

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

IN RE: ZETIA (EZETIMIBE) ANTITRUST  
LITIGATION

MDL No. 2836  
No. 2:18-md-2836-RBS-DEM

This Document Relates To: All End-Payor  
Actions

**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**

We, Marvin A. Miller and Michael M. Buchman, hereby declare as follows:

1. I, Marvin A. Miller, am a member of the New York and Illinois state bars and the founding member of Miller Law LLC.
2. I, Michael M. Buchman, am a member of the New York and Connecticut state bars and a member of Motley Rice LLC.
3. On August 15, 2018, this Court appointed: (i) Marvin A. Miller of Miller Law LLC and Michael M. Buchman as Interim Co-Lead Counsel for the End-Payor Plaintiff Class; and (ii) Alan Rashkind and James Cales as Interim Local Counsel for the End-Payor Plaintiff Class. (ECF No. 105.) On August 20, 2021, this Court appointed: (i) Marvin A. Miller of Miller Law LLC and Michael M. Buchman as Co-Lead Counsel for the End-Payor Plaintiff Class; and (ii) Alan Rashkind and James Cales as Local Counsel for the End-Payor Plaintiff Class. (ECF Nos. 1094, 1316.)
4. This Declaration is respectfully submitted based upon our personal knowledge concerning the work performed in this litigation and in further support of Plaintiffs' Motion for

Preliminary Approval of the Proposed Settlement, Approval of the Form and Manner of Notice to the Class, and Proposed to the Class and Schedule for a Fairness Hearing.

5. Co-Lead Counsel took on this complex litigation and committed considerable resources to achieve substantial benefits for the Class at risk of not being compensated. Some of the significant events which occurred as a result of Co-Lead Counsel and the Court's five-year efforts during this litigation are briefly summarized below.

**A. The MDL Transfer Order and Appointment of Counsel**

6. On June 15, 2018, the Judicial Panel on Multidistrict Litigation entered a Transfer Order transferring all related Zetia matters to this Honorable Court for coordinated and consolidated pretrial proceedings. (ECF No. 1.)

7. On July 3, 2018, the Court entered Pretrial Order No. 1 setting an initial status conference for August 9, 2018. (ECF No. 20.)

8. On July 11, 2018, the Court entered Pretrial Order No. 2 establishing a briefing schedule for the appointment of Interim Class Counsel for the End-Payor Class. (ECF No. 21.)

9. On August 9, 2018, the Court held an Initial Status Conference and entertained argument concerning the appointment of Co-Lead Counsel for the End-Payor Class. (ECF No. 84.)

10. On August 15, 2018, this Court entered Pretrial Order No. 3 appointing: (i) Marvin A. Miller of Miller Law LLC and Michael M. Buchman as Interim Co-Lead Counsel for the End-Payor Plaintiff Class and (ii) Alan Rashkind and James Cales as Interim Local Counsel for the End-Payor Plaintiff Class. (ECF No. 105.) That same day, the Court entered an Order directing Interim Co-Lead Counsel/Interim Class Counsel to file a Consolidated Amended Complaint no later than September 13, 2018. (ECF No. 106.)

**B. The Consolidated Class Action Complaint and Motion to Dismiss**

11. On September 13, 2018, the End-Payor Consolidated Class Action Complaint was filed against Glenmark Generics, Inc., USA, Glenmark Pharmaceuticals, Ltd., MSP Singapore Co. LLC, Merck & Co., Inc., Merck Sharp & Dome Corp., Schering Corp., and Schering-Plough Corp. (collectively “Defendants”) on behalf of 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) Self-Insured Schools of California; (vi) Sergeants Benevolent Association Health & Welfare Fund; (vii) the Uniformed Firefighters’ Association of Greater New York Security Benefit Fund and the Retired Firefighters’ Security Benefit Fund of the Uniformed Firefighters’ Association; and (viii) United Food and Commercial Workers Local 1500 Welfare Fund, and all others similarly situated. (ECF No. 130.)

12. On October 11, 2018, Defendants filed a Joint Motion to Dismiss All Claims Asserted by End Payor Plaintiffs (ECF Nos. 162, 163), which was fully briefed by the parties. (ECF Nos. 188, 202.)

13. On January 14, 2019, the Court heard oral argument on the Defendants’ Joint Motion to Dismiss All Claims Asserted by End Payor Plaintiffs. (ECF No. 231.) Defendants argued that End-Payor Plaintiffs had failed to plausibly allege any payment or other agreement that would give rise to antitrust liability under federal law. They also asserted that End-Payor Plaintiffs either lacked standing under state law or had failed to state a claim for various reasons particular to those claims.

14. On February 6, 2019, Magistrate Judge Miller issued a Report and Recommendation Order granting, in part, and denying, in part, the Defendants’ Motion to Dismiss the End-Payor Plaintiffs’ Consolidated Class Action Complaint. (ECF No. 234.) Magistrate Judge

Miller granted Defendants' motion to dismiss with respect to all claims under the laws of Alaska, Arkansas, Colorado, Connecticut, Idaho, Maryland, Massachusetts, Missouri, Montana, and South Carolina. (*Id.* at 104.) With respect to End-Payor Plaintiffs' claims under the laws of the remaining thirty jurisdictions, the Report recommended dismissing: (i) End-Payor Plaintiffs' § 17200 claim under California law; (ii) the consumer protection claims under Arkansas, District of Columbia, Idaho, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, New York, Oregon, South Dakota, Tennessee, Utah, and Vermont; and (iii) the unjust enrichment claims under Alaska, Arkansas, Colorado, Connecticut, Florida, Idaho, Maryland, Massachusetts, Michigan, Missouri, Montana, and South Carolina. (*Id.* at 109.)

15. On February 20, 2019, Defendants filed an objection to Magistrate Judge Miller's February 6, 2019 Report and Recommendation which the End-Payors briefed. (ECF No. 237.)

16. On August 9, 2019, this Court, having reviewed the record in its entirety, made a *de novo* determination with respect to the portions of the Report and Recommendation to which Defendants specifically objected. *In re Zetia (Ezetimibe) Antitrust Litig.*, 400 F.Supp.3d 418, 419 (E.D. Va. Aug. 9, 2019). The Court adopted and approved in full Magistrate Judge Miller's Report and Recommendation, holding that: (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 End-Payor Plaintiffs plausibly pleaded anticompetitive effects; and (iv) that End-Payor Plaintiffs could bring claims under state consumer protection statutes. *Id.* at 443–444.

### **C. Discovery and Class Certification**

17. After extensive discovery was conducted, on November 18, 2019, the End-Payor Plaintiffs moved for certification of a proposed class of Third-Party Payors pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. In the same motion, the End-Payor Plaintiffs

sought appointment of the Named Plaintiffs as Class Representatives and the appointment of Class Counsel pursuant to Federal Rules of Civil Procedure 23. (ECF No. 729, 730.) End-Payor Plaintiffs also filed a Motion for Leave to Modify and Limit their Class Definition. (ECF No. 809.) Defendants opposed class certification (ECF No. 829) and argued that End-Payor Plaintiffs' proposal to modify the class definition was futile because it failed to cure the defects noted by Defendants in their opposition to End-Payor Plaintiffs' motion for class certification (ECF No. 854).

18. The Court heard expert witness testimony on May 1, 2020 (ECF Nos. 931, 987) and oral argument on July 7, 2020 (ECF No. 1014).

19. On August 14, 2020, Magistrate Judge Miller issued a Report and Recommendation recommending that the Court certify the class pursuant to End-Payor Plaintiffs' modified class definition. (ECF No. 1094.)

20. On August 28, 2020, Defendants filed an Objection to Magistrate Judge Miller's Report and Recommendation Granting End-Payors Plaintiffs' Motion for Class Certification to which the End-Payors filed an opposition. (*See, e.g.*, ECF No. 1103.)

21. On August 20, 2021, the Court issued a Memorandum Order Adopting and Approving in Full the findings and recommendations set forth in Magistrate Judge Miller's Report and Recommendation, thereby granting End-Payor Plaintiffs' Motion for Leave to Modify and Limit their Class Definition and certifying the class of Third-Party Payors. (ECF No. 1316.)

22. On November 24, 2021, End-Payor Plaintiffs filed a motion seeking approval of the form and manner of Notice to the Class and to appoint a Notice Administrator. End-Payor Plaintiffs also requested a ruling without a hearing. (ECF Nos. 1429, 1446.)

23. On February 3, 2022, the Court heard argument on End-Payor Plaintiffs' motion seeking approval of the form and manner of Notice to the Class and to appoint a Notice Administrator. (ECF No. 1490.)

24. On February 9, 2022, Magistrate Judge Miller issued an Opinion and Order granting End-Payor Plaintiffs' motion seeking approval of the form and manner of Notice to the Class and to appoint a Notice Administrator. (ECF No. 1497.)

**D. Motion Practice Concerning the California Opt-Out Plaintiffs**

25. On January 1, 2022, the End-Payor Plaintiffs filed a Motion for a Protective Order pursuant to Federal Rule of Civil Procedure 26(c) and the Confidentiality Order entered by the Court in this case on October 24, 2018. (ECF No. 1459.) The parties fully briefed the motion. (ECF Nos. 1478, 1479, 1485.) On February 3, 2022, a hearing was held before Magistrate Judge Miller on the End-Payor Plaintiffs' Motion for Protective Order. (ECF No. 1490.) End-Payor Plaintiffs' motion was denied on February 7, 2022. (ECF 1492.)

26. On June 3, 2022, Plaintiffs filed a motion for entry of a set-aside order (ECF No. 1566), requesting a framework through which they may seek compensation from various tag-along plaintiffs for common benefit work (ECF No. 1567.) The motion was fully briefed by the parties. (ECF Nos. 1567, 1614.) On November 8, 2022, the Court entered an Opinion and Order granting and denying in part the motion and establishing a common benefit fund as requested. (ECF No. 1763, 1764.)

**E. Summary Judgment, *Daubert* Motions, and Motions In *Limine***

27. On August 10, 2020, Glenmark and Merck moved for summary judgment. Glenmark filed "Glenmark Defendants' Motion for Summary Judgment on All Claims" that included over 471 pages of exhibits. (ECF Nos. 1037, 1038, 1039.) On the same day, Merck filed "Defendants 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, 1069.) Defendants also moved to exclude proposed expert opinions and testimony concerning experts Jon Clark, Todd Clark, Robert Hrubiec, Thomas McGuire, Louis Molina and Shashank Upadhye. (ECF Nos. 1040-1044, 1084.)

28. End-Payor Plaintiffs simultaneously moved for preclusion of argument and evidence at summary judgment and trial based on Merck's privilege assertions. (ECF No. 1053, 1054, 1074, 1075.) The End-Payor Plaintiffs also moved to preclude portions of testimony from Defendants' experts Dr. Mark Robbins and Dr. Anupam B. Jena. (ECF Nos. 1070, 1071, 1072, 1073.)

29. End-Payor Plaintiffs also moved that same day for Partial Summary Judgment Concerning the Relevant Market on August 10, 2020. (ECF Nos. 1080, 1081.)

30. On November 4, 2020, Plaintiffs and Defendants convened before the Court to address Defendants' concerns regarding one-way intervention. (ECF No. 1238.) On November 6, 2020, the Court Ordered the parties to submit their briefing on the one-way intervention issue. (ECF No. 1239.) Direct Purchaser Plaintiffs and Retailer Plaintiffs opposed the motion for one way intervention. (ECF Nos. 1250, 1251, 1253, 1254.)

31. On November 17, 2020, the Court heard oral argument on Defendants' Joint Motion to Exclude Proposed Expert Opinion and Testimony on Plaintiffs' Generic Launch Timing Experts Jon Clark and Todd Clark (ECF No. 1040), Defendants' Joint Motion to Exclude Testimony and Opinions of Plaintiffs' Patent Merits Expert Robert Hrubiec (ECF No. 1042), Defendants' Joint Motion to Exclude Testimony and Opinions of Plaintiffs' Experts Drs. Thomas McGuire and Keith Leffler (ECF No. 1048), and Plaintiffs' Sword/Shield motions (ECF No. 1053,1074). (ECF No. 1245.)

32. On May 7, 2021, the Court granted, in part, Defendants' motion to delay determinations on dispositive motions due to one-way intervention concerns. (ECF No. 1276.)

33. On June 28, 2021, the Court held a hearing to address the Motions to Exclude Portions of the Proposed Testimony of Shashank Upadhye, Dr. Mark Robbins, and Mr. Louis Molina. (ECF No. 1285.)

34. On June 30, 2021, the Court held a hearing to address Plaintiffs' Motion for Partial Summary Judgment Concerning the Relevant Market and the Motions to Exclude Proposed Testimony of Dr. Anupam Jenna. (ECF No. 1286.)

35. On August 16, 2021, Magistrate Judge Miller issued Memorandum Orders concerning the Motions to Exclude the Proposed Testimony of Shashank Upadhye and Louis Molina. (ECF Nos. 1313, 1314.)

36. On August 17, 2021, Magistrate Judge Miller issued a Report and Recommendation granting Plaintiffs' Motion to Exclude portions of the proposed testimony of Mark Robbins. (ECF No. 1315.)

37. On August 31, 2021, Defendants filed Objections to Magistrate Judge Miller's Ruling or Recommendation re Order on Motion to Exclude portions of the testimony of Dr. Mark Robbins. (ECF Nos. 1318, 1319.)

38. On October 12, 2021, the Court issued a Memorandum Order overruling Defendants' objections and adopting Magistrate Judge Miller's Recommendation to exclude portions of the testimony of Dr. Mark Robbins. (ECF No. 1369.)

39. On November 1, 2021, Magistrate Judge Miller issued a Report and Recommendation granting End-Payor Plaintiffs' Motion for Partial Summary Judge Concerning the Relevant Market. (ECF No. 1391.)

40. On November 15, 2021, Merck filed Objections to the Report and Recommendation Granting Partial Summary Judgment Concerning the Relevant Market. (ECF No. 1423.)

41. On February 24, 2022, the Court adopted in full the findings and recommendation of Magistrate Judge Miller, overruling Defendants' Objections and granting End-Payor Plaintiffs' Motion for Partial Summary Judgment. (ECF No. 1518.)

42. On March 28, 2022, Defendants filed a motion seeking interlocutory appeal under 28 U.S.C. § 1292(b) concerning the Court's decision granting Plaintiffs' Motion for Partial Summary Judgment Concerning the Relevant Market. (ECF No. 1532.) The parties fully briefed the motion. (ECF Nos. 1533, 1536, 1539.)

43. On April 29, 2022, the Court denied Defendants' Motion to Certify the Order for Interlocutory Appeal. (ECF No. 1548.)

44. On July 21, 2022, Magistrate Judge Miller heard oral argument on Defendants' Motions to Exclude Testimony and Opinions of Plaintiffs' Experts Drs. Thomas McGuire and Keith Leffler, as well as the Motions to Exclude Proposed Expert Opinions and Testimony of Plaintiffs' Generic Launch Timing Experts Messrs. Jon Clark and Todd Clark. (ECF No. 1626.)

45. On July 22, 2022, the Court heard oral argument on Defendants' Motion for Summary Judgment (ECF Nos. 1027 and 1067). (ECF No. 1628.)

46. On August 3, 2022, Magistrate Judge Miller issued a Memorandum Opinion and Order denying Defendants' Motion to Exclude the Testimony and Opinions of Plaintiffs' Patent Merits Expert Robert Hrubiec. (ECF No. 1648.)

47. On August 3, 2022, Magistrate Judge Miller issued a Memorandum Opinion and Order denying Defendants' Motion to Exclude the Testimony and Opinion of Plaintiffs' Experts Drs. Thomas McGuire and Keith Leffler. (ECF No. 1649.)

48. On December 15, 2022, the Court held argument on Defendants' Objection to the Report and Recommendation of Magistrate Judge Miller regarding the Motions for Summary Judgment (ECF Nos. 1037, 1067). (ECF No. 1791.)

49. On February 10, 2023, the Court entered an Opinion denying Defendants' Objection to Magistrate Judge Miller's Report and Recommendation regarding the Motions for Summary Judgment and affirming the Report and Recommendation. (ECF No. 1929.)

**F. Pre-Trial Motions**

50. On January 17, 2023, Plaintiffs filed Motions *in Limine* 1 to 10, 11 to 16, and 17 to 19, as well as corresponding motions to seal portions of the supporting memoranda and exhibits. (ECF Nos. 1804-1806, 1809-1817, 1817, 1820, 1824, 1827, 1828, 1829.)

51. On January 17, 2023, Defendants filed Motions *in Limine* 1-24 to Preclude Certain Evidence, Opinion and Argument, which the Plaintiffs opposed. (*See* ECF No. 1822, 1823, 1830-1864.)

52. On January 17, 2023, End-Payor Plaintiffs filed a motion to bifurcate the trial. (ECF Nos. 1825, 1826.)

53. On February 16, 2023, Plaintiffs filed a motion for live trial testimony via video transmission. (ECF No. 1931.)

54. On February 28, 2023, Plaintiffs filed their Trial Brief, which provided: (i) a summary of the purchasers' case; (ii) identification of the cross-cutting legal issues that would likely need to be addressed pretrial; and (iii) identification of the evidentiary and legal issues likely to arise during trial. (ECF No. 1949.)

55. On February 28, 2023, Plaintiffs filed their Proposed Jury Instructions. (ECF Nos. 1960, 1961.)

56. On March 3, 2023, Plaintiffs filed their Motion to Allocate Trial Time. (ECF No. 1983.)

57. On March 8, 2023, Magistrate Judge Miller heard oral argument on: (i) the Motion to Bifurcate the Trial; (ii) Motion to Disallow Improper Pretrial Disclosures; and (iii) Motions *in Limine* 1-10. (ECF No. 1992.)

58. On March 14, 2023, the Court denied the Motion to Bifurcate the Trial. (ECF No. 1995.)

59. On March 17, 2023, Magistrate Judge Miller issued a Memorandum Opinion and Order denying Defendants' Motion *in Limine* No. 19. (ECF No. 2000.)

60. On March 21, 2023, the parties filed their Position Statement and Proposed Agendas for the Final Pretrial Conference. (ECF Nos. 2008, 2009.)

61. On March 22, 2023, Plaintiffs filed their Joint Position Statement on the Proposed Preliminary Jury Instructions. (ECF No. 2014.)

62. On March 22, 2023, Magistrate Judge Miller heard argument on multiple Motions *in Limine*, the motion to allocate trial time, and the motion for live testimony. (ECF No. 2033.)

63. On March 31, 2023, Magistrate Judge Miller issued an Omnibus Order granting in part and denying in part Defendants' Motions *in Limine* 1, 2, 4, 6, 7, 8, 11, 12, 18, 19, 20, 21, 22, 23, and 24 and Plaintiffs' Motions *in Limine* 3, 4, 7, 10, and 11. (ECF No. 2036.)

64. On March 31, 2023, Defendants filed their objections to Magistrate Judge Miller's Ruling and Recommendations concerning Plaintiffs' Motion *in Limine* No. 19. (ECF No. 2037.)

65. On April 5, 2023, Magistrate Judge Miller issued an Omnibus Order, granting in part and denying in part: (i) Defendants' Motions *in Limine* 3, 5, 9, 10, 13, 14, 15, 16, 17, and 18; and (i) Plaintiffs' Motions *in Limine* to Preclude Defendants from Challenging the Validity of

Direct Purchasers' Assignments, Motions *in Limine* 6, 9, 12, 13, 14, 16, 17, and Motion for Live Trial Testimony via Contemporaneous Video Transmission. (ECF No. 2040.)

66. On April 5, 2023, Defendants filed their Objection to Magistrate Judge Miller's Ruling and Recommendation concerning Plaintiffs' Motion *in Limine* No. 15. (ECF No. 2042.)

67. On April 5, 2023, Defendants filed their Objection to Magistrate Judge Miller's Ruling and Recommendation concerning Plaintiffs' Motion *in Limine* No. 13. (ECF No. 2043.)

68. On April 6, 2023, Defendants filed their Objection to Magistrate Judge Miller's Ruling and Recommendation concerning Defendants' Trial Exhibit 216. (ECF No. 2044.)

69. On April 10, 2023, Magistrate Judge Miller held a Zoom status conference to discuss the remaining objections to exhibits and to schedule a further pretrial conference. (ECF No. 2056.)

70. On April 10, 2023, Plaintiffs filed their Memorandum of Law Concerning the Remaining Objections to the Parties' "Expect to Use" Exhibits. (ECF No. 2059.)

71. On April 11, 2023, Magistrate Judge Miller issued a Memorandum and Opinion Order denying Plaintiffs' Motion *in Limine* No. 15. (ECF No. 2063.)

72. On April 12, 2023, Plaintiffs filed an Objection to Magistrate Judge Miller's Ruling and Recommendation concerning Plaintiffs' Motion *in Limine* No. 14. (ECF No. 2070.)

73. On April 13, 2023, Magistrate Judge Miller held a status conference to address the parties' objections to exhibits and deposition designations. (ECF No. 2094.)

74. On April 14, 2023, Magistrate Judge Miller issued a Final Pre-Trial Order. (ECF No. 2086.)

75. On April 14, 2023, the Court heard oral argument on the objections to Magistrate Judge Miller's Ruling or Recommendations regarding the motions *in limine*. (ECF No. 2088.)

76. On April 17, 2023, Magistrate Judge Miller heard oral argument on the remaining issues concerning objections to trial exhibits. (ECF No. 2102.)

77. On April 18, 2023, Magistrate Judge Miller issued an Opinion and Order, granting in part and denying in part, Plaintiffs' Motion *in Limine* No. 2 and the End-Payor Plaintiffs' Motion *in Limine* No. 20. (ECF No. 2103.)

78. On April 20, 2023, the End-Payor Plaintiffs advised the Court that they had reached a settlement with the Defendants.

**G. The Resolution of this Action**

79. With trial set to commence on or about April 17, 2023, the End Payor Plaintiffs reached a settlement agreement with Defendants during the evening of April 19, 2023 and announced the proposed settlement to the Court the next morning. The proposed Settlement in this matter includes separate cash payments from Merck and Glenmark that collectively total \$70,000,000.00.

80. Despite the risks associated with prosecuting this complex case, including issues related to class certification and various defenses asserted by Defendants, Co-Lead Counsel prosecuted this case on a wholly-contingency-fee basis and made a significant out-of-pocket monetary and time investment with the real possibility of an unsuccessful outcome and no fee or reimbursement of expenses of any kind. Indeed, since Co-Lead Counsel filed the initial actions, there were no obvious indications that a settlement was possible, or that the litigation would be successful.

81. End Payor-Plaintiffs faced a number of well-regarded defense litigation law firms in this case. Gibson Dunn & Crutcher LLP represented the Merck Defendants, and Morgan Lewis & Bockius LLP and Kirkland & Ellis LLP represented the Glenmark Defendants.

82. The substantial risks the End-Payor Plaintiffs faced in this case are illustrated by the recent *Opana* trial in the United States District Court for the Northern District of Illinois. The *Opana* trial focused on federal and state pay-for-delay, no authorized generic claims, and patent issues as they were related to the antitrust 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* case, substantially reducing any chances of a meaningful appeal or post-verdict settlement. *Id.* at ECF No. 1064.

83. The defendants in the *Opana* case placed great emphasis at trial on patent related issues. Defendants in this case endeavored to follow a similar approach by seeking to argue before the jury that the patents in the Glenmark and Mylan litigations were the same, the patents involved the same inventors and the issues in the cases were the same. Defendants intended to argue to the jury that since Merck prevailed in the Mylan litigation, it would have prevailed in the Glenmark case had it not settled. Plaintiffs sought to preclude Defendants from referencing the Mylan litigation during a trial in this antitrust litigation. The motion was not resolved during the End-Payor Plaintiffs' litigation. The absence of a ruling created uncertainty for both sides, thereby raising significant risk if the matter proceeded further.

**H. The Work Performed by Co-Lead Leading Up to The Settlement**

84. The following summary illustrates the type of work Co-Lead Counsel performed, in coordination with other Class counsel, to achieve the all-cash settlement for the benefit of the 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 extensive 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 no less than 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 at least 8 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;
- 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;
- Working with a nationally recognized settlement administrator concerning notice to the Settlement Class;
- Preparing and assisting in the formulation of a Class Notice Plan;
- 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 successfully arguing a motion for partial summary judgment on the 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 successfully arguing 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 exhibit 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 and arguing *in limine* 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.

85. 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. Based on those reports, we know what activities were completed and helped prosecute the claims and achieve the benefits for the Class.

86. Consistent with the percentage of funds method, Class Counsel will seek fees equal to 1/3 of the total Settlement Amount of \$70,000,000, equal to \$23,333,333, plus a proportionate share of any interest earned on the Settlement Fund and amounts derived from the common benefit fund. Through April 30, 2023, Plaintiff's counsel has spent approximately 31,078.3 hours, with lodestar value of approximately \$18,536,499.80, and approximately \$3,812,887.08 in costs reasonably expended or incurred on this litigation by all the firms representing Plaintiffs in this litigation, all at risk.

87. Co-Lead Counsel ensured an efficient and effective prosecution of this action to minimize expenses and fees. We accomplished this by, among other things:

- Supervising all pretrial proceedings;
- Supervising and preparing pleadings, motions, briefs, discovery, objections to discovery, subpoenas, trial preparation materials, mediation statements, and Class Notice;
- Acting as a spokesperson for the End-Payor Class at hearings, pretrial conferences, and meetings with Defendants;
- Negotiating and entering into multiple stipulations with defense counsel relating to trial;
- Conducting and coordinating the efficient examination of witnesses in interviews and preparing Class Plaintiffs for depositions and defending them;

- Coordinating the activities of counsel of record for the Class Plaintiffs and implementing procedures to ensure that Co-Lead Counsel met all court deadlines in this case;
- Collecting time and expense reports from counsel of record for the Class Plaintiffs on a monthly basis;
- Employing and consulting with experts;
- Employing and consulting with vendors;
- Delegating assignments among counsel of record for Class Plaintiffs; and
- Negotiating and securing settlements with Defendants.

88. Such management required regular and ongoing communications with counsel of record for the End-Payor Plaintiffs, which occurred by phone and *via* electronic mail, video conference, and (on occasion) in-person meetings.

89. We also have knowledge concerning the efforts and work performed by the Class Representative Plaintiffs concerning the prosecution of this action, especially The City of Providence Rhode Island (“Providence”) and Painters District Council (“Painters”), which had active roles concerning the trial in this matter.

90. Providence and Painters assisted greatly in the prosecution of this case. They communicated with counsel throughout the litigation, reviewed and approved the filing of the complaints and key motion practice, provided voluminous paper and electronic responses to numerous requests for documents and data, provided data for the experts, answered interrogatories, had an employee sit for depositions by Defendants’ counsel, were scheduled witnesses at trial (Providence), agreed to send a member with settlement authority to the trial as required by this Court (Painters), and conferred and approved the settlement agreement as terms were negotiated and completed.

91. Providence and Painters, as well as other Class Representative Plaintiffs, stepped forward, risking their reputations, and subjecting themselves to public scrutiny on behalf of the Class. For their varying efforts, we respectfully request that the Court approve an aggregate

incentive award in the sum of \$ 300,000 for the Class Representatives to be allocated by Co-Lead Counsel. Co-Lead Counsel will make a formal request as part of the Final Approval and Fee Application process if the proposed Settlement Agreement receives preliminary approval.

92. This information is being provided at this time so members of the Class have the opportunity to review and consider the relief that will be requested for final approval. *See McDonough v. Toys “R” Us, Inc.*, 834 F. Supp. 2d 329 (E.D. Pa. 2011). To the extent there is a need to provide further updates, Co-Lead Counsel will endeavor to timely do so.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct to the best of my knowledge. Executed May 22, 2023, in Chicago, Illinois.

/s/ Marvin A. Miller

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct to the best of my knowledge. Executed May 22, 2023, in New York, New York.

/s/ Michael M. Buchman