

be raised to their cause of action.'"). Moreover, any trial victory for Plaintiffs would likely have been appealed by Defendants, which at a minimum would have resulted in substantial delays before any financial recovery. The risks associated with establishing liability and damages at trial, and preserving any trial victory through appeal, thus, weigh in favor of approving the Settlement.

2. The Settlement Falls Within the Range of Reasonableness

Girsh requires the Court to evaluate the proposed Settlement alongside "a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and . . . in light of all the attendant risks of litigation (the ninth factor)." *In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613, at *9 (D.N.J. Feb. 9, 2010) ("*Merck/Vytorin*"). In making a "range of reasonableness" assessment, courts do not need to make a precise estimate of damages. *See In re N.J. Tax Sales Certificates Antitrust Litig.*, 2016 WL 5844319, at *8 (D.N.J. Oct. 3, 2016) (granting final approval without predicting precise value of damages). On August 1, 2022 following the Court's hearing regarding preliminary approval of the Settlement, Plaintiffs submitted for *in camera* review a letter detailing an expected range of Class-wide potential damages, as well as information regarding what percentage of damages the proposed Settlement represented based on preliminary figures. Those preliminary figures, while not finalized by the retained experts, support a finding of reasonableness here. Plaintiffs can resubmit the August 1, 2022 letter at the Court's request.[11]

Moreover, the recovery – $25 million – is clearly within a range of reasonableness. *See, e.g.*, *In re Warfarin Sodium Antitrust Litig.*, No. MDL 98-1232-SLR (D. Del.) ($44.5 million settlement

[11] "The Court recognizes that settlement may be appropriate even where the settlement is only a fraction of the ultimate total exposure should the case be decided at trial." *Kress v. Fulton Bank, N.A.*, 2021 WL 9031639, at *11 (D.N.J. Sept. 17, 2021); *see also In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 490 (E.D. Pa. 2003) (concluding "[a] settlement amounting to 15% of maximum provable damages is within the range of settlement agreements approved by other courts in this District"); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 144 (E.D. Pa. 2000) (granting final approval where "[t]he settlement that was achieved represents approximately seventeen percent of single damages to the class, an amount significantly higher than the proportion of damages obtained in settlement agreements approved by other courts").

on behalf of end-payor consumers and TPPs that purchased Coumadin certified); *In re Metoprolol Succinate End-Payor Antitrust Litig.*, No. 1:06-cv-0007-GMS-MPT (D. Del.) ($11 million settlement on behalf of end-payor consumers and TPPs that purchased Toprol XL); *In re Remeron End-Payor Antitrust Litig.*, Civ. 04-5126 FSH (D.N.J.) ($36 million settlement on behalf of end-payor consumers and TPPs that purchased Mirtazapine products); *In re Wellbutrin XL Antitrust Litig.*, No. 2:08-cv-2433-GAM (E.D. Pa.) ($11.75 million settlement on behalf of certain end-payor consumers and TPPs that purchased Mirtazapine products).[12]

D. The Settlement Satisfies the Remaining Rule 23(e)(2) Factors

The remaining factors of Rule 23(e)(2) require courts to consider: (i) the effectiveness of the proposed method for distributing relief; (ii) the terms of the proposed attorneys' fees, including the timing of payment; (iii) the existence of any other "agreements"; and (iv) whether the settlement treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv); Fed. R. Civ. P. 23(e)(2)(D). These factors are met here.

1. The Proposed Method for Distributing Relief Is Effective

The proposed methods of notice and settlement administration are effective and provide the Class Members with the necessary information to receive their *pro rata* share of the Settlement Fund. As detailed in the Peak Declaration submitted in conjunction with preliminary approval, the method proposed for processing Class Member claims is consistent with that successfully applied in similar cases by the Settlement Administrator. Declaration of Carla A. Peak in Support of Settlement Notice Plan (ECF 172-11), ¶¶3-4. The information and documentation to be provided by Class Members regarding their payments for Remicade will be reviewed by the Settlement Administrator, who is familiar with processing these types of claims and with the types of additional

[12] *See* Appendix A: End-Payor/Indirect Purchaser Generic Suppression Cases (ECF 172-2).

documentation that are available to support Class Members and Gilardi will seek additional information as needed to verify and process the claims. *Id.*, ¶¶25-27.

Once the Settlement Administrator has received, reviewed, and processed all of the timely claims, they will generate an approved claims list based upon that review, provide that list to Class Counsel and make Distribution to Class Members with approved claims in accordance with the Plan of Allocation and Distribution approved by the Court. *Id.*, ¶¶28-30. Further, the proposed Plan of Allocation and Distribution allocates the Net Settlement Fund in a fair and efficient manner. ECF 177 at 26-27.

2. The Requested Attorneys' Fees Are Reasonable

As set forth below in §VI, Plaintiffs' counsel's request for an award of attorneys' fees is reasonable and appropriate. Further, because the fee award is based on a requested percentage of an all-cash settlement, there is no risk that counsel will be paid but Class Members will not.

3. The Parties Have No Other Agreements Beside an Agreement to Address Requests for Exclusion

As discussed in connection with the motion for preliminary approval, Plaintiffs and Defendants have entered into a supplemental agreement which provides that Defendants will have the right to terminate the Settlement in the event that valid requests for exclusion from the Class exceed the criteria set forth in that agreement. To date, no requests for exclusion affected by the agreement have been received.

4. Class Members Will Be Treated Equitably, and the Reaction of the Class Supports Final Approval

Rule 23(e)(2)(D) requires the Court to consider whether Class Members will be treated equitably. All Class Members will be treated equitably under the terms of the Settlement Agreement, which provides that each Class Member that properly submits a valid Proof of Claim

form will receive a *pro rata* share of the monetary relief based on the terms of the Plan of Allocation and Distribution.

The proposed Plan of Allocation and Distribution sets forth how claims will be reviewed and processed, and how the Settlement Fund will be allocated and disbursed. The allocation method recognizes that some Class Members reside in or made reimbursements in the Selected States, which permit recovery for indirect purchases in a manner that is precluded under the Sherman Antitrust Act under *Illinois Brick*, 431 U.S. 720 (1977). To the extent a Class Member resides outside of the Selected States, remedies for purchases made outside of the Selected States would likely be limited to injunctive relief. Indeed, in its Preliminary Approval Order, the Court carefully considered the Plan of Allocation and Distribution and the purposes and reasons for the three-tier structure and its relationship to applicable state and federal law. In so doing, the Court found the Plan of Allocation and Distribution to be fair, reasonable, and adequate. ECF 177 at 26 & n.14.

Under the Plan of Allocation and Distribution, Class Members' Recognized Claims are determined as follows:

> (a) The Recognized Claim of Class Members that reside or have their principal place of business in one of the Selected States shall be the total dollars spent by that member to indirectly purchase or provide reimbursement for some or all of the purchase price of Remicade.
>
> (b) The Recognized Claim of Class Members that do not reside or have their principal place of business in one of the Selected States but indirectly purchased or provided reimbursement for some or all of the purchase price of Remicade in one or more of the Selected States shall be the sum of:
>
> (i) The total dollars spent to indirectly purchase or provide reimbursement for some or all of the purchase price of Remicade in any of the Selected States; and
>
> (ii) The total dollars spent to indirectly purchase or provide reimbursement for some or all of the purchase price of Remicade outside of the Selected States multiplied by 0.01.
>
> (c) The Recognized Claims of Class Members of that do not reside or have their principal place of business in one of the Selected States and did not indirectly

> purchase or provide reimbursement for some or all of the purchase price of Remicade in any of the Selected States shall be the total dollars spent to indirectly purchase or provide reimbursement for some or all of the purchase price of Remicade multiplied by 0.01.

ECF 172-5, ¶5.

As the ability of members of the Class to recover is tied primarily to the laws of the Selected States, this Plan of Allocation and Distribution appropriately recognizes and reflects each Class Member's likely ability to recover should the Action have been litigated to resolution. Thus, Plaintiffs negotiated a benefit for non-Selected State resident payers' nominal interest in this action through both a cash component for release of their nominal Sherman Antitrust Act claim and a cash component addressing 100% of the cost of Remicade infused within Selected States on an equal basis with all such Class Member expenses. This is a substantial benefit and fairly reflects the relative strengths and weaknesses of Class Member claims.

Allocation plans such as this are routinely used and approved in class action litigation. "When assessing proposed plans of allocation, courts utilize the same standard for determining whether to approve the settlement itself." *McDonough v. Toys R Us, Inc*., 80 F. Supp. 3d 626, 648 (E.D. Pa. 2015). "Therefore," the *Toys R Us* court explains, "the proposed plan needs to be fair, reasonable and adequate." *Id*. Importantly, the district court "must determine whether the compromises reflected in the settlement – including those terms relating to the allocation of settlement funds – are fair, reasonable, and adequate when considered from the perspective of the class as a whole." *In re Baby Prods*. *Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013); *see also Cendant*, 264 F.3d at 248. "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *In re Ikon Off. Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). "A district court's 'principal obligation' in approving a plan of allocation 'is simply to ensure that the fund distribution is fair and reasonable as to all participants in the

fund.'" *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 326 (3d Cir. 2011) (quoting *Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 964 (3d Cir. 1983)).

Further, out of the thousands of potential Class Members, other than the potential objection that is the subject of the currently pending intervention motion by the Attorneys General for the State of Illinois and the Commonwealth of Massachusetts, no other objections have been received.[13] *See* Bernay Decl., ¶28; Smith Decl., ¶25.

Thus, because each factor identified in Rule 23(e)(2) and the Third Circuit's *Girsh* opinion is satisfied and pursuant to *Warfarin*, the Settlement is entitled to a presumption of fairness. 391 F.3d at 535. Given the litigation risks involved, the complexity of the underlying issues, the recovery pursuant to the Settlement is outstanding, and could not have been achieved without the commitment of Plaintiffs and the hard work of Plaintiffs' counsel.

Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate, and should be granted final approval.

V. THE COURT SHOULD APPROVE THE PROPOSED PLAN OF ALLOCATION AND DISTRIBUTION

The Proposed Plan of Allocation and Distribution details how the Settlement proceeds are to be divided among Class Members who submit claims. *See* ECF 172-5. As discussed above, the proposed Plan of Allocation and Distribution is fair and reasonable. *See, e.g.*, *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *8 (D.N.J. July 29, 2013) (approving similar plan of allocation);

[13] As fully addressed in Plaintiffs' Response in Opposition to Motion by the Illinois and Massachusetts Attorneys' General to Intervene for Limited Purpose (ECF 186), not only is intervention untimely but the articulated bases for the states' objection is without merit for the simple reasons that, *inter alia*: (1) Plaintiffs never sought damages under the those states' laws in this litigation, indeed, Plaintiffs lack standing to assert Massachusetts or Illinois antitrust or consumer protection claims here; and (2), the Plan of Allocation and Distribution fairly and reasonably allocates the recovery between Class Members that reside in or paid for Remicade infusions in the Selected States, and those with no damages claim in this Action. *See* ECF 186; *see also* Defendants' Memorandum of Law in Support of Their Joinder in Plaintiffs' Opposition to the Illinois and Massachusetts Attorneys General's Motion to Intervene (ECF 187).

Viropharma, 2016 WL 312108, at *15 (same). For all of these reasons, the Plan of Allocation and Distribution should be approved.

VI. THE REQUEST FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES SHOULD BE APPROVED

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The ultimate determination of the proper amount of attorneys' fees rests within the sound discretion of the court based on the facts of the case. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d Cir. 2009).

Here, Plaintiffs' counsel request attorneys' fees of 28% of the Settlement Amount and litigation expenses of $2,288,388.90, plus interest earned on these amounts at the same rate and for the same period as earned by the Settlement Fund. Bernay Decl., ¶38. Plaintiffs also request service awards of $15,000 and $15,600 for NEHP and Local 295, respectively. Bernay Decl., ¶50.

These requests are fair and reasonable, and well within the range of fees, expenses, and service awards typically granted in similar matters. The Settlement is very good result for the Class in the face of significant risks. This Action involved substantial outlays of costs and attorney and staff time, with no guarantee of any ultimate recovery. Further, Plaintiffs' counsel brought substantial experience to their work on this Action, and skillfully overcame defense counsel's determined opposition. For these reasons, and those detailed below, Plaintiffs respectfully request that these attorneys' fees, expenses, and service awards be approved.

A. Attorneys' Fees Should Be Awarded Based on a Percentage of the Common Fund

It is well established that an attorney "who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also e.g.*, *Viropharma*, 2016 WL

312108, at *15 (same). "Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995).

The Supreme Court has recognized that it is appropriate to award counsel a reasonable percentage of the common fund as a fee. *See Boeing*, 444 U.S. at 478-79. This is because the percentage method aligns counsel's interests with those of the Class. The lodestar method, by contrast, has been criticized in the class action context for incentivizing billing "excessive hours" and drawing out litigation, while failing to incentivize lawyers to seek the largest recovery possible. *Cendant*, 264 F.3d at 256. Courts in this district recognize that the percentage-of-recovery method is preferred in common fund cases because it rewards counsel for success and penalizes it for failure. *Hall v. Accolade, Inc.*, 2020 WL 1477688, at *10 (E.D. Pa. Mar. 25, 2020); *see also Fanning v. Acromed Corp.*, 2000 WL 1622741, at *5 (E.D. Pa. Oct. 23, 2000); *Grier v. Chase Manhattan Auto. Fin. Co.*, 2000 WL 175126, at *7 (E.D. Pa. Feb. 16, 2000).

B. The Requested Fee Is Fair and Reasonable Under the *Gunter* Factors

When evaluating proposed fee awards, courts in the Third Circuit consider several factors, including:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the Settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000). These factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Id.* Here, each factor supports the requested fee.

1. The Size of the Common Fund Created and the Number of Persons Benefited by the Settlement

In awarding fees, the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Viropharma*, 2016 WL 312108, at *16 (same). To assess this factor, courts "'consider[] the fee request in comparison to the size of the fund created and the number of class members to be benefitted.'" *Harshbarger v. Penn Mut. Life Ins. Co.*, 2017 WL 6525783, at *3 (E.D. Pa. Dec. 20, 2017) (quoting *Rowe v. E.I. DuPont de Nemours & Co.*, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011)).

Here, the $25 million recovery is an outstanding result that provides an immediate cash recovery to a large Class. As discussed herein, this is a good result in an end-payor case. *See* below at 29. Additionally, the "number of class members to be benefitted" by the Settlement is large. *Harshbarger*, 2017 WL 6525783, at *3; Settlement Agreement, ¶1.6. Likely thousands of TPPs and consumers who indirectly purchased Remicade during the Class Period will benefit from the Settlement. For these reasons, the first *Gunter* factor clearly weighs in favor of approving the requested fee.

2. Reaction of Class Members to the Fee Request

Notice of this Settlement, including the fee request, has been provided to "virtually the entire TPP portion of the End-Payor Class . . . . and approximately 81% of the likely consumer portion . . . . " Smith Decl., ¶26. To date, counsel have received no objections to the fee request.[14] Smith Decl., ¶25. Thus, the reaction of the Class weighs in favor of approval of the requested fee. *See Cendant*, 264 F.3d at 235 (stating that "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement"); *see also High St. Rehab., LLC v.*

[14] Significantly, Illinois and Massachusetts also do not "raise any objection to the total amount of the settlement or the attorneys' fees sought by the Class Counsel." ECF 183-1 at 17.

Am. Specialty Health Inc., 2019 WL 4140784, at *4 (E.D. Pa. Aug. 29, 2019) ("A low number of objectors or opt-outs is persuasive evidence of the proposed settlement's fairness and adequacy.").

3. The Skill and Efficiency of Counsel

The third *Gunter* factor – the skill and efficiency of the attorneys involved – is measured by the "'quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'" *Viropharma*, 2016 WL 312108, at *16. Here, each of these considerations demonstrates the skill and efficiency of Plaintiffs' counsel and supports the requested fee.

Class Counsel worked with a group of other counsel appearing in the Action, "Plaintiffs' counsel," to achieve the result here. As part of Class Counsel's job, Class Counsel ensured that work assignments were not duplicative and that resources were efficiently allocated. Class Counsel oversaw all projects and believe the results obtained would not have occurred but for the efforts of all Plaintiffs' counsel. Plaintiffs' counsel were opposed by Defendants' highly sophisticated counsel, who skillfully pressed every available argument at each stage of the litigation. Class Counsel also engaged in multiple rounds of negotiations that ultimately resulted in a resolution of this Action.

This outstanding result was only possible due to Plaintiffs' counsels' vast experience and expertise. *See* Bernay Decl., ¶¶43-44.[15] Ultimately, this outstanding result is the best indicator of the skill and expertise that Plaintiffs' counsel brought to this matter. *See In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 436 (D.N.J. 2004) ("Indeed, 'the results obtained' for a class evidence the skill and quality of counsel.").

[15] Bernay Fee Decl., Exhibit G (Robbins Geller Firm résumé); Goldberg Decl., Exhibit E (Freedman Boyd Hollander & Goldberg, PA firm résumé); Looby Decl., Exhibit C (Gustafson Gluek PLLC firm résumé); Bennett Decl., Exhibit E (Miller Shah, LLP firm résumé).

4. The Complexity and Duration of the Action

As detailed herein and the Bernay Declaration, this Action has spanned five years and involved overcoming a challenging motion to dismiss and extensive discovery practice, including massive document discovery and dozens of depositions. *See* above, §II; *see also* Bernay Decl., ¶¶4-19.

Each of these stages of litigation presented obstacles that Plaintiffs' counsel skillfully overcame. In order to secure this recovery, Plaintiffs' counsel analyzed a large quantity of complex, jargon-laden documents concerning pharmaceutical drug pricing and marketing, secured key admissions in depositions of Defendants' executives, and wove the documentary and deposition evidence into a compelling narrative. These are only samples of the complex issues that arose in the course of this Action. In light of the complexity and duration of this Action, this factor clearly favors approval of the requested attorneys' fees.

5. The Risk of Non-Payment

Plaintiffs' counsel prosecuted this Action on a contingency fee basis. *See* Bernay Fee Decl., ¶¶37, 41-42. Thus, without a settlement or a trial victory, they would go unpaid. *Id.* This created an incentive to litigate the Action aggressively and seek the best recovery possible. "'Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval.'" *High St. Rehab.*, 2019 WL 4140784, at *13; *see also In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012) ("*Schering-Plough II*") (approving 33.3% fee; noting that "the risk created by undertaking an action on a contingency fee basis militates in favor of approval").

6. The Significant Time Devoted to This Action

The significant time that counsel devoted to this Action favors approval of the requested attorneys' fees. Plaintiffs' counsel collectively invested 23,698.55 hours of attorney and support

staff time over the course of four years, and incurred approximately $2,288,388.90 in expenses prosecuting this Action for the benefit of the Class, without promise of payment of attorney's fees or expenses if Plaintiffs did not prevail on their claims. *See* Bernay Fee Decl., ¶¶4-6 (setting out Class Counsel's time and expenses); *see also* Bernay Decl., ¶38 (summarizing the time and expenses of all of Plaintiffs' counsel).

7. The Range of Fees Typically Awarded

"While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has noted that reasonable fee awards in percentage-of-recovery cases generally range from nineteen to forty-five percent of the common fund." *Whiteley v. Zynerba Pharms., Inc*., 2021 WL 4206696, at *12 (E.D. Pa. Sept. 16, 2021) (holding that this factor weighs in favor of approval where 33% fee request "falls in the middle" of the range of fees granted in comparable securities class actions in the Third Circuit); *see also Viropharma*, 2016 WL 312108, at *17 (noting that in this Circuit, awards of thirty percent are not uncommon in class actions) (citing cases).

Courts have frequently awarded fee percentages similar to or higher than the requested fee of 28% in this Action, even on large recoveries. *In re Schering-Plough Corp. Enhance Sec. Litig.*, 2013 WL 5505744, at *3, *6 (D.N.J. Oct. 1, 2013) ("*Schering-Plough III*") (awarding attorney's fees of 28% on $215 million recovery); *In re Aetna Inc.*, 2001 WL 20928, at *13-*16 (E.D. Pa. Jan. 4, 2001) (awarding attorney's fees of 30% on $82.5 million recovery); *Ikon*, 194 F.R.D. at 192-97 (awarding attorney's fees of 30% on $111 million recovery); *see also In re Veritas Software Corp. Sec. Litig.*, 396 F. App'x 815, 818-19 (3d Cir. 2010) (affirmed attorney's fees of 30% on $21.5

million recovery). Because the requested fee is reasonable in relation to fees typically awarded in similar cases, this factor favors approval of the requested fee award.[16]

C. The Requested Fee Is Reasonable Under a Lodestar Cross-Check

Courts in the Third Circuit may also use a "lodestar cross-check" to confirm the reasonableness of a percentage fee. *See Moore v. GMAC Mortg.*, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) (stating that the "lodestar cross-check is 'suggested,' but not mandatory"). If used, the lodestar cross-check "should not displace a district court's primary reliance on the percentage-of-recovery method." *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006). Placing too much emphasis on the lodestar method "may encourage attorneys to delay settlement or other resolution to maximize legal fees" and "may also compensate attorneys insufficiently for the risk of undertaking complex or novel cases on a contingency basis." *Ikon*, 194 F.R.D. at 193. Given its limited value, some courts consider a lodestar review "an inevitable waste of judicial resources." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49 (2d Cir. 2000).

When used, the Third Circuit has recognized that the lodestar cross-check "need entail neither mathematical precision nor bean-counting," and that "district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005). The lodestar cross-check involves simply comparing counsel's "lodestar" to the fee resulting from the requested percentage award and assessing the reasonableness of the resulting multiplier. The appropriate multiplier varies based on the specifics of each case and "need not fall within any pre-defined range, provided that the [d]istrict [c]ourt's analysis justifies the award." *Id.* at 307. However, the Third Circuit has recognized that percentage

[16] In evaluating attorneys' fee requests, courts in the Third Circuit have also considered factors such as whether the fee award "reflects commonly negotiated fees in the private marketplace," and any benefit received from the efforts of government agencies. *See Merck/Vytorin*, 2010 WL 547613, at *12-*13. These additional factors also favor approval of the requested fee here. *See id.* at *13 (noting that contingent fees in the private marketplace are commonly 30% to 40%).

awards that result in multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *Veritas*, 396 F. App'x at 819; *see also Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (approving multiplier of 6.16; noting that "multiples ranging from 1 to 8 are often used in common fund cases" to "compensate counsel for the risk of assuming the representation on a contingency fee basis").

Here, Plaintiffs' counsel have spent a total of 23,698.55 hours of attorney and paraprofessional time on this matter, for a total lodestar amount of $11,811,010.25. *See* Bernay Decl., ¶38. The resulting overall lodestar multiplier is 0.593, which falls within the range of reasonableness based on the cases cited above. Indeed, because the fee requested is lower than the total lodestar, this fee is more than reasonable.

D. Reasonably Incurred Litigation Expenses Should Be Reimbursed

Plaintiffs' counsel also request payment of expenses incurred in connection with the prosecution of this Action in the aggregate amount of $2,288,388.90. Bernay Decl., ¶38. Counsel in class actions "are entitled to reimbursement of expenses that were 'adequately documented and reasonable and appropriately incurred in the prosecution of the class action.'" *Viropharma*, 2016 WL 312108, at *18 (quoting *Abrams v Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)); *Schering-Plough II*, 2012 WL 1964451, at *8 (approving litigation expenses and noting that "[t]his type of reimbursement has been expressly approved by the Third Circuit").

The expenses borne by Plaintiffs' counsel are documented in the accompanying firm declarations.[17] These expenses consist of the typical categories, such as travel, document hosting and production, research costs, expert fees, filing fees, postage, copying, and delivery. These expenses were reasonable and necessary to the prosecution of the claims and achieving the Settlement, and are of the same type routinely approved in class actions. *See Viropharma*, 2016 WL

[17] *See* Bernay Fee Decl., ¶6; Bennett Decl., ¶6; Goldberg Decl., ¶6; and Looby Decl., ¶6.

312108, at *18 (approving costs and expenses for, among other things, experts, travel, copying, postage, telephone, filing fees, and online and financial research); *Yedlowski v. Roka Bioscience, Inc.*, 2016 WL 6661336, at *23 (D.N.J. Nov. 10, 2016) (approving costs and expenses for experts, investigation, mediation, publishing notice, and online legal research, and noting that "[c]ourts have held that all of these items are properly charged to the [c]lass").

The requested expense amount is significantly lower than the expenses approved in many other class actions. *See, e.g.*, *AT&T Corp.*, 455 F.3d at 169 (approving expenses of nearly $5.5 million); *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, 2016 WL 11575090, at *5 (D.N.J. June 28, 2016) (approving award of $9.5 million in expenses); *Ikon*, 194 F.R.D. at 197 (approving award of over $3.5 million in expenses); *In re Lucent Techs., Inc. Sec. Litig.*, No. 2:00-cv-621 (ECF 236) (D.N.J. July 23, 2004) (approving award of $3.5 million in expenses).

For all of these reasons, the requested expense award should be approved.

E. Service Awards Here Are Proper

The Third Circuit "favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws." *Schering-Plough III*, 2013 WL 5505744, at *37. "Service awards are regularly granted to 'compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation and [] reward the public service of contributing to the enforcement of mandatory laws.'" *Kyle Stechert v. Travelers Home & Marine Ins. Co*., 2022 WL 2304306, at *15 (E.D. Pa. June 27, 2022) (Marston J.) (quoting *Sullivan*, 667 F.3d at 333 n.65).

Local 295 and NEHP are self-funded health and welfare fund TPPs. Their declarations describe Plaintiffs' activities directly related to representing the Class, including: (a) consulting with counsel regarding the litigation and the Court's orders; (b) reviewing and commenting upon pleadings, motions, and briefs; (c) reviewing correspondence and status reports from counsel;

(d) responding to discovery requests and collecting documents for production; (e) preparing for and participating in depositions; (f) conferring with counsel concerning litigation strategy; and (g) monitoring settlement negotiations. Nobles Decl., ¶¶2-6; Kellner Decl., ¶¶2-6.

The requested class representative service awards, totaling $30,600.00, are reasonable, and are less than or equal to awards in many similar cases. *See, e.g.*, *In re CIGNA Corp. Sec. Litig.*, ECF 288 (E.D. Pa. July 13, 2007) (Baylson, J.) (approving awards to four lead plaintiffs totaling more than $130,000); *Schering-Plough III*, 2013 WL 5505744, at *37 (approving awards to four lead plaintiffs totaling more than $102,000); *id.* at *56-*57 (in related matter, approving awards to four separate lead plaintiffs totaling more than $109,000); *Par Pharm.*, 2013 WL 3930091, at *11 (approving award to lead plaintiff of $18,000); *Li v. Aeterna Zentaris, Inc.*, 2021 WL 2220565, at *2 (D.N.J. June 1, 2021) (approving awards of $17,000 to each of the three lead plaintiffs).[18]

Plaintiffs respectfully request the proposed awards be approved.

[18] Further buttressing the requested service awards' reasonableness is that their aggregate percentage of the $25 million recovery – 0.12% – is lower than the same measurement when utilized in granting class representative service awards in prior Third Circuit class actions. *See, e.g.*, *Stechert v. The Travelers Home & Marine Ins. Co.*, 2022 WL 2304306, at *16 (E.D. Pa. June 27, 2022) (Marston, J.) (1.1% when measured against class recovery); *Sweda v. Univ. of Pa.*, 2021 WL 5907947, at *8 (E.D. Pa. Dec. 14, 2021) (1.15% of the class recovery).

VII. CONCLUSION

For all the reasons stated above and in the accompanying declarations, Plaintiffs respectfully request that the Court: (i) grant their motion for final approval of the Settlement and the Plan of Allocation and Distribution; (ii) award Attorneys' Fees of 28%, of the Settlement Amount and payment of litigation expenses of $2,288,388.90, plus interest on both amounts at the same rate and for the same period as earned by the Settlement Fund; and (iii) award Service Awards to NEHP and Local 295 in the amount of $15,000 and $15,600, respectively.

Dated: October 31, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on October 31, 2022, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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