UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

IN RE: ZETIA (EZETIMIBE) ANTITRUST LITIGATION This Document Relates to: All End-Payor Actions	MDL No. 2836 No. 2:18-md-2836-RBS-DEM

MEMORANDUM OF LAW IN SUPPORT OF END-PAYOR PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS TO THE CLASS REPRESENTATIVE PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Co-Lead Counsel and Local Counsel,[1] who represent End-Payor Plaintiffs, The City of Providence, Rhode Island, International Union of Operating Engineers Local 49 Health and Welfare Fund, Painters District Council No. 30 Health & Welfare Fund, Philadelphia Federation of Teachers Health & Welfare Fund, Sergeants Benevolent Association Health & Welfare Fund, The Uniformed Firefighters' Association of Greater New York Security Benefit Fund and the Retired Firefighters' Security Benefit Fund of the Uniformed Firefighters' Association, and United Food and Commercial Workers Local 1500 Welfare Fund (collectively, "End-Payor Plaintiffs") and the certified End-Payor Class, respectfully submit this Memorandum of Law in Support of their Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards to the Class Representative Plaintiffs. Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2), Co-Lead Counsel respectfully request entry of an Order awarding: (i) one third (1/3) of the Settlement Fund in attorneys' fees; (ii) $3,905,175.85 in reasonable costs and expenses; and (iii) $300,000 in the aggregate for incentive awards for the Class Representative Plaintiffs, to be allocated by Co-Lead Counsel among the Class Representatives as follows: (i) Painters District Council No. 30 Health & Welfare Fund - $75,000; (ii) The City of Providence, Rhode Island - $75,000; (iii) Sergeants Benevolent Association - $30,000; (iv) Uniformed Firefighters' Association of Greater New York Security Benefit Fund and Retired Firefighters' Security Benefit Fund of the Uniformed Firefighters' Association - $30,000; (v) United Food and Commercial Workers Local 1500 Welfare Fund - $ 30,000; (vi) Philadelphia Federation of Teachers Health &

[1] "Co-Lead Counsel" refers to Motley Rice LLC and Miller Law LLC. Local counsel refers to Furniss, Davis, Rashkind and Saunders, P.C. "Class Counsel" refers to all End-Payor counsel of record in this case.

Welfare Fund - $30,000; (vii) International Union of Operating Engineers Local 49 Health and Welfare Fund - $30,000.

The $70 million all-cash settlement obtained for the End-Payor Plaintiffs, of which Co-Lead Counsel expects all, less fees and costs, will be distributed to the Class, and will provide substantial relief to each Class member. As compensation for their efforts, which was entirely at risk, Co-Lead Counsel respectfully request an award of attorneys' fees in the amount of one-third of the Settlement Fund or $23,333,333.33 (*i.e.*, one-third of the gross settlement amount of $70 million), reimbursement of their reasonable litigation expenses and $300,000 in incentive awards for the Class Representative Plaintiffs. Under the lodestar cross-check, frequently used in awarding class action fees, the requested fees represent a modest 1.22 of Class Counsel's lodestar. As demonstrated below, the requested fee is a fair and reasonable request given the complex nature of the case and the excellent result obtained in the face of significant risks over the past five years.

The requested $300,000.00 in combined incentive awards for the Class Representative Plaintiffs is also fair and reasonable given the time and effort they expended prosecuting this case on behalf of the End-Payor Class. Accordingly, End-Payor Plaintiffs, Co-Lead and Local Counsel respectfully request the Court grant this motion in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

I. The End-Payor Plaintiffs' Claims & Procedural Background.

This antitrust class action alleged state antitrust, consumer protection, and unjust enrichment law claims by End-Payor purchasers of the prescription drug Zetia (Ezetimibe) and its generic equivalents. End-Payor Plaintiffs alleged that Defendants Merck & Co., Inc.; Merck Sharp & Dohme Corp.; Schering-Plough Corp.; Schering Corp.; MSP Singapore Co. LLC (collectively "Merck"); and Glenmark Pharmaceuticals, Ltd.; and Glenmark Pharmaceuticals Inc., USA,

incorrectly identified as Glenmark Generics Inc., USA (collectively "Glenmark," and together with Merck, "Defendants") entered into an unlawful agreement to delay the introduction of a less expensive generic version of Merck's cholesterol-lowering medication, Zetia, which resulted in artificially inflated prices for branded Zetia (Ezetimibe) and its generic equivalents. *See* End-Payor Plaintiffs' Consolidated Class Action Complaint and Demand for Jury Trial, ECF No. 130 (hereinafter "CCAC"). Over a dozen class actions on behalf of End-Payor Plaintiffs were filed against Defendants Merck and Glenmark, alleging that Defendants placed an unreasonable restraint on trade in the market for Zetia by entering into an unlawful pay-for-delay agreement. On June 8, 2016, the Judicial Panel on Multidistrict Litigation granted a motion to transfer and consolidate the actions, choosing to centralize the cases before the Eastern District of Virginia for pre-trial proceedings. ECF No. 1.

On September 13, 2018, the CCAC was filed against Defendants on behalf of the following End-Payor Plaintiffs: (i) The City of Providence, Rhode Island; (ii) International Union of Operating Engineers Local 49 Health and Welfare Fund; (iii) Painters District Council No. 30 Health & Welfare Fund; (iv) Philadelphia Federation of Teachers Health & Welfare Fund; (v) Sergeants Benevolent Association Health & Welfare Fund; (vi) the Uniformed Firefighters' Association of Greater New York Security Benefit Fund and the Retired Firefighters' Security Benefit Fund of the Uniformed Firefighters' Association; and (vii) United Food and Commercial Workers Local 1500 Welfare Fund, and all other similarly situated Class members. Defendants moved to dismiss the CCAC.[2] On August 9, 2019, the Court granted, in part, and denied, in part,

[2] Plaintiff Self-Insured Schools of California ("SISC") originally filed an End-Payor Plaintiff Complaint and was included in the Consolidated Class Action Complaint And Demand For Jury Trial, but later withdrew from the action. No incentive award is being sought on behalf of SISC.

the Defendants' Motion to Dismiss the End-Payor Plaintiffs' Consolidated Class Action Complaint. ECF No. 234.[3]

Thereafter, the parties engaged in extensive discovery. On August 20, 2021, after full briefing, argument, and an evidentiary hearing on End-Payor Plaintiffs' class certification motion, the Court certified the End-Payor Class. ECF Nos. 1094, 1316. End-Payor Plaintiffs then implemented and effectuated the Court-approved Notice Plan, giving members of the Class the ability to request exclusion from the Class. Only thirty members of the Class ultimately requested[4] exclusion.[5]

On August 10, 2020, Glenmark and Merck moved for summary judgment and to exclude Plaintiffs' proposed expert opinions and testimony. End-Payor Plaintiffs simultaneously moved

[3] A more detailed litigation history can be found in the Declaration of Marvin A. Miller and Michael M. Buchman In Support of End-Payor Class Plaintiffs' Motion For Preliminary Approval of Proposed Settlement, Approval of the Form and Manner of Notice to the Class and Proposed Schedule for a Fairness Hearing. ECF No. 2133 ("Joint Decl.").

[4] The following entities requested exclusion in 2022: Donegal Mutual Insurance Company; Koniag, Inc.; Citation Oil & Gas Corp.; Accusoft; Central Painting & Sandblasting, Inc.; Ovintiv Inc.; United States Fire Insurance Company; Health Net LLC; New York Quality Healthcare Corporation dba Fidelis Care; Humana Inc.; Centene Corporation; Kaiser Foundation Health Plan, Inc.; WellCare Health Plans, Inc.; United HealthCare Services, Inc.; Williams and Connolly LLP; and Klick USA, Inc. United HealthCare, Centene, Humana, and Kaiser each joined in this multidistrict litigation and were directed to file a motion to remand their action with the Panel on Multidistrict Litigation. *See* Order, ECF No. 2121. Of those, Williams and Connolly LLP; and Klick USA, Inc., and United HealthCare were not timely but United HealthCare has continued to prosecute its separate claims. *See* Supplemental Declaration of Eric J. Miller Regarding Dissemination of Notice, Exhibit G ("Supplemental Miller Decl.") ECF No. 2157.

[5] The following entities untimely requested exclusion in 2023: Anesthesia Physician Solutions of South Florida; Arizona EM-I Medical Services, P.C.; Emergency Medical Associates of NJ; Envision Healthcare Corp.; Envision Physician Services, LLC; Florida EM-I Medical Services, P.A.; HCA-Emcare Holdings LLC; Infinity Healthcare Physicians, S.C.; Nevada EM-I Silver/Homansky Medical; New Jersey Healthcare Specialists, P.C.; Northside Emergency Associates, P.C.; Radadvantage, A Professional Corp.; and Sheridan Anesthesia Services of Georgia' Wabash EM-I Medical Services, P.C. *Id*. at Exhibit H.

for preclusion of argument and evidence at summary judgment and trial based on Merck's privilege assertions. ECF Nos. 1053, 1054, 1074, 1075. End-Payor Plaintiffs also moved to preclude portions of testimony from Defendants' experts. ECF Nos. 1070, 1071, 1072, 1073. End-Payor Plaintiffs further moved that same day for Partial Summary Judgment Concerning the Relevant Market. ECF Nos. 1080, 1081. On November 1, 2021, Magistrate Judge Miller issued a Report and Recommendation, recommending the granting of End-Payor Plaintiffs' Motion for Partial Summary Judgment Concerning the Relevant Market, ECF No. 1391, which the Court adopted in full on February 24, 2022. ECF No. 1518.

Before resolution of the summary judgment motions, the parties began preparing for the April 17, 2023 trial. Preparation for trial was extensive and included exchanging thousands of documents designated as potential trial exhibits and filing a combined total of 43 motions *in limine* between Plaintiffs and Defendants. Plaintiffs prepared their trial witness list, exhibit list, and deposition designations and reviewed and objected to Defendants' pre-trial disclosures. The parties filed competing sets of proposed jury instructions and verdict forms and initiated the jury selection process. Both sides were fully prepared to proceed with an initially proposed five-week trial. ECF No. 2133. End-Payor Plaintiffs were well-versed in the strengths and weaknesses of their case against Defendants and in a position to assess and balance the risks and benefits of continuing to pursue the litigation to verdict.

With relevant information concerning the nature and scope of the case, the parties reached a settlement in principle on April 19, 2023, after the jury selection process had commenced. The Settlement Agreement was a result of months of good faith, contentious, arms-length negotiations aided through mediation with retired federal Judge Layn Phillips. Under the terms of the Settlement Agreement, Defendants will deposit $70 million into an escrow account. Declaration

of Michael M. Buchman dated May 22. 2023 ("Buchman Decl."), Ex. A, ¶ 5, ECF No. 2134. The Settlement further provides that Co-Lead Counsel may apply to the Court for an award of reasonable attorneys' fees not to exceed one-third of the Settlement Fund, as well as reimbursement of reasonable expenses incurred in the action. It also provides that Co-Lead Counsel may request an Incentive Award for Class Representative Plaintiffs. As such, the settlement amount in the escrow account, together with any interest thereon, will be used to pay: (i) Court-approved attorneys' fees; (ii) costs and expenses incurred and to be incurred in connection with this litigation; (iii) taxes payable on the Settlement Fund; (iv) any and all Notice Plan and Claims Administration, administrative expenses associated with this litigation or the Settlement; and (v) Court-approved incentive awards to the named Class Representative Plaintiffs. *Id.* at ¶ 9. The remainder of the Settlement Fund will be distributed to eligible members of the End-Payor Class according to the Court-approved Plan of Allocation. *Id.*

The parties continued to work over the next months following the settlement in principle to finalize the Settlement Agreement. End-Payor Plaintiffs moved the Court to preliminarily approve the Settlement Agreement on May 22, 2023. *See* Mot. For Preliminary Approval. ECF No. 2131. The Court granted preliminary approval to the Settlement on June 6, 2023, and scheduled a final approval hearing for September 21, 2023. *See* ECF No. 2151.

The Court-approved robust Notice Plan, which included direct mail, digital, and media publication so that members of the Class received notice of the Settlement Agreement and their rights, was implemented. *See* Declaration of Eric J. Miller dated July 3, 2023, ¶¶ 4-7, ("EJM Decl.") ECF No 2156-1. Members of the End-Payor Class were previously given Notice of their right to request exclusion from the Class by May 10, 2022. The more recent Notice Plan explained to members of the Class their right to object to any aspect of the Settlement, the request for

attorneys' fees, reimbursement of expenses, incentive awards, and the procedures to follow. Like the past dissemination of Notice concerning certification of the End-Payor Class, the Notice was designed to alert members of the Class to the Settlement Agreement with a bold headline and plain language providing essential information regarding the salient terms. The Notice Plan satisfied the requirements of Rule 23(e) and the due process requirements that must be met to bind each member of the Class.

The details of the manner of Notice that was sent to Class members are provided in the Declaration of Eric J. Miller Regarding Dissemination of Notice dated July 3, 2023 at ¶¶ 4-7, and the Supplemental Declaration of Eric J. Miller Regarding Dissemination of Notice dated August 16, 2023 ("Supplemental Miller Decl.") at ¶¶ 2-5, ECF No. 2157. The Notice Plan ensured that a large portion of the members of the End-Payor Class received direct Notice. The Short-Form Postcard Notice was sent *via* First-Class Mail directly to each End-Payor Class member identified in A.B. Data's database.[6] EJM Decl., at ¶ 4 ECF No. 2156-1; *See In re NeuStar, Inc. Sec. Litig.*, 2015 WL 5674798, at *12 (E.D. Va. Sept. 23, 2015) (approving notice by first-class mail). In addition, A.B. Data sent emails to potential End-Payor Class Members to the extent that addresses

[6] A.B. Data maintains, and updates regularly, a proprietary database of approximately 42,000 entities that include: (i) insurance companies; (ii) health maintenance organizations; (iii) self-insured entities such as certain large corporations, labor unions, and employee benefit and pension plans; and (iv) certain record keepers, such as PBMs and third-party administrators ("TPAs"). This database was previously approved to provide notice of the certified litigation class action in this Action. In addition, it has been approved as the basis for individual class notice to End-Payor Plaintiffs in *In re Restasis* (*Cyclosporine Ophthalmic Emulsion*) *Antitrust Litig.*, 1:17-cv-06684-NG-LB (E.D.N.Y. Mar. 15, 2021), Dkt. No. 147, at 8; *In re EpiPen (Epinephrine Injection USP) Marketing, Sales Practices and Antitrust Litig.*, 17-md-2785 (D. Kan. Oct. 13, 2020, Dkt. Nos. 2209 & 2240; *In re Loestrin 24 FE Antitrust Litig.*, 13-md-2472 (D.R.I. Sept. 27, 2019), Dkt. Nos. 1234 & 1245; *In re Aggrenox Antitrust Litig.*, 14-md-2516, Dkt. Nos. 748−1 & 766; *In re Solodyn Antitrust Litig.*, 14-md-2503, Dkt. Nos. 532, 533-8, & 555 (D. Mass. Apr 2018); and *Vista Healthplan, Inc., et al., v. Cephalon, Inc. et al. (Provigil)*, Civil No. 06-CV-01833 (E.D. Pa., August 8, 2019).

were available. EJM Decl., at ¶ 5 ECF No. 2156-1. Included within the email notices was a link allowing recipients to view the full, detailed notice package. In addition to direct notice to End-Payor Plaintiffs and as referenced above, a banner advertisement campaign was purchased on ThinkAdvisor.com/life-health and BenefitNews.com. *Id.*, at ¶ 6, ECF No. 2156-1. All banner advertisements included an embedded link to the case-specific website. A news release was also disseminated via *PR Newswire*'s US1 Newsline distribution list. *Id.*, at ¶ 7, ECF No. 2156-1. This news release was distributed via *PR Newswire* to the news desks of approximately 10,000 newsrooms, including those of print, broadcast, and digital websites across the United States. *Id.* In sum, the robust Notice sent to Class members was designed to provide a favorable 80% reach.

ARGUMENT

I. The Percentage-of-the Fund Method is Appropriate for Awarding Attorneys' Fees in this Common Fund Case.

Under Rule 23(h), "[i]n 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 Supreme Court has recognized that "a litigant or lawyer 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). This doctrine, known as the "common-fund doctrine," is derived from a federal court's "historic equity jurisdiction." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939). It is premised upon the principle "that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478.

While competing methods for calculating a reasonable fee in common fund cases exist—namely the lodestar and percentage-of-fund methods—the Supreme Court and district courts in

the Fourth Circuit have overwhelmingly applied the percentage-of-fund method.[7] This method also best aligns with the interests of Co-Lead Counsel and Class members because it ties the attorneys' fees award to the overall result achieved rather than hours expended by the attorneys. *See Thomas v. FTS USA, LLC*, No. 3:13-cv-825 REP, 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017), *report and recommendation adopted*, 2017 WL 1147460 (E.D. Va. Mar. 27, 2017); *see also Deem v. Ames True Temper, Inc*., No. 6:10–cv–01339, 2013 WL 2285972, at *5 (S.D. W. Va. May 23, 2013) ("The percentage method 'is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and punishes it for failure."')(quoting *In re Prudential Ins. Co. Am. Sales Litig*., 148 F.3d 283, 333 (3d Cir. 1998)). In light of the "clear consensus among the federal and state courts, consistent with Supreme Court precedent," this Court should apply the "better-reasoned and more equitable method of determining attorneys' fees in [common fund] cases" and award fees as a percentage of the Settlement Fund. *Deem*, 2013 WL 2285972, at *5; *see also In Re Peanut Farmers Antitrust Litigation*, Case No. 2:19cv463, 2021 WL 9494033 *1 (E.D. Va., Aug. 10, 2021) (Jackson, J.) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984)

[7] *See Blum v. Stenson*, 464 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."); *In re: Celebrex Antitrust Litig.*, No. 2:14-cv-00361, 2018 WL 2382091 (E.D. Va. April 18, 2018) (Allen, J.); *see also In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 261; *see Berry v. LexisNexis Risk & Info. Analytics, Grp., Inc.*, No. 3:11–CV–754 2014 WL 4403524, at *15 (E.D. Va. Sept. 5, 2014) ("Where there is a common fund, the percentage method of awarding attorneys' fees is favored by the Supreme Court, the Fourth Circuit, and district courts within this Circuit."); *Jones v. Dominion Resource Serv., Inc.*, 601 F. Supp. 2d 756, 759 (S.D.W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases."); *Strang v. JHM Mortg. Sec. Ltd P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) ("Although the Fourth Circuit has not yet ruled on the issue, the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases."). These courts recognize that the percentage-of-the-fund method is "more efficient and less burdensome than the traditional lodestar method and offers a more reasonable measure of compensation for common fund cases." *Strang*, 890 F. Supp. at 503.

and echoing language in cases like *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009) indicating that other courts within this district and the vast majority of courts in other districts consistently apply the percentage of the fund method for calculating attorneys' fees in common fund cases).

By requesting one-third of the common fund cash settlement, Co-Lead Counsel's percentage-of-the-fund request is in keeping with case law in the Fourth Circuit. A request of one-third of the Settlement Fund is consistent with awards in similar generic drug antitrust class actions approving a one-third attorneys' fee. *See* Joint Declaration of Marvin A. Miller and Michael M. Buchman dated September 13, 2023 ("Miller and Buchman Decl."), at Exhibit B.

II. Co-Lead Counsel's Attorneys' Fee Request of One-Third of the Settlement Fund is Fair and Reasonable.

In assessing the reasonableness of attorneys' fee requests, district courts in the Fourth Circuit typically analyze seven primary factors:

> (1) the results obtained for the Class; (2) objections by members of the Class to the settlement terms and/or fees requested by counsel; (3) the quality, skill, and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy; and (7) awards in similar cases.

In re Mills, 265 F.R.D. at 261; *see also Hooker v. Sirius XM Radio, Inc.*, No. 4:13-cv-003, 2017 U.S. Dist. LEXIS 201809, at *16 (E.D. Va. May 11, 2017) (citing *Mills*, 265 F.R.D. at 261); *see also In re NeuStar, Inc. Sec. Litig.*, No. 1:14cv885 JCC TRJ, 2015 U.S. Dist. LEXIS 165320, at *20–21 (E.D. Va. Dec. 8, 2015) ("When evaluating Co-Lead Counsel's fee request under the percentage-of-recovery method, the Court will apply the seven-factor approach that other district courts in this Circuit have adapted from the Third Circuit . . ."). As discussed in detail below, each

of these factors support granting Co-Lead and Local Counsel's request for an award of one-third of the Settlement Fund.

1. Co-Lead Counsel Achieved Excellent Results for the Class.

Of the seven factors, the degree of success is consistently recognized by courts as the most important when considering an attorneys' fee request. *See McKnight v. Circuit City Stores, Inc*., 14 F. App'x 147, 149 (4th Cir. 2001) (stating that the degree of success is "the most critical factor in calculating a reasonable fee award"); *Hensley,* 461 U.S. 424, 436 (8th Cir. 1983) ("[T]he most critical factor is the degree of success obtained.").

Here, the $70 million settlement represents a significant all cash recovery for the End-Payor Class. This complex case presented numerous risks through trial. Defendants possessed substantial defenses to the merits of the claims at issue, both at the trial level and on appeal. Absent the Settlement, these risks and complexities could have resulted in the End-Payor Class receiving *no recovery at all*. In contrast, the Settlement serves the best interests of the End-Payor Class by securing a substantial cash recovery of $70,000,000 while avoiding delays, risks, and uncertainties, including the vagaries of juries tasked with rendering a verdict in a case as highly complex as this one and the potential appeal of any favorable verdict for the End-Payor Class. Compared to proceeding through trial, the certain receipt of the settlement funds works to the benefit of the End-Payor Class.

Moreover, but for this litigation brought by Co-Lead Counsel, it is unlikely that compensation of this magnitude would have been available to class members. *See Castro v. Sanofi Pasteur Inc*., No. 11-7178 JMV MAH, 2017 U.S. Dist. LEXIS 174708, at *23 (D.N.J. Oct. 20, 2017) (finding the fact that the "case was investigated and brought entirely by private counsel" to be a benefit attributable to Co-Lead Counsel and factor weighing "strongly" in favor of court

approval of the requested one-third fee award). Balanced against the many risks involved with proceeding, the Settlement provides an excellent result for the End-Payor Class and supports Co-Lead and Local Counsel's request for attorneys' fees.

2. No Objections Have Been Submitted.

The response of the class members to the Settlement and the requested attorneys' fees, reimbursement of expenses, and request for incentive awards for the Class Representative Plaintiffs has been overwhelmingly favorable. The Notice advised potential members of the Class that Co-Lead Counsel would seek an attorneys' fee award of up to one-third of the Settlement Fund, reimbursement of expenses, and request for incentive awards for the Class Representative Plaintiffs. No objections have been received and the objection deadline has passed. Supplemental Miller Decl., at ¶ 10; s*ee In re Neustar, Inc. Sec. Litig*., No. 1:14cv885 JCC TRJ, 2015 WL 8484438, at *7 (E.D. Va. Dec. 8, 2015) ("The lack of objection is particularly informative of fairness in this case because Co-Lead Counsel is seeking less in fees and expenses than was disclosed in the notice."); *West v. Circle K Stores, Inc.,* No. CIV. S-04—438 WBS GGH, 2006 WL 8458679, at *5 (E.D. Cal. Oct. 20, 2006) ("[T]he notice informed plaintiffs of the upper bound of attorneys' fees, and plaintiffs' counsel are now requesting $250,000 less in attorneys' fees. The lack of a single objection to the settlement is perhaps the most significant factor weighing in favor of settlement."). In fact, the Class Representative Plaintiffs have expressed their affirmative approval of the Settlement Agreement and Co-Lead Counsel's request for attorneys' fees and reimbursement of expenses. *See* Buchman Decl., Exhibit J: Declaration of Aaron Anderson on behalf of Painters District Council No. 30 Health & Welfare Fund ¶¶ 17, 18; *Id*. Exhibit K Declaration of Megan Maciasz DiSanto on behalf of The City of Providence, Rhode Island ¶ 12. "A lack of objections by class members as to fees requested by counsel weighs in favor of the

reasonableness of the fees." *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 844 (E.D. Va. 2016). Thus, this factor also weighs in support of granting Co-Lead and Local Counsel's attorneys' fee request.

3. Co-Lead Counsel Skillfully and Efficiently Litigated This Action.

The quality of representation Co-Lead Counsel provided is another factor supporting Co-Lead Counsel's fee request in this case. *See In re Mills*, 265 F.R.D. at 261. Co-Lead Counsel are experienced and highly skilled specialists in pharmaceutical antitrust class actions. *See* Pretrial Order No. 3 at 5-10, ECF No. 105 (emphasizing Motley Rice LLC and Miller Law LLC's "years of experience litigating similar cases across the country and extensive knowledge of the applicable law from that experience"). In fact, Co-Lead Counsel has been leadership counsel in numerous pharmaceutical antitrust end-payor class actions in which courts have granted final approval of settlements between end-payors and pharmaceutical companies and one-third fee requests.[8]

Co-Lead Counsel's experience and proficiency was central to the success achieved in this litigation. Through their years of experience, Co-Lead Counsel was able to avoid the substantial risks and costs of trial while still achieving an excellent result for the class: a $70 million settlement against well-funded and well-represented Defendants. Courts often evaluate the quality of the work performed by plaintiffs' counsel in light of the quality of the representation of the opposition. *See In re Mills*, 265 F.R.D. at 262 (noting that counsel reached a favorable settlement against "experienced and sophisticated defense attorneys"). Here, Plaintiffs' counsel faced formidable

[8] *See In re Namenda Indirect Purchaser Antitrust Litigation*, 15 cv 6549 (S.D.N.Y. (S.D.N.Y, April 23, 2023); *In re Flonase Antitrust Litig*., 951 F. Supp. 2d 739 08-cv-3149 (E.D. Pa. 2013); *In re Lidoderm Antitrust Litig.*, 14 md 02521 (N.D. CA, September 20, 2018); *In re Aggrenox Antitrust Litig.*, 14 MD 2516 (D. Conn., January 8, 2018); *In re Loestrin 24 FE Antitrust Litig.***,** MDL No. 2472 (D. R.I., Sept. 27, 2019); *In re Relafen Antitrust Litig.*, 01-12239 (D. Mass., Sept. 28, 2005); *In re Solodyn Antitrust Litig.*, 14-md-02503 (D. Mass., Apr. 5, 2018).

opposition from Gibson Dunn & Crutcher LLP and Kirkland & Ellis LLP. In the face of these large and skilled opponents, Co-Lead Counsel was able to develop a case that was sufficiently strong to settle on terms that offer substantial monetary benefits to the End-Payor Class. Accordingly, End-Payor Plaintiffs respectfully submit that the skill and efficiency with which Co-Lead Counsel litigated this case to a favorable settlement strongly supports the award of the attorneys' fees requested. *See Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 198 (3d Cir. 2000) ("Commentators discussing fee awards have correctly noted that one purpose of the percentage method of awarding fees—rather than the lodestar method, which arguably encourages lawyers to run up their billable hours—is to encourage early settlements by not penalizing efficient counsel.").

4. The Complexity and Duration of the Litigation.

In evaluating the complexity and duration of the litigation, courts consider not only the time between filing the complaint and reaching settlement, but also the complexity of the case. *See Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 465 (S.D.W. Va. 2010). Here, the proposed Settlement was reached as the jury selection process was commencing and before the trial was set to commence. At that point, the parties had aggressively litigated the case for approximately five years. In litigating the case, the parties, among other things: (i) reviewed half-a-million documents, consisting of millions of pages; (ii) served and responded to interrogatories; (iii) conducted dozens of depositions of fact and expert witnesses; (iv) briefed and argued *Daubert* and summary judgment motions; and (v) completed extensive pretrial motion practice. Joint Decl. ¶ 84 ECF No. 2133. At the time the proposed Settlement was entered into the parties were also fully prepared for the scheduled five-week trial. *Id.* This case had no extensive delays or periods

of inactivity. Instead, Co-Lead Counsel, over the course of the nearly five years, conducted the following type of work to achieve the all-cash settlement for the benefit of the End-Payor Class:

- Researching, preparing, and filing a Consolidated Class Action Complaint;
- Researching, preparing, and filing an opposition to Defendants' motion to dismiss;
- Arguing the opposition to Defendants' motion to dismiss;
- Preparing and serving initial disclosures;
- Commencing discovery and propounding numerous discovery requests;
- Engaging in extensive negotiations with Defendants concerning discovery, including the formulation of agreed-upon custodial lists, search terms, and a protocol concerning electronically stored information;
- Gathering, reviewing for privilege, and producing responsive documents on behalf of the Class Representative Plaintiffs;
- Engaging in extensive and efficient document review by, among other things, reviewing and analyzing approximately six million pages of documents produced in this matter utilizing a vendor-sponsored document review platform;
- Drafting and responding to numerous discovery disputes resulting in motion practice before Magistrate Judge Miller;
- Engaging in third-party discovery;
- Defending the depositions of the Class Representative Plaintiffs;
- Researching, preparing, filing, and successfully arguing a motion for class certification and to modify the Class definition in connection with class certification;
- Working with a nationally recognized notice and claims administrator concerning class certification notice to the Class;
- Preparing and assisting in the formulation of a class certification Class Notice Plan;
- Taking and reviewing testimony from approximately 25 depositions of Defendants and non-party fact witnesses;
- Developing the factual record through factual investigation and formal discovery;
- Formulating a litigation strategy through legal research and factual investigation;
- Retaining experts to assist in the prosecution and settlement of this action;

- Reviewing and analyzing opinions from Defendants' expert witnesses;
- Taking approximately a dozen depositions of Defendants' expert witnesses;
- Retaining, reviewing, and serving expert reports from, and defending expert depositions of Plaintiffs' expert witnesses;
- Working with experts to prepare opening, opposition and reply reports;
- Researching, preparing, filing and assisting in the successful argument of a motion for partial summary judgment on relevant market;
- Researching, preparing, filing and successfully arguing a motion for a set aside order;
- Preparing for and conducting jury focus group studies;
- Researching, preparing, filing and assisting in the successful argument of motions to exclude the opinions and testimony of the various defense expert witnesses;
- Researching, preparing, and filing an opposition to Defendants' summary judgment motion as to all claims;
- Preparing and filing the Trial Brief;
- Preparing and filing the proposed Jury Instructions and Verdict Form;
- Researching, preparing, filing, and arguing Plaintiffs' motions *in limine*;
- Researching, preparing, filing, and arguing oppositions to Defendants' motions *in limine*;
- Preparing and filing proposed *voir dire*;
- Preparing for and participating in an all-day mediation before The Honorable Layn Phillips;
- Preparing for and attending pretrial conferences;
- Reviewing deposition transcripts and preparing deposition designations for trial;
- Reviewing documents and preparing "expect to use" and "may call" exhibit lists;
- Conducting meet and confers to attempt to resolve any outstanding issues related to the parties' exhibit lists, joint exhibit list, and deposition designations;
- Researching, preparing, and filing a motion for bifurcation of trial;
- Drafting *in limine* motions and a motion for trial time;
- Preparing for and attending the Final Pretrial Conferences to resolve the remaining exhibit-related disputes;

- Reviewing and analyzing the substantial factual record to prepare the case for trial (designating deposition testimony, reviewing, and identifying exhibits, lodging objections to Defendants' deposition designations and exhibits, researching jury instructions, drafting preliminary and substantive jury instructions, researching, and drafting proposed verdict slip, etc.);
- Engaging in numerous meet and confers and working diligently with Defendants to resolve all exhibit and deposition designation issues in advance of trial;
- Preparing the opening and closing statements for trial;
- Preparing direct examinations of Plaintiffs' live witnesses for trial, including End-Payor Plaintiffs' live witness from The City of Providence, Rhode Island;
- Preparing cross-examinations of Defendants' live witnesses for trial;
- Engaging and closely working with trial demonstrative vendors to create demonstratives for trial;
- Preparing video deposition clips for trial;
- Negotiating settlement terms with Defendants and preparing the corresponding Term Sheet; and
- Announcing the proposed Settlement to the Court on April 20, 2023.

See also Joint Decl. 84-87.

Further, this case involved numerous complex issues of fact and law concerning: (i) antitrust and patent law; (ii) pharmaceutical operations and supply chains; (iii) FDA regulatory strategy and compliance; (iv) generic drug development; (v) medicinal chemistry; (vi) clinical pharmacology; (vii) health economics and policy; and (viii) market economics, pricing, and regulation. The complexity of these issues was raised at numerous stages in the case, including in discovery, dispositive motion practice (both motions to dismiss and summary judgment), class certification, *Daubert* motions, and motions *in limine*. Additionally, while Co-Lead Counsel have always been confident in the End-Payor Plaintiffs' claims, proceeding through trial presented several risks. *First*, proving antitrust liability in this case would require the jury to synthesize, digest, and deliberate a complex, intersecting body of scientific, economic, and regulatory

evidence. Much of this evidence would be presented via videotape depositions. *Second*, despite the significantly developed record in this case, the *Mylan* motion *in limine* was unresolved at the time of the End-Payor settlement. The pending motion raised significant uncertainty and real concern as to whether this would be tried as a patent case by Defendants. *Third*, Defendants are represented by some of the best law firms in the country, which have vigorously represented their clients and continuously maintained that Defendants' actions were lawful. Thus, notwithstanding Co-Lead Counsel's confidence, there is no guarantee that they would succeed in establishing liability through trial and appeal, especially given their concerns regarding whether Defendants would be able to try this as a patent case in light of the unresolved *Mylan* motion *in limine*. *See Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8406 (CM), 2015 WL 10847814, at *8 (S.D.N.Y. Sept. 9, 2015) ("While Plaintiffs and Co-Lead Counsel believe that they would prevail in their claims asserted against Defendants, they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial and appeals."). Additionally, even if End-Payor Plaintiffs prevailed on the issue of liability, Defendants would have vigorously challenged damages. "[T]he damages issue would have become a battle of experts at trial, with no guarantee of the outcome in the eyes of the jury." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 667 (E.D. Va. 2001 (internal quotations omitted).

The complexity and duration of this case clearly supports the reasonableness of Co-Lead Counsel's request for an attorneys' fee award of one-third of the Settlement Amount. *See e.g.*, *Castro*, 2017 U.S. Dist. LEXIS 174708, at *24 (granting a one-third fee request in part because of the "complex[ity]" of the case and the fact that it had been litigated for years); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-cv-12141-AC-DAS, 2015 U.S. Dist. LEXIS 5964, at *1 (E.D. Mich. Jan. 20, 2015) (granting a one-third fee, noting that "[a]ntitrust class actions are inherently

complex" because the "legal and factual issues are complicated and highly uncertain in outcome"); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013) ("Antitrust class actions are particularly complex to litigate and therefore quite expensive."). [9]

5. Risk Of Nonpayment.

The Court must next consider the risk Co-Lead Counsel took in prosecuting this case. Co-Lead Counsel undertook this action on a 100% contingent-fee basis and prosecuted the claims with no guarantee of compensation or recovery of litigation expenses.[10] From inception of the case through August 31, 2023, Plaintiffs' counsel has spent approximately 31,710.2 hours, with lodestar value of $18,999,856.3, with no guarantee of reimbursement for any of these attorneys' fees. The out-of-pocket costs necessarily incurred by Co-Lead Counsel were also significant. Class Counsel incurred $3,905,175.85 in costs reasonably expended or incurred on this litigation by all the firms representing Plaintiffs in this litigation.

Courts within the Fourth Circuit recognize that the risk of receiving little or no recovery is a major factor when considering an award of attorneys' fees. *See e.g.*, *In re Mills*, 265 F.R.D. at

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[9] *See also In re Namenda Indirect Purchaser Antitrust Litig.*, 15 cv 6549 (S.D.N.Y., April 23, 2023) ECF No. 967; *In re Lidoderm Antitrust Litig.*, 14 md 02521 (N.D. CA, September 20, 2018) ECF No. 1055; *In re Loestrin 24 FE Antitrust Litig.***,** MDL No. 2472 (D. R.I., Sept. 27, 2019) ECF No. 1443; *In re Relafen Antitrust Litig.*, 01-12239 (D. Mass., Sept. 28, 2005) ECF No. 297; *In re Solodyn Antitrust Litig.*, 14-md-02503 (D. Mass., Apr. 5, 2018), ECF No. 1173.

[10] The substantial risk of nonpayment Co-Lead Counsel faced in this case is illustrated by the recent *Opana ER* trial in the United States District Court for the Northern District of Illinois. The *Opana ER* trial focused on federal and state pay-for-delay claims. While Impax settled soon after trial had begun, the case against Endo went to verdict. The jury ultimately found in favor of Endo. After the jury rendered its verdict, *see In re Opana ER Antitrust Litig.*, 14-cv-10150, at ECF No. 1005 (N.D. Ill. July 1, 2022), the plaintiffs filed a post-trial motion for judgment as a matter of law or for a new trial. *Id.* at ECF No. 1048. Shortly after the plaintiffs filed their post-trial motion, Endo declared bankruptcy and filed a notice of suggestion of bankruptcy and automatic stay of proceedings in the *Opana* ER case, substantially reducing any chances of a meaningful appeal or post-verdict settlement. *Id.* at ECF No. 1064.

263 ("[C]lass counsel bore a substantial risk of nonpayment . . . [t]he outcome of the case was hardly a foregone conclusion, but nonetheless counsel accepted representation of the plaintiff and the class on a contingent fee basis, fronting the costs of litigation."). Yet, despite facing a great deal of uncertainty in bringing this case, Co-Lead Counsel invested a substantial amount of time and resources, further supporting Co-Lead Counsels' fee request.

6. Public Policy Supports the Attorneys' Fee Request.

When considering a request for attorneys' fees in a class action, a court must weigh competing interests and strike the appropriate balance to award attorneys' fees. *See Hooker*, 2017 WL 4484258, at *8. On the one hand, "[i]ncentives for counsel to undertake worthy class action lawsuits are important because class actions serve to provide relief when it would be inefficient for an individual to pursue a claim." *Id.* (citing *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338 (1980)). "Co-Lead Counsel play a vital role in protecting the rights of class members." *Thomas v. FTS USA, LLC*, No. 3:13-cv-825 REP, 2017 WL 1148283, at *2 (E.D. Va. Jan. 9, 2017) (recognizing that "Congress relies on the private attorney-general concept" to enforce consumer protections statutes). Accordingly, a "central factor in fixing the amount of attorneys' fees is to ensure that competent, experienced counsel will be encouraged to undertake the often risky and arduous task of representing a class . . . ." *In re Mills*, 265 F.R.D. at 260; *see also Thomas*, 2017 WL 1148283, at *2 ("Due to the commendable work that Co-Lead Counsel undertook to protect consumers, the Court must ensure that counsel receive compensation for their work.").

On the other hand, there is also a public policy against compensating class action attorneys so much as to create public disdain for attorneys and the legal process. *In re Mills*, 265 F.R.D. at 263. "Because of the damage caused by the perception of overcompensation of attorneys in class

action suits, lawyers requesting attorneys' fees and judges reviewing those requests must exercise heightened vigilance to ensure the fees are in fact reasonable beyond reproach and worthy of our justice system." *Kay Co.*, 749 F. Supp. 2d at 469.

Co-Lead Counsel's request for one-third of the Settlement Fund strikes a balance between these competing interests and is consistent with other generic drug antitrust cases. Miller and Buchman Decl., ¶¶ 12-14; at Exhibit B. This lawsuit serves the interests of both the public and private class members. The focus of the case was to expose the allegedly unlawful monopolization in the Zetia market which led to inflated pricing of the drug. Without sufficient incentive for qualified class action attorneys to undertake the risks associated with class litigation, the rights of potential class members with small claims would go unvindicated. An award of one-third of the Settlement Fund provides Co-Lead Counsel reasonable compensation for the benefits obtained, without overcompensating Co-Lead Counsel to the detriment of the End-Payor Class.

7. Awards in Similar Antitrust Cases Support the Fee Request.

The last factor district courts within the Fourth Circuit must analyze in awarding attorneys' fees is fees awarded in similar cases. Co-Lead Counsel's request for one-third of the Settlement Fund falls within the range regularly approved in other pharmaceutical antitrust cases. *Id*. "[E]mpirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in the class action average around one-third of the recovery." 4 Newberg on Class Actions § 14:6 (4th ed.); *see also In Re Peanut Farmers Antitrust Litig.*, No. 2:19-cv-00463, 2021 WL 9494033 *5-6 (E.D. Va. Aug. 10, 2021) (noting that awarding one-third of the settlement fund as the fee for Class Counsel in antitrust cases is a generally accepted percentage in the Fourth Circuit, and determining that a one-third fee of $34,250,000 was reasonable in that case where the lodestar cross-check resulted in a multiplier of 2.92); *In re*

Namenda Indirect Purchaser Antitrust Litig., No. 15 cv 6549 (S.D.N.Y. April 23, 2023)(one-third fee award on $54,500,000 settlement); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (stating that a review of 289 class action settlements demonstrates "average attorney's fees percentage [of] 31.31%" with a median value that "turns out to be one-third"). The trend has been that courts have typically awarded a one-third attorney fee pharmaceutical antitrust cases brought by end-payors. *Id*. Here, Class Counsel's unreimbursed efforts over the course of five years required considerable expenditure of skill, risk, time, and financial resources. Whether those efforts would result in any recovery was unknown until the settlement was reached during the jury selection process. Under the circumstances, End-Payors' fee request is not only in-line with fee awards in similar cases, but also eminently reasonable.

8. The Lodestar Multiplier Cross-Check Confirms the Reasonableness of the Requested Fee Award.

Each of the seven factors that comprise the standard in Fourth Circuit have been met here, however, to ensure reasonableness, the Fourth Circuit also has a mechanism to confirm that the requested fee award is reasonable in the lodestar multiplier cross-check. "The purpose of a lodestar cross-check is to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar."[11]

[11] "Use of the lodestar calculation as a cross-check to the percentage method adds an extra layer of assurance as to reasonableness by ensuring that 'the fee award is still roughly aligned with the amount of work the attorneys contributed.'" *Thomas*, 2017 U.S. Dist. LEXIS 1148283, at *3 (quoting *Jones*, 601 F. Supp. 2d at 759). The lodestar cross-check does not require the "exhaustive scrutiny" that might be mandated if it were the principal method used to test the reasonableness of the fee request. *See Mills*, 265 F.R.D. at 264 (it suffices to "accept the hours estimates provided by Lead Counsel"); *Jones*, 601 F. Supp. 2d at 765-66 ("Because I am using the lodestar method as a cross-check . . . I may use Class Counsels' estimate of the hours they have spent working on this case.").

"To apply the lodestar method, the Court determines the attorneys' fees award by multiplying the number of hours reasonably worked by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer."[12] *Boyd v. Coventry Health Care, Inc.*, 299 F.R.D. 451, 467 (D. Md. 2014). Courts in this circuit are careful to note that "[a]ttorneys' fees must be sufficient 'to ensure that competent, experienced counsel will be encouraged to undertake the often risky and arduous task of representing a class.'" *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 469 (S.D.W. Va. 2010) (quoting *In re Microstrategy, Inc. Sec. Litig*, 172 F. Supp. 2d 778, 788 (E.D. Va. 2001)).

Here, Co-Lead counsel has efficiently litigated a risky and difficult case, avoided the enormous costs of a trial, and obtained a significant result providing the class members with certain compensation.[13]

Co-Lead and Local Counsel's fee request, on behalf of all Class Counsel, for $23,333,333.33 as compared to a collective lodestar calculated using the historical hourly rates of each class counsel firm of $18,999,856.30, results in a modest multiplier of 1.22 – well within the acceptable range of fee awards both in district courts in this circuit,[14] as well as, more generally,

[12] *Mills*, 265 F.R.D. at 264 (citing *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002)). That figure may then be augmented or multiplied to reflect additional factors to be considered in determining a reasonable attorney fee award. *See e.g., Singleton*, 976 F. Supp. 2d at 689.

[13] Co-Lead Counsel allocated work assignments based on the experience and expertise of each class counsel in a manner that effectively prosecuted the case while avoiding duplication of effort.

[14] *See In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 845 (E.D. Va. 2016) ("District courts within the Fourth Circuit have regularly approved attorneys' fees awards with 2-3 times lodestar multipliers."); *Singleton*, 976 F. Supp. 2d at 689 ("The range of multipliers on large and complicated class actions have ranged from at least 2.26 to 4.5."); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 439 n.6 (D. Md. 1998) ("The . . . fee requested amounted to a lodestar enhancement of 3.6 – well within the average range of 3-4.5 for comparable cases.").

in delayed generic entry cases.[15] *See also In Re Peanut Farmers Antitrust Litig.*, 2021 WL 9494033 at *7. Class counsel's total cumulative hours are set forth in the Joint Declaration and were reasonable to achieve this outcome.[16] *See* Miller and Buchman Decl., at ¶ 13.

III. Co-Lead Counsel's Request for Litigation Costs and Expenses is Reasonable.

Under Federal Rules of Civil Procedure 23(h), a trial court may award nontaxable costs that are authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h); *see also Singleton v. Domino's Pizza, LLC.*, 976 F. Supp. 2d 665, at 689 (D. Md. 2013) ("It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award."). Here, a cost award is authorized by both the Settlement Agreement (Buchman Decl., Exhibit A, Agreement ¶ 6.c., ECF No. 2134), and the common fund doctrine. *See In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 791 (E.D. Va. 2001) (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (finding that costs typically billed by attorneys to paying clients in the marketplace may be reimbursed)). Expenses that are normally charged to a fee-paying client, including mailing costs, online legal research, expert and mediator fees, travel expenses for mediation and court proceedings, and court filing fees, may be

[15] *See In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141 (E.D. Mich. 2015), ECF No. 68 (one-third fee award resulted in 3.01 multiplier); *King Drug Co. of Florence v. Cephalon, Inc.*, No. 06-cv-197 (E.D. Pa. 2015), ECF No. 858-1 (fee award resulted in 4.12 multiplier); *In re Flonase Antitrust Litig.*, 951 F. Supp.2d 739 (E.D. Pa. 2013), ECF No. 488-1 (one-third fee award resulted in 2.98 multiplier).

[16] Additional detail regarding the work performed by each firm, including a breakdown of the total number of hours worked by each individual attorney and/or staff member is annexed to the Declaration of Michael M. Buchman dated September 23, 2023 as Exhibits A-I. Each class counsel's detailed time and expense records are also available for the Court's review should the Court wish to examine them.

reimbursed. *See Reynolds v. Fid. Investments Institutional Operations Co.*, No. 1:18-CV-423, 2020 WL 92092, at *4 (M.D.N.C. Jan. 8, 2020).

Co-Lead Counsel has incurred $3,905,175.85 in out-of-pocket expenses in prosecuting this litigation. Co-Lead Counsel has provided the Court with a summary of the costs and expenses advanced. *See* Miller and Buchman Decl., ¶13.[17] Because these expenses were advanced with no guarantee of recovery, Co-Lead Counsel had a strong incentive to keep such costs to a reasonable level. Further, no class member has filed an objection to the amount of costs. As such, the Court should award Co-Lead Counsel $ 3,905,175.85 in reasonable costs and litigation expenses.

IV. The Requested Incentive Awards Are Reasonable.

At the end of a successful class action, it is common for trial courts to compensate class representatives for the time and effort they invested to benefit the class. *See Reynolds v. Fid. Investments Institutional Operations Co., Inc*., No. 1:18-CV-423, 2020 WL 92092, at *4 (M.D.N.C. Jan. 8, 2020); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit."). "Incentive . . . awards reward representative plaintiffs' work in support of the class, as well as their promotion of the public interest" and "[c]ourts around the country have allowed such awards to named plaintiffs or class representatives." *Deem*, 2013 WL 2285972, at *6. To determine whether an incentive award is warranted, courts normally consider the actions the class representative has taken to protect the

[17] Throughout the course of this litigation, Co-Lead Counsel kept files contemporaneously documenting all time spent litigating this matter, including tasks performed and expenses incurred. Co-Lead Counsel also made sure that the other firms and attorneys who were counsel of record did the same. In that regard, each firm was required to and did submit monthly time and expense reports.

interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation. *Id.*

Co-Lead Counsel respectively request that the Court approve an aggregate incentive award of $300,000 to be allocated among the Class Representative Plaintiffs as follows: (i) Painters District Council No. 30 Health & Welfare Fund - $75,000; (ii) The City of Providence, Rhode Island - $75,000; (iii) Sergeants Benevolent Association - $30,000; (iv) Uniformed Firefighters' Association of Greater New York Security Benefit Fund and Retired Firefighters' Security Benefit Fund of the Uniformed Firefighters' Association - $30,000; (v) United Food and Commercial Workers Local 1500 Welfare Fund - $ 30,000; (vi) Philadelphia Federation of Teachers Health & Welfare Fund - $30,000; (vii) International Union of Operating Engineers Local 49 Health and Welfare Fund - $30,000. The incentive awards will compensate the Class Representative Plaintiffs in recognition of their essential contributions in the prosecution of this litigation. The Class Representative Plaintiffs stepped forward risking their reputations, and subjecting themselves to public scrutiny on behalf of the End-Payor Class. *See Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 578 (E.D. Va. 2016) (stating that incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general"); *In re Namenda Indirect Purchaser Antitrust Litig.*, No. 15 cv 6549 (S.D.N.Y., Apr. 23, 2023). Class Representative Plaintiffs have made important and valuable contributions to the prosecution and fair resolution of this action on behalf of all members of the End-Payor Class by: (i) assisting Co-Lead Counsel's investigation of the claims in this case; (ii) providing factual information and other relevant information related to their claims; (iii) preparing the Complaint in coordination with Co-Lead Counsel; (iv) searching for, gathering and providing

documents in their possession relevant to the action; (v) providing deposition testimony; (vi) monitoring the litigation and conferring with Co-Lead Counsel to provide guidance and insight; (vii) assisting Co-Lead Counsel's efforts to prepare for trial, be available to testify or attend trial, and/or assist in the negotiation of the Settlement Agreement with Co-Lead Counsel.. In the Notice the Class was apprised of End-Payor Plaintiffs' request for an Incentive Award, and no class member has objected to the Incentive Award. Supplemental Miller Decl. at ¶ 10 ECF No. 2157.

A $75,000 Incentive Award has been proposed for Class Representative Plaintiffs Painters District Council No. 30 Health & Welfare Fund and The City of Providence, Rhode Island. These Class Representative Plaintiffs uniquely performed trial related services. For example, Mr. Aaron Anderson, of Painters District Council 30, was in Norfolk during jury selection and prepared to attend the entire trial per this Court's Order. Ms. Margaret Wingate was prepared and made arrangements to testify at trial as The City of Providence, Rhode Island witness on behalf of the End-Payor Class. These trial related services set these two Class Representative Plaintiffs apart from other End-Payor Class Representatives in this case and warrant an enhanced Incentive Award given the additional time committed and important roles these Class Representatives played in this case. *See* Miller and Buchman Decl., at ¶ 18.

But for the Class Representative Plaintiffs' commitment to prosecuting this matter on behalf of the End-Payor Class, the class members would have received nothing. There being no objection to the requested incentive award, Co-Lead Counsel respectfully request that the Court approve incentive awards to the Class Representative Plaintiffs totaling $300,000.00.

CONCLUSION

For the foregoing reasons, End-Payor Plaintiffs, Co-Lead and Local Counsel respectfully request that the Court award attorneys' fees in the amount of $23,333,333.33 (one-third of the Settlement Amount, plus interest at the same rate earned by the Settlement Amount), and reimbursement of litigation costs and expenses in the amount of $3,905,175.85. Co-Lead and Local Counsel also respectfully request that the Court approve incentive awards totaling $300,000 in recognition of Class Representative Plaintiffs' valuable service to the End-Payor Class.

Dated: September 13, 2023

Respectfully submitted,

/s/ James A. Cales III

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2023, a true copy of the foregoing document was served on all counsel of record by electronically filing the document with the Court's CM/ECF system.

/s/ James A. Cales III
James A. Cales