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

END-PAYOR PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT, ENTRY OF FINAL JUDGMENT AND ORDER OF DISMISSAL

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INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, 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" or "EPPs"), on behalf of themselves and the certified End-Payor Class (the "Class"), respectfully submit this Memorandum of Law in Support of their Unopposed Motion for Final Approval of Settlement, Entry of Final Judgment and Order of Dismissal.

After approximately five years of extensive litigation, the parties negotiated a fair, reasonable, adequate settlement that resolves the claims of the Class. Specifically, EPPs entered into a Settlement Agreement with 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"). The Settlement Agreement provides for cash payments totaling $70,000,000.[1] Buchman Decl., Ex. A ¶ 5 ECF No 2134. The Settlement Fund will be distributed to members of the Class after Class Counsel are awarded attorneys' fees, litigation expenses incurred are reimbursed, expenses of administration of this litigation are paid, and incentive awards are paid to

[1] Merck has deposited $56 million into escrow and Glenmark is required to deposit $14 million into escrow by April 19, 2024.

the EPP Class Representative Plaintiffs. In exchange, EPPs will dismiss this case with prejudice by which all members of the Class will release their claims against Defendants, as set forth in the Settlement Agreement. *Id*. ¶ 10.

At the time the Settlement Agreement was reached, the record was fully developed through the completion of discovery and extensive motion practice, and the parties were on the precipice of trial. To be clear, the parties agreed to the settlement after extensive discovery, motion practice, trial preparation, and the commencement of jury selection. The settlement is a product of intensive litigation and good faith arm's-length negotiations among experienced counsel which occurred with the assistance from a well-regarded, neutral mediator — former United States District Judge Layn Phillips. Given that Defendants deny any allegations of unlawful or wrongful conduct and believe they have meritorious defenses to this litigation, the settlement confers substantial benefits to the Class, while avoiding the risks and uncertainties of continued litigation. The Settlement Agreement is fair, reasonable, and adequate. Accordingly, EPPs respectfully request that the Court enter an Order granting final approval of the settlement and dismissing the EPPs' case with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

I. The EPPs' Claims and Procedural Background.

The Joint Declaration of Marvin A. Miller and Michael M. Buchman dated May 22, 2023 ("Joint Decl.") ECF No. 2133, sets forth in detail the efforts spent to achieve the settlement. We now highlight some of those points here.

EPPs filed this case under state antitrust, consumer protection, and unjust enrichment laws against Defendants Merck and Glenmark. On June 15, 2018, the Judicial Panel on Multidistrict Litigation transferred all related Zetia matters to this Honorable Court for coordinated and

consolidated pretrial proceedings. ECF No. 1. On September 13, 2018, EPPs filed the End-Payor Consolidated Class Action Complaint (hereinafter "CCAC"). ECF No. 130.

EPPs alleged that Defendants Merck and Glenmark 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* CCAC at ¶¶ 1-7, ECF No. 130. EPPs alleged, *inter alia*, that they paid more for Zetia and/or its generic equivalents than they would have paid absent Defendants' unlawful conduct. *Id.* ¶ 274.

On August 9, 2019, the Court denied, in part, Defendants' motion to dismiss, holding: (i) the alleged settlement agreement was subject to the rule of reason; (ii) the settlement agreement did not unambiguously contradict and require dismissal of the antitrust complaint; (iii) the EPPs plausibly pleaded anticompetitive effects; and (iv) that EPPs could bring claims under state antitrust and consumer protection statutes with few exceptions.[2] *In re Zetia (Ezetimibe) Antitrust Litig.*, 400 F.Supp.3d 418, 433–44 (E.D. Va. Aug. 9, 2019). In their answer, Defendants denied: (i) EPPs' allegations of unlawful or wrongful conduct; and (ii) that any of the alleged conduct challenged by EPPs caused any damage. *See* Answer and Affirmative Defenses of Glenmark to EPPs' CCAC, ECF No. 588; and Merck's Answer to EPPs' CCAC, ECF No. 589.

Following the Court's decision on the motion to dismiss, the parties participated in fulsome discovery. This included the review of nearly half-a-million documents comprising over six million pages of documents, pre-pandemic travel to take and defend depositions, remotely taking/defending depositions, and reviewing deposition testimony from numerous witnesses

[2] The Court dismissed the California, Missouri, Idaho, Maine, New York, Massachusetts, Tennessee, and Vermont consumer protection claims. ECF No. 489.

including Defendants and non-party fact witnesses. *See* Joint Decl., ¶ 84 ECF No. 2133. The parties also retained their own experts, served their respective expert reports, reviewed the expert reports, and took/defended the respective experts' depositions. *Id*.

After extensive discovery was conducted, on November 18, 2019, the EPPs moved, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, for certification of a proposed class of Third-Party Payors. ECF No. 729. After an evidentiary hearing and consideration of the evidence, Magistrate Judge Miller issued a Report and Recommendation recommending class certification. *In re Zetia (Ezetimibe) Antitrust Litig.*, Case No. 2:18-md-2836, 2020 WL 5778756 (E.D. Va. Aug. 13, 2020). On August 20, 2021, the Court issued a Memorandum Order affirming the certification of the Third-Party Payor Class. *In re Zetia*, 2021 WL 3704727 (E.D. Va. Aug. 20, 2021).

The parties filed comprehensive cross-motions for summary judgment. *First*, on August 10, 2020, Glenmark filed the Glenmark Defendants' Motion for Summary Judgment on All Claims, which included over 471 pages of exhibits. ECF Nos. 1037, 1038, 1039. On the same day, Merck filed Merck & Co., Inc., Merck Sharp & Dohme Corp., Schering-Plough Corp., Schering Corp., and MSP Singapore Co. LLC's Motion for Summary Judgment. ECF Nos. 1067, 1068, 1069. *Second*, Plaintiffs filed Purchasers' Motion for Partial Summary Judgment Concerning the Relevant Market on August 10, 2020. ECF Nos. 1077, 1078, 1079. EPPs joined that Motion for Partial Summary Judgment. ECF Nos. 1080, 1081. A hearing on summary judgment related to the issue of the relevant market was held on June 30, 2021. ECF No. 1286. The Court granted in full Purchasers' Motion for Partial Summary Judgment Concerning the Relevant Market, limiting the relevant market to Zetia and its AB-rated generics. ECF Nos. 1391, 1518. A hearing on

Defendants' motions for summary judgment was held on August 17, 2022, ECF No. 1691, which resulted in the Court's denial of the motions on February 10, 2023. ECF Nos. 1717, 1929.

Before resolution of the summary judgment motions, the parties began preparing for trial which was Ordered to begin on April 17, 2023. The preparation for trial included exchanging thousands of documents designated as potential trial exhibits and filing a combined total of approximately 43 motions *in limine* among Plaintiffs and Defendants, which were fully briefed. Plaintiffs also 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. Joint Decl. ¶¶ 79-84 ECF No. 2133. EPPs were thus well-versed in the strengths and weaknesses of their case against Defendants and were able to assess and balance the risks and benefits of continuing to pursue the litigation to verdict. The case settled on April 19, 2023, and was publicly announced the following day during the jury selection process.

EPPs entered into the Settlement on behalf of the Class. *See* Buchman Decl., Ex. A. The Settlement is the product of Co-Lead Counsel's extensive arm's-length negotiations with Defendants. Under the terms of the Settlement Agreement, Defendants will deposit $70 million into an escrow account. Buchman Decl., Ex. A ¶ 5 ECF No. 2134. The settlement amount in the escrow account, together with any interest thereon, will be used to pay: (i) costs and expenses incurred and to be incurred in connection with this litigation; (ii) any taxable costs; (iii) taxes payable on the Settlement Fund; (iv) any and all administrative expenses associated with this litigation or the Settlement; and (v) any Court-approved attorneys' fees and expenses, as well as Court-approved incentive awards to the named Class Representative Plaintiffs. *Id.* ¶ 9. The

remainder of the Settlement Fund will be distributed to eligible members of the Class according to the Court-approved Plan of Allocation. *Id.*

In exchange for the $70 million cash payment, EPPs agreed to release Defendants from liability for the claims arising from conduct alleged in the CCAC. *Id.* ¶ 10. Upon the Settlement Agreement becoming final, in accordance with its terms, the EPPs' claims against Defendants in the above-captioned action will be dismissed with prejudice. *Id.* ¶ 3(f).

On May 22, 2023, EPPs filed a motion for preliminary approval of the settlement. ECF Nos. 2131, 2132. On June 6, 2023, the Court entered an Order preliminarily approving the Settlement and Notice Plan. ECF No. 2151. Plaintiffs have complied with the Court's Order by timely mailing and publishing notice to the Class. *See* Affidavit of Eric Miller dated July 3, 2023 ECF No. 2156. The reaction of the Class is an important factor for the Court to consider when deciding whether to grant final approval of the settlement. The reaction of this Class to this settlement overwhelmingly favors approval. No member has objected to the proposed settlement, the request for reimbursement of expenses, incentive awards, or request for attorneys' fees. *See* Supplemental Declaration of Eric J. Miller dated August 16, 2023 ("Supplemental Miller Decl."), ¶ 10. Class members have been advised that they may appear at the September 21, 2023 fairness hearing. ECF No. 2156, ¶ 8.

II. Plan of Distribution.

As detailed in the proposed Plan of Allocation, if the Court approves the motion to grant final approval to the settlement and motion for attorneys' fees, reimbursement of expenses and incentive awards, the Settlement Amount will be distributed as follows: (i) one-third of the settlement fund will be for the payment of attorneys' fees in the amount of $23,333,333.33, plus any accrued interest thereon; (ii) litigation expenses in the amount of $3,905,175.85 will be

reimbursed; (iii) Class Representative Plaintiffs will receive incentive awards totaling $300,000,[3] and (iv) any remaining expenses associated with the administration of the settlement will be paid. The remaining net amount will be distributed *pro rata* to eligible members of the Class according to their purchases of branded and/or generic Zetia, according to the Plan of Allocation.

The settlement administrator, A.B. Data, will manage and effectuate administration of the Settlement, including the processing of claims and distribution of the net Settlement Fund to eligible members of the Class. To determine each eligible claimant's *pro rata* share of the Settlement, A.B. Data shall multiply the total value of the applicable allocation pool by a fraction, for which: (a) the numerator is the applicable qualifying claim for that eligible claimant; and (b) the denominator is the sum total of all applicable qualifying claims by all eligible claimants for the applicable allocation pool.

ARGUMENT

I. The Settlement is Fair, Reasonable, and Adequate and Warrants Final Approval.

A. Legal Standard

To approve a class action settlement, a court must determine whether the settlement agreement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also In re Lumber Liquidators Chinese-Manufactured Flooring Prods.*, 952 F.3d 471, 484 (4th Cir. 2020 ("[T]he court may approve the proposed settlement only after a hearing and only on finding that the

[3] The requested incentive awards are 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.

proposed settlement is fair, reasonable, and adequate.") (internal quotations omitted)). "This standard includes an assessment of both the procedural fairness of the settlement negotiations and the substantive adequacy of the settlement itself." *In re NeuStar, Inc. Sec. Litig.*, Case No. 1:14CV885, 2015 WL 5674798, at *9 (E.D. Va. Sept. 23, 2015); *see also Solomon v. Am. Web Loan, Inc.*, Case No. 4:17 cv 145, 2020 WL 3490606, at *4 (E.D. Va. June 26, 2020); *In re MicroStrategy, Inc. Sec. Litig.*, 150 F. Supp.2d 896, 903–04 (E.D. Va. 2001) ("Simply put, the Court must assess whether the settlement here is both fair and adequate under the circumstances.").

In assessing the fairness and adequacy of a settlement, courts in the Fourth Circuit follow the factors set forth in *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991).[4] The *Jiffy Lube* decision instructs district courts to consider the following when evaluating the fairness of a class action settlement: "(1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of class action litigation." *Id*. When determining the adequacy of the settlement, courts should examine:

> (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a

[4] Fed. R. Civ. P. 23(e)(2)(i) and *Jiffy Lube* factors (1) and (4) concern the adequacy of representation. Fed. R. Civ. P. 23(e)(2)(ii) and *Jiffy Lube* factor (3) concern whether the settlement negotiations were conducted at arm's length, and are fair and reasonable. Fed. R. Civ. P. 23(e)(2)(iii) and *Jiffy Lube* factors (1) and (2) essentially seek to address whether the settlement is fair, reasonable, and adequate under the circumstances of each case. The only material way in which Fed. R. Civ. P. 23(e) and the *Jiffy Lube* factors differ is with respect to Fed. R. Civ. P. 23(e)(iv) which concerns the equity of the treatment of class representatives relative to each other. Here, the Plan of Allocation establishes *pro rata* distribution in the Class states such that all Class members will be treated fairly based upon their total purchases. *See* Buchman Decl., Ex. D, ECF No. 2134. Given this significant overlap and the lack of any issue concerning Fed. R. Civ. P. 23(e)(iv), Co-Lead Counsel will address the *Jiffy Lube* factors below.

> litigated judgment, and (5) the degree of opposition to the settlement.

Id.

As set forth further below, the Settlement Agreement clearly meets the requirements under the Federal Rules and Fourth Circuit precedent. Further, while ultimate approval of a proposed class action settlement is "left within the sound discretion of the Court," *Solomon*, 2020 WL 3490606, at *4 (internal quotations omitted), there is "a strong initial presumption that [a class action] compromise is fair and reasonable." *In re Zetia (Ezetimibe) Antitrust Litig*., Case No. 2:18 md 2836, 2019 WL 6122038, at *3 (E.D. Va. Oct. 1, 2019) (quoting *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001)); *Lomascolo v. Parsons Brinckerhoff, Inc.*, Case No. 1:08 cv 1310, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) ("[T]here is an overriding public interest in favor of settlement, particularly in class action suits."). Accordingly, EPPs respectfully submit that the Settlement should receive final approval.

B. The Settlement Satisfies the *Jiffy Lube* Test for Fairness.

The first step in the *Jiffy Lube* analysis is a determination as to the fairness of the settlement. A proposed class action settlement is considered presumptively fair where there is no evidence of collusion between the parties and the parties have engaged in arm's-length negotiations. *See S. Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991). To determine whether the settlement was reached through good faith bargaining at arm's-length, the Court should consider "(1) the posture of the case at the time the settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation." *NeuStar*, 2015 WL 5674798, at *10 (quoting *Jiffy Lube*, 927 F.2d at 159).

Here, the Settlement Agreement was negotiated after approximately five years of intensive, hard-fought litigation by experienced antitrust class action counsel, well after the completion of discovery and on the eve of trial, and with the assistance of retired federal Judge Layn Phillips. As explained below, the four *Jiffy Lube* factors strongly support the finding that the Settlement Agreement is eminently fair.

1. The Posture of the Case Favors Settlement.

"The first *Jiffy Lube* factor directs the Court to evaluate essentially how far the case has come from its inception." *See In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009); *see also Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016). "Considering the posture of the case at the time of settlement allows the Court to determine whether the case has progressed far enough to dispel any wariness of 'possible collusion among the settling parties.'" *Id. (*quoting *Mills Corp.*, 265 F.R.D. at 254).

Here, the EPPs agreed to settle during the jury selection process. Co-Lead Counsel, thus, had a well-developed record from which to gain a complete understanding of the risks and benefits of continued litigation against Defendants when agreeing to the terms of the Settlement. *See Mills Corp.*, 265 F.R.D. at 254–55 (finding that nearly reaching the conclusion of all fact discovery "clarifie[s] plaintiffs' previous understanding of the strength and weaknesses of their claims and afford[s] plaintiffs the ability to confirm the fairness, reasonableness, and adequacy of the proposed partial settlement" (internal quotations omitted)). Because discovery was long completed, the record fully developed, and jury selection well underway, the posture of the case at the time of settlement heavily weighs in favor of final approval. *In re Celebrex (Celecoxib) Antitrust Litig.*, 14-cv-00361, 2018 WL 2382091, *3e. (E.D. Va. Apr. 18, 2018) (Allen, J.).

2. Extensive Discovery Was Conducted in This Case.

The extent of discovery in this case also establishes that the case was "well-developed enough for [Co-Lead Counsel and Local Counsel] and Lead Plaintiffs alike to appreciate the full landscape of their case when agreeing to enter into this Settlement." *Mills Corp.*, 265 F.R.D. at 254. Here, there can be little question that the parties had amassed a deep understanding of this case. By the time the Settlement was reached, fact and expert discovery (which included the production and review of millions of pages of documents) had been completed. Joint Decl. ¶ 84 ECF No. 2133. Co-Lead Counsel had: (i) taken/defended dozens of fact and expert-witness depositions; (ii) fully briefed numerous motions on privilege and other discovery matters; (iii) obtained certification of the Class after extensive briefing and oral argument; (iv) exchanged expert reports; (vii) subpoenaed and obtained discovery from several non-parties; (viii) drafted motions *in limine*; (ix*)* responded to the Defendants' motions *in limine*; (x) responded to Defendants' objections to Magistrate Judge Miller's Report and Recommendations concerning the Plaintiffs' motions *in limine*; (xi) designated deposition testimony; (xii) participated in the preparation of the Plaintiffs' exhibit list; (xiii) lodged objections to the Defendants' exhibit list; (xiv) contributed to the preparation of the trial brief; (xv) prepared jury instructions; (xvi) participated in numerous meet and confers with Defendants to attempt to resolve all exhibit and deposition designation issues before trial; and (xvii) helped prepare the Plaintiffs' presentation for the evidentiary hearing on the Mylan patent issues that occurred only a few days before trial was set to begin. Joint Decl. ¶ 87 ECF No. 2133. With settlement occurring at the outset of the jury selection process, the parties intimately understood the landscape of this case, as well as the risks and rewards of continuing with the litigation. *Celebrex*, 2018 WL 2382091 at *3e (Allen, J.).

3. Settlement Negotiations Were Conducted at Arm's-Length.

The Settlement is the product of serious, informed, and non-collusive arm's-length negotiations. *Id.* at *3c. EPPs agreed to settle this case after approximately five years of litigation involving extensive discovery and motion practice. Joint Decl. ¶ 87 ECF No. 2133. The Court's rulings on the summary judgment, *Daubert* motions, and motions *in limine*, in addition to other case developments in the weeks leading up to trial, were extensive. "In the absence of any evidence to the contrary, it is presumed that no fraud or collusion occurred" in reaching the Settlement. *Gagliastre v. Capt. George's Seafood Restaurant, LP*, Case No. 2:17cv379, 2019 WL 2288441, at *3 (E.D. Va. May 29, 2019). Like all aspects of this litigation, the negotiations were contentious and extremely hard-fought. *See* Joint Decl. ¶¶ 6-79 ECF No. 2133. The parties analyzed the strengths and weaknesses of EPPs' claims and the defenses asserted by Defendants. Co-Lead Counsel was well-positioned to evaluate the risks and rewards of proceeding to trial, including the risks associated with the impending decision on the *Mylan* motion.

The parties' settlement negotiations in this case more than satisfy the requirement that the settlement not be one brokered through "collusion or coercion." *See e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *Weiss v. Regal Collections*, Case No. 01cv881, 2006 WL 2038493, at *2 (D.N.J. July 19, 2006); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501–02 (E.D. Va. 1995) (concluding fairness requirement met where "Plaintiffs' counsel, with their wealth of experience and knowledge in the … class action area, engaged in sufficiently extended and detailed settlement negotiations to secure a favorable settlement for the Class."). Moreover, the settlement negotiations were in part guided and assisted by a distinguished and experienced mediator, retired federal Judge Layn Phillips.

4. Co-Lead Counsel Is Highly Experienced in Complex Antitrust Class Action Matters.

Finally, in deciding whether a proposed class action settlement is reasonable, courts often give significant weight to the judgment of experienced counsel. *See Mills Corp.*, 265 F.R.D. at 255 ("[I]t is entirely warranted for this Court to pay heed to [Class Counsel's] judgment in approving negotiating, and entering into a putative settlement."); *Burke v. Shapiro, Brown & Alt, LLP*, Case No. 3:14cv838, 2016 WL 2894914, at *3 (E.D. Va. May 17, 2016). Here, Co-Lead Counsel is experienced in both class action litigation and pharmaceutical antitrust litigation. Co-Lead Counsel based their judgment upon their extensive experience with similar generic drug 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"). Relying on their years of experience in similar cases and their efforts in this litigation, Co-Lead Counsel possessed the experience and ability to assess the merits of continued litigation and the benefits achieved for the End-Payor Class. *See MicroStrategy*, 148 F. Supp. 2d at 665 (finding the fact that "Counsel for both sides are nationally recognized members of the . . . litigation bar further minimizes concerns that the Settling Parties colluded to the detriment of the class's interests."). Moreover, Co-Lead Counsel's recommendation is consistent with that of counsel for the Direct Purchaser and the Retailer Plaintiffs, who resolved their actions with Defendants within days of the EPPs' Settlement. *Celebrex*, 2018 WL 2382091, *3f (Allen, J.). Accordingly, the Settlement clearly meets the *Jiffy Lube* test for fairness and should receive final approval.

C. The Settlement is Adequate and Reasonable Under *Jiffy Lube*.

In addition to analyzing the fairness of the Settlement, the Court must also determine, under the second *Jiffy Lube* prong, whether the Settlement is substantively "adequate." The Fourth

Circuit's decision in *Jiffy Lube* provided that courts must evaluate: (i) the relative strength of the plaintiffs' case on the merits; (ii) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (iii) the anticipated duration and expense of additional litigation; (iv) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (v) the degree of opposition to the settlement. *See In re Jiffy Lube*, 927 F.2d at 159. An analysis of the *Jiffy Lube* factors for adequacy demonstrate that the Settlement should be approved in its entirety.

1. The Relative Strength of Plaintiffs' Case and Applicable Defenses.

The first two *Jiffy Lube* factors with respect to adequacy require a court "to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case." *Mills Corp.*, 265 F.R.D. at 256. Consideration of both factors confirms that the Settlement provides adequate relief to the End-Payor Class.

Co-Lead Counsel has, at all times, believed that this case was very strong. But, as with any litigation, there are always risks. Defendants were fully prepared to challenge Plaintiffs' claims at every turn at trial in this case. *First*, proving antitrust liability in this case would require the jury to synthesize, digest, and deliberate about a complex body of scientific, economic, and regulatory evidence. Much of this technical and complex evidence would be presented via videotape depositions. *Second*, despite the significantly developed record in this case, the *Mylan* motion *in limine*, which was unresolved at the time of the EPP settlement, raised significant uncertainty and real concern for all parties to the litigation. *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 have succeeded in establishing liability through

trial and appeal, especially given their concerns regarding Defendants' expressed desire to try this as a patent case in light of the unresolved *Mylan* motion. *See Fleisher v. Phoenix Life Ins. Co.*, Case No. 11cv8405, 2015 WL 10847814, at *8 (S.D.N.Y. Sept. 9, 2015) ("While Plaintiffs and Class 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 EPPs prevailed on the issue of liability, Defendants would have vigorously challenged damages. Indeed, Defendants challenged the admissibility of basic Fed. R. Civ. P. 1006 summaries of the EPP Class Representatives' purchase data and clearly intended to vigorously challenge EPPs' damage claims. Damages issues would have been "a battle of experts at trial, with no guarantee of the outcome in the eyes of the jury." *MicroStrategy*, 148 F. Supp. 2d at 667 (internal quotations omitted).

Without the certainty afforded to both sides by reaching an arms-length settlement, all parties would have proceeded with a long, expensive trial on the merits, likely followed by an appeal. In conducting settlement negotiations, Co-Lead Counsel was cognizant of the numerous and multi-layered risks and complexities that continued litigation presented to the Class. Absent the Settlement, these risks and complexities could have resulted in the Class receiving *no recovery at all*. In contrast, the Settlement serves the best interests of the Class by securing a substantial cash recovery of $70 million 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 the Class might have been awarded. Avoiding the perils and risks

inherent in proceeding through trial,[5] the certain receipt of the settlement funds works to the benefit of the Class. *See Celebrex*, 2018 WL 2382091, *3a, b (Allen, J.).

2. Anticipated Duration and Expenses of Additional Litigation.

The Fourth Circuit also instructs district courts to examine "the anticipated duration and expense of additional litigation" in evaluating a settlement. *Jiffy Lube*, 927 F.2d at 159. Here, had this case not settled, it would have proceeded to a five-week trial. In fact, the parties settled on the eve of trial, after jury selection had already commenced. The probable costs of continued litigation with respect to both time and money were high for all parties and militate in favor of approval of the Settlement. By the time the parties reached the settlement, the litigation had already been pending for five years. At the time of the settlement, the parties had spent significant sums preparing for trial, including for costs associated with expert witness fees on issues such as patents, causation, authorized generic entry, and damages. The additional litigation expenses associated with trial would have included attorney hours, document hosting platform fees, court reporter fees, expert fees, daily transcript fees, witness and expert travel expenses, and housing expenses for counsel, witnesses, and experts. This complex class action has already reasonably incurred $3,905,175.85 in expenses through April 30, 2023, and would expect to incur a substantial amount more if the case proceeded to trial. Joint Decl. ¶ 86 ECF No. 2133. The proposed settlement avoids the increased costs of trial to both sides, as well as the burden of a class action trial on this Court's docket, while still providing considerable benefits to the Class. Accordingly, this factor

[5] These cases present risks for both sides. In the *Opana ER* generic drug antitrust litigation, End-Payors lost at trial in the Northern District of Illinois. *See* Brendan Pierson, *Endo Prevails at trial over Opana purchasers' antitrust claims*, Reuters (July 5, 2022) *available at* https://www.reuters.com/legal/litigation/endo-prevails-trial-over-opana-purchasers-antitrust-claims-2022-07-01/.

weighs in favor of a finding that the settlement is adequate. *Celebrex*, 2018 WL 2382091, *3 (Allen, J.).

3. Solvency of Defendants.

Another Fourth Circuit factor for consideration involves the Defendants' solvency. Solvency was not at issue in this case. *See Sims v. BB&T Corp.*, Case No. 1:15cv732, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) ("Class Counsel have not expressed any concerns as to the solvency of the defendants or their ability to recover if they were to proceed to trial."). Defendants would likely have been able to pay a significant judgment had the case proceeded to trial and a verdict been returned in favor of the End-Payor Class. As such, EPPs do not contend that the settlement is fair because Defendants could not withstand a greater judgment and thus do not believe this risk is relevant.

4. Opposition to the Settlement.

Despite sending direct notice of the settlement to over 42,000 perceived Class members, *no* members of the class have objected. Supplemental Miller Decl., ¶ 10. Further, when members of the Class were previously given notice of the pendency of the litigation and the opportunity to exclude themselves from the Class, only 13 members out of at least 42,000 potential members of the Class timely requested exclusion.[6] *See* Order at 3–4, ECF No. 1763. "Such a lack of opposition to the Settlement strongly supports a finding of adequacy, for '[t]he attitude of the members of the Class, as expressed directly or by failure to object, after notice to the settlement is a proper consideration for the trial court.'" *Microstrategy,* 148 F. Supp. 2d at 668 (citing *Flinn v. FMC*

[6] Additionally, three requests for exclusion, Williams & Connelly LLP, Klick USA, Inc., and United Healthcare were postmarked after May 10, 2022. Fourteen other entities belatedly filed requests for exclusion in 2023. *See* Joint Declaration of Marvin A. Miller and Michael M. Buchman In Further Support of End-Payor Plaintiffs' Motion For Final Approval of Settlement, Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards, ¶¶ 10, 11.

Corp., 528 F.2d 1169, 1173 (4th Cir. 1975)). The lack here of any objection to the Settlement and the small number of Class members choosing to opt-out of the case strongly compel a finding of adequacy. *Celebrex*, 2018 WL 2382091, *3d (Allen, J.). The parties have reached a proposed settlement that is fair, reasonable and adequate, and warrants approval.

CONCLUSION

In light of the foregoing, the End-Payor Plaintiffs, Co-Lead and Local Counsel respectfully request that the Court: (i) grant final approval to the proposed settlement pursuant to Rule 23(e); (ii) enter an Order approving the Plan of Allocation; (iii) find that the notice plan satisfied due process to all members of the class; and (iv) dismiss the End-Payor Plaintiffs' claims with prejudice in accordance with the Settlement Agreement or for such further or other relief as the Court deems appropriate under the circumstances.

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 Cales