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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re Effexor XR Antitrust Litigation This Document Relates to: Direct Purchaser Actions	Master Docket No. 3:11-cv-05479 (PGS/JBD)

DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS, APPOINTMENT OF LEAD CLASS COUNSEL, PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE CLASS AND PROPOSED SCHEDULE FOR A FAIRNESS HEARING

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Direct Purchaser Class Plaintiffs Rochester Drug Co-Operative, Inc., Stephen L. LaFrance Holdings, Inc. d/b/a SAJ Distributors, and Uniondale Chemists, Inc. (the "Plaintiffs," "Named Plaintiffs," or "Direct Purchaser Class Plaintiffs") respectfully submit this Memorandum of Law in Support of their Unopposed Motion for Certification of a Settlement Class, Appointment of Lead Class Counsel, Preliminary Approval of Proposed Settlement, Approval of the Form and Manner of Notice to the Class and Proposed Schedule for a Fairness Hearing.

I. INTRODUCTION

Plaintiffs and Defendants Wyeth LLC, Wyeth Pharmaceuticals, Inc., Wyeth-Whitehall Pharmaceuticals LLC, and Wyeth Pharmaceuticals Company (collectively or individually, "Wyeth") have reached a proposed settlement pursuant to which Wyeth will pay $39,000,000 (thirty-nine million dollars) in cash into an escrow fund for the benefit of all members of the Class (defined below) in exchange for dismissal of this litigation between Plaintiffs and Wyeth with prejudice and certain releases (the "Settlement"). All the terms of the Settlement are set forth in the Settlement Agreement dated March 21, 2024 ("Settlement Agreement") (Ex. 1) (Exhibits 1-5, cited herein, are to the accompanying Pearlman Decl.).

Preliminary approval of the Settlement is appropriate. The Settlement was reached after more than twelve years of litigation and extensive mediation. Counsel for both sides are experienced in class actions and pharmaceutical antitrust litigation

and well-positioned to assess the case risks and merits. The Settlement ensures that Class members will receive a cash settlement payment now and that the litigation against Wyeth (but not Teva[1]) will end, avoiding continued litigation, potential appeals, and further delay. Accordingly, Plaintiffs respectfully request that the Court enter the accompanying proposed order providing for:

1. Preliminary approval of the proposed Settlement Agreement and the documents necessary to effectuate the Settlement, including a proposed Notice Plan and Form of Notice to the Class (Settlement Agreement Ex. B) and Direct Purchaser Class Plaintiffs' [Proposed] Plan of Allocation for the Direct Purchaser Class ("Plan of Allocation") (Ex. 2) of the Settlement funds as described in the proposed form of Notice;

2. Certification of the Class for purposes of the settlement with Wyeth;

3. Appointment of Thomas M. Sobol and his firm Hagens Berman Sobol Shapiro LLP, David F. Sorensen and his firm Berger Montague PC, Peter Kohn and his firm Faruqi & Faruqi LLP, Barry S. Taus and his firm Taus, Cebulash & Landau, LLP, Dianne M. Nast and her firm Nastlaw LLC, and Don Barrett and his firm Barrett Law Group, P.A. as Lead Class Counsel for purposes of the Settlement pursuant to Federal Rule of Civil Procedure 23(c)(1)(B) and 23(g);

4. Appointment of RG/2 Claims Administration LLC ("RG/2") as Notice and Claims Administrator;

5. Appointment of The Huntington National Bank as Escrow Agent (*see* Settlement Agreement and Ex. D to the Settlement Agreement (Escrow Agreement)); and

6. A settlement schedule, including the scheduling of a Fairness Hearing to consider: (a) Plaintiffs' request for final approval of the Settlement and entry of a proposed order and final judgment (filed herewith); (b) Class

[1] "Teva" means, collectively, Teva Pharmaceuticals USA, Inc. and Teva Pharmaceutical Industries Ltd. Teva, together with Wyeth, are collectively referred to as "Defendants." The proposed Settlement is with Wyeth only.

Counsel's application for attorneys' fees expenses, administrative costs, and service awards for the Named Plaintiffs; and (c) Plaintiffs' request for dismissal of this action against Wyeth with prejudice.

II. BACKGROUND

A. Plaintiffs' Claims and Procedural Background

In 2011, Direct Purchaser Class Plaintiffs filed the first antitrust lawsuits on behalf of a proposed class of direct purchasers challenging Wyeth and Teva's conduct regarding the prescription drug, Effexor XR.[2] Following the transfer of Direct Purchaser Class Plaintiffs' lawsuits to this Court,[3] Judge Pisano coordinated Plaintiffs' cases with later-filed actions filed by indirect purchasers (end-payors) and Retailer Plaintiffs.[4] This Court appointed Thomas M. Sobol (Hagens Berman Sobol Shapiro LLP), David F. Sorensen (Berger Montague PC), Peter Kohn (Faruqi & Faruqi LLP), Barry S. Taus (Taus, Cebulash & Landau LLP), Dianne M. Nast (Nastlaw LLC), and Don Barrett (Barrett Law Group, P.A) as the Interim Class Counsel Executive Committee ("Interim Class Counsel") for the proposed Class. ECF No. 85. Plaintiffs filed the Second Amended Consolidated Class Action Complaint on October 23, 2013 (ECF No. 287 ("Compl.")), alleging that Wyeth and Teva unlawfully delayed the entry of less expensive generic Effexor XR through an

[2] *See Professional Drug Co., Inc. v. Wyeth, Inc.*, 11-cv-196 (S.D. Miss.); *Stephen L. LaFrance Holdings Inc., v. Wyeth Inc.*, 11-cv-199 (S.D. Miss.); *Rochester Drug Co-operative, Inc. v. Wyeth LLC*, 11-cv-221 (S.D. Miss.); *Uniondale Chemists, Inc., v. Wyeth LLC*, 11-cv-256 (S.D. Miss.).

[3] ECF No. 44 (Transfer Order).

[4] ECF No. 86 (Case Management Order No. 1).

unlawful "reverse payment" agreement. *See In re Lipitor and Effexor XR Antitrust Litig.*, 868 F.3d 231 (3d Cir. 2017); *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

The history of this litigation is extensive. In October 2014, this Court granted Defendants' motion to dismiss Plaintiffs' claims.[5] Plaintiffs appealed to the Third Circuit, and in August 2017, the Third Circuit reversed the Court's motion to dismiss order and reinstated Plaintiffs' claims.[6] The case then proceeded to discovery, with the parties serving and responding to document requests and interrogatories and conducting third-party discovery, including subpoenas to non-party generic Effexor XR manufacturers, and motion practice regarding various discovery disputes.[7]

In March 2020, three months before the close of fact discovery, the Court referred the case to mediation and issued a stay of discovery.[8]

B. Settlement Negotiations and the Proposed Settlement

Plaintiffs and Wyeth engaged in extensive mediation proceedings before Judge Hochberg, an experienced mediator. Both sides submitted mediation briefs on: (1) whether the Wyeth-Teva agreement contains a large, unexplained reverse payment, (2) whether any such payment caused generic Effexor XR entry to be

[5] *In re Effexor XR Antitrust Litig.*, 2014 WL 4988410 (D.N.J. Oct. 6, 2014).
[6] *In re Lipitor and Effexor*, 868 F.3d 231 (reversing and remanding dismissal of Plaintiffs' claims).
[7] *See e.g.,* ECF Nos. 528, 529, 576 (Joint Letter Motions to Compel).
[8] ECF Nos. 648 (Order referring case to mediation); 623 (Scheduling Order with close of fact discovery June 18, 2020).

delayed, (3) class certification, (4) the existence of potential procompetitive justifications, and (5) whether Wyeth possessed the requisite degree of market power. As such, the parties are well aware of each other's respective positions.

On March 21, 2024, Plaintiffs and Wyeth executed the proposed Settlement pursuant to which Wyeth will pay $39,000,000 (thirty-nine million dollars) in cash for the benefit of Class members in exchange for dismissal of the litigation between Plaintiffs and Wyeth and certain releases by Class members.

Plaintiffs have proposed the form and manner of notice of the proposed Settlement Agreement to the Class and the procedures by which Class members may: (a) receive their share of Settlement funds; (b) seek exclusion from the Class or object to the proposed Settlement; and (c) object to Class Counsel's application for attorneys' fees of up to one-third of the Settlement amount (plus interest incurred thereon), reimbursement of reasonable costs and expenses incurred in prosecuting this case, and service awards of $100,000 for each of the Named Plaintiffs. Final approval of the Settlement will result in dismissal with prejudice of Plaintiffs' claims against Wyeth.

III. ARGUMENT

A. The Requirements for Certification of a Settlement Class Have Been Met

Plaintiffs and Wyeth have agreed, subject to the Court's review and approval, to the certification of the following "Class" for purposes of settlement:

> All persons or entities in the United States and its territories who purchased Effexor XR and/or AB-rated generic versions of Effexor XR directly from any of the Defendants at any time during the period June 14, 2008 through and until May 31, 2011 (the "Class Period").
>
> Excluded from the Direct Purchaser Class are Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, all governmental entities, and all persons or entities that purchased Effexor XR directly from Wyeth during the Class Period that did not also purchase generic Effexor XR directly.
>
> Also excluded from the Class for purposes of this Settlement Agreement are the following: Walgreen Co., The Kroger Co. (including Peytons), Safeway, Inc., United Natural Foods, Inc. f/k/a Supervalu Inc., H-E-B, L.P. f/k/a HEB Grocery Company, L.P., American Sales Company, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corporation, JCG (PJC) USA, LLC, Maxi Drug, Inc. d/b/a/ Brooks Pharmacy, Eckerd Corporation, Meijer, Inc., Meijer Distribution, Inc., Giant Eagle, Inc., and CVS Caremark Corporation (including Caremark and Omnicare) (collectively, "Retailer Plaintiffs").

Settlement Agreement ¶ 1.

The Court should certify the Class for purposes of settlement. Courts have repeatedly certified classes of direct purchasers seeking antitrust overcharges both for purposes of litigation and settlement, including certifying similar classes in similar pharmaceutical antitrust cases.[9]

[9] Classes certified for settlement: *In re Lipitor Antitrust Litig.*, 3:12-cv-02389, ECF Nos. 1363-3, 1374 at ¶¶ 3-7 (D.N.J.); *In re Novartis and Par Antitrust Litig.*, 18-cv-04361, ECF No. 635 (S.D.N.Y. Jul. 26, 2023) ("*Exforge*"); *In re Generic Pharms. Pricing Antitrust Litig.*, 2023 WL 2466622 (E.D. Pa. Mar. 9, 2023); *Mylan Pharms., Inc. v. Warner Chilcott Pub. Co.*, 2014 WL 631031, at *1 (E.D. Pa. Feb. 18, 2014) ("*Doryx*"); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 8181042, at *1 (D.N.J. Nov. 9, 2005); *In re Domestic Drywall Antitrust Litig.*, 2:13-md-02437, ECF No. 503 (E.D. Pa. Dec. 7, 2016); *In re Chocolate Confectionary Antitrust Litig.*,

"Judicial review of a proposed class action settlement is a two-step process: preliminary fairness approval and a subsequent fairness hearing."[10] At the "preliminary fairness review," the Court "should make a *preliminary determination* that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)."[11] It is appropriate for a "final certification decision"

1:08-md-01935, ECF No. 1106 (M.D. Pa. Dec. 12, 2011); *Sullivan v. DB Invs., Inc.*, 2008 WL 8747721, at *38 (D.N.J. May 22, 2008); *In re K-Dur Antitrust Litig.*, 01-1652, ECF No. 176, ¶ 1 (D.N.J. Sept. 30, 2004). Classes certified for litigation: *In re Seroquel XR Antitrust Litig.*, 1:20-cv-01076, ECF No. 582 (D. Del. Feb. 6, 2024); *In re Suboxone Antitrust Litig.*, 421 F. Supp. 3d 12, 78 (E.D. Pa. 2019), *aff'd*, 967 F.3d 264 (3d Cir. 2020); *In re K-Dur Antitrust Litig.*, 2008 WL 2699390, at *1 (D.N.J. Apr. 14, 2008), *aff'd*, 686 F.3d 197, 224 (3d Cir. 2012), *reinstated*, 2013 WL 5180857, at *1 (3d Cir. Sept. 9, 2013); *Castro v. Sanofi Pasteur Inc.*, 134 F. Supp. 3d 820, 826 (D.N.J. 2015); *In re Neurontin Antitrust Litig.*, 2011 WL 286118, at *1 (D.N.J. Jan. 25, 2011); *In re Bulk (Extruded) Graphite Prod. Antitrust Litig.*, 2006 WL 891362, at *16 (D.N.J. Apr. 4, 2006) (same); *In re Niaspan Antitrust Litig.*, 397 F. Supp. 3d 668, 691 (E.D. Pa. 2019); *Am. Sales Co. v. SmithKline Beecham Corp.*, 274 F.R.D. 127, 137 (E.D. Pa. 2010) ("*Flonase*"); *In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, 2008 WL 1946848, at *11 (E.D. Pa. May 2, 2008); *In re Ranbaxy Drug Generic Application Antitrust Litig.*, 338 F.R.D. 294, 309 (D. Mass. 2021); *In re Glumetza Antitrust Litig.*, 336 F.R.D. 468, 484 (N.D. Cal. 2020); *In re Loestrin 24 Fe Antitrust Litig.*, 2019 WL 3214257, at *17 (D.R.I. July 2, 2019); *In re Solodyn Antitrust Litig.*, 2017 WL 4621777, at *22 (D. Mass. Oct. 16, 2017); *Am. Sales Co., LLC v. Pfizer, Inc.*, 2017 WL 3669604, at *17 (E.D. Va. July 28, 2017), *adopted*, 2017 WL 3669097, at *1 (E.D. Va. Aug. 24, 2017) ("*Celebrex*"); *In re Lidoderm Antitrust Litig.*, 2017 WL 679367, at *15 (N.D. Cal. Feb. 21, 2017); *In re Nexium Antitrust Litig.*, 296 F.R.D. 47, 60 (D. Mass. 2013); *In re Domestic Drywall Antitrust Litig.*, 322 F.R.D. 188 (E.D. Pa. 2017); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200 (M.D. Pa. 2012).

[10] *Smith v. Pro. Billing & Mgmt. Servs., Inc.*, 2007 WL 4191749, at *1 (D.N.J. Nov. 21, 2007).

[11] *In re Nat'l Football League Players Concussion Inj. Litig.*, 775 F.3d 570, 582 (3d Cir. 2014) (quoting Manual Complex Lit. § 21.632 (4th ed.) ("MANUAL")); *see*

to be "addressed at the final hearing."[12]

Class certification is particularly appropriate with respect to claims asserting nationwide antitrust violations like those alleged here. In *Hawaii v. Standard Oil Co.*, the Supreme Court explained:

> Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. . . . Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of recovery of three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'. . . *Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture*.[13]

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also In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 341 (3d Cir. 2010) ("In order to approve a class settlement agreement, a district court first must determine that the requirements for class certification under Rule 23(a) and (b) are met."); *Sullivan v. D.B. Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011) (*en banc*).

[12] *Smith*, 2007 WL 4191749 at *2; *see also Nat'l Football League*, 775 F.3d at 586 (describing the district court's preliminary class certification analysis as "basic and necessarily contingent" and noting that the court reserved a "rigorous analysis" until after the fairness hearing) (quotation omitted).

[13] 405 U.S. 251, 262, 266 (1972) (emphasis added) (citation omitted). *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (emphasis in original); *In re Cathode Ray Tube (CRT) Litig.*, 308 F.R.D. 606, 612 (N.D. Cal. 2015) ("[c]lass actions play an important role in the private enforcement of antitrust actions").

Here, the Class satisfies Rule 23(a) and (b)(3) and should be certified for purposes of the Settlement. Plaintiffs' expert Dr. Leitzinger has prepared a report supporting certification of the settlement class, which demonstrates that the Class is so numerous that joinder is impracticable and that evidence common to the Class is capable of proving Class-wide injury and damages.[14]

1. The Requirements of Rule 23(a) Are Satisfied

(a) Numerosity and Impracticability of Joinder

Rule 23(a)(1) requires a class be "so numerous that joinder of all members is impracticable[.]"[15] "Impracticable does not mean impossible"—"[n]o minimum number of plaintiffs is required."[16] Generally, if "the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met."[17] Here, there are 59 geographically dispersed Class members (not including Retailer Plaintiffs that filed individual actions, settled with Wyeth, and are expressly excluded from the Class

[14] Ex. 5 (Decl. of Jeffrey J. Leitzinger, Ph.D. Regarding Certification of the Proposed Settlement Class) ("Leitzinger Settlement Class Certification Decl.").

[15] *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249 (3d Cir. 2016) (citation omitted).

[16] *Id.* (citations omitted); *id.* at 250 ("At this point, we need not specify a 'floor' at which a putative class will fail to satisfy the numerosity requirement.").

[17] *Id.* (citing *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) for the proposition that "difficulty in joining as few as 40 class members should raise a presumption that joinder is impracticable"). *See also In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 426 (3d Cir. 2016) ("[N]umerosity is generally satisfied if there are more than 40 class members."); *Bing Li v. Aeterna Zentaris, Inc.*, 324 F.R.D. 331, 339 (D.N.J. 2018) (similar).

definition), readily satisfying Rule 23(a)(1).[18] The Class size and its geographic dispersion render joinder difficult, inconvenient, judicially inefficient, and costly.[19]

Further, judicial economy favors certification because joinder of individual plaintiffs would involve additional counsel, discovery, and unnecessary delay.[20] Three cases involving similar Class members (though smaller class sizes) are instructive. Following denial of class certification in *Value Drug*, more than 30

[18] Ex. 5 (Leitzinger Settlement Class Certification Decl.) ¶ 36, Exs. 4 (listing Class members) & 5 (showing Class members' geographic dispersion).

[19] *Id.*; *Niaspan*, 397 F. Supp. 3d at 678 (geographic dispersion supports certification); *K-Dur*, 2008 WL 2699390, at *3 n.4 (numerosity satisfied due to, *inter alia*, geographic dispersion); *Teva Pharms. USA, Inc. v. Abbott Lab'ys* ("*TriCor*"), 252 F.R.D. 213, at 225 n.26 (D. Del. 2008) (similar). *See generally Modafinil*, 837 F.3d at 253 (courts should consider, *inter alia*, judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, and geographic dispersion).

[20] *Modafinil*, 837 F.3d at 257 ("each plaintiff may need to hire his own counsel to protect his individual interests" in a joinder action); *Niaspan*, 397 F. Supp. 3d at 677 ("Judicial economy will be served by allowing this case to proceed as a class action. If this case proceeds through joinder, the Court faces the prospect of individual plaintiffs represented by dozens of different attorneys with the potential for a multitude of summary judgment briefs espousing an array of arguments and additional complications at trial."); *In re Opana ER Antitrust Litig.*, 2021 WL 3627733, at *5 (N.D. Ill. June 4, 2021) ("This case will be a more impractical than average to join[] additional parties, and it will be a particularly efficient use of judicial resources in this litigation to have a single class of direct purchasers represented amongst the other plaintiffs."); *Loestrin*, 2019 WL 3214257, at *10 ("the Court is further satisfied that joinder is impracticable after considering the non-exhaustive list of considerations, especially judicial economy; the class members' incentives to bring suit individually against their supplier(s); and the geographic dispersion of class members.") (citations omitted); *Nexium*, 296 F.R.D. at 53 ("judicial economy would best be served by certifying the Direct Purchaser class, primarily because all putative class members seek damages stemming from the same, identical transactions") (citations omitted).

former putative absent class members (out of 49) did not sue after class certification was denied, including 21 of the 26 former class members with the smallest claim values (lowest share of damages), and discovery issued upon the former putative absent class members who did file joinder actions resulted in numerous discovery disputes requiring court intervention.[21] In *Zetia*, following denial of certification, half the former putative absent class members—including two who submitted declarations saying they feared retaliation (and then were deposed by the defendants about their declarations)—did not sue, and joinder of former putative absent class members likewise resulted in discovery disputes filed before the court.[22] In *AndroGel*, following denial of certification, over half the former putative absent class members did not join, and those that sued filed in a new jurisdiction.[23] Judicial

[21] *Value Drug Co. v. Takeda Pharms., U.S.A., Inc.*, 2023 WL 2314911, at *1 (E.D. Pa. Feb. 28, 2023) (proposed class included 49 members); *Value Drug Co. v. Takeda Pharms., U.S.A., Inc.*, 21-cv-03500, ECF Nos. 905 (E.D. Pa. Apr. 14, 2023) (complaint of 19 joinder plaintiffs); 724-3 at p.409 (class members' damages showing that 21 of 26 former class members with damages below $250,000 did not sue after certification was denied); 901, 915, 918, 922, 927, 935 (discovery disputes).

[22] *In re Zetia Antitrust Litig.*, 18-md-02836, ECF No. 1356-1 (listing class members), 1583-2 (listing plaintiffs) (E.D. Va.); *Burlington Drug Co. v. Merck & Co., Inc.*, 22-cv-00269, ECF No. 1 (E.D. Va. June 30, 2022) (listing plaintiffs); *Zetia*, 18-md-2836, ECF Nos. 1358, 1360 (E.D. Va. Sept. 24, 2021) (two former class members would "likely not be able to pursue [their] claim" through joinder because of, *inter alia*, risk of retaliation). ECF Nos. 1627, 1653, 1657, 1663, 1665-69, 1680-81, 1686, 1693, 1708-10, 1731-32, 1734-37 (discovery disputes, related hearings).

[23] *See In re AndroGel Antitrust Litig.*, 2018 WL 3424612 (N.D. Ga. July 16, 2018) (declining to certify proposed class of 33); *King Drug Co. v. Abbott Laby's*, 19-cv-3565, ECF No. 1 (E.D. Pa. Aug. 7, 2019) (14 former absent class members sued as

economy is clearly served by granting certification.

Denying certification here is also likely to result in more motion practice before this Court and additional delay. Further, because many Class members have relatively small claims,[24] absent certification, they will likely decline to pursue joinder and thus would likely recover no overcharge damages from Wyeth. It is far more practicable to resolve the claims here via settlement on a classwide basis.

As such, it is unsurprising that courts have repeatedly found that similar classes with more than 40 direct purchasers of pharmaceutical drugs satisfy Rule 23(a)(1), including classes smaller than the Class here and four recent decisions in similar generic delay cases brought by similar classes in this circuit. *Suboxone*, 421 F. Supp. 3d at 47 (finding numerosity in class with 71 members), *aff'd*, 967 F.3d at 267 ("In a thorough, thoughtful, and well-reasoned opinion, the District Court certified a class of those who purchased Suboxone...We will affirm."); *Niaspan*, 397 F. Supp. 3d at 677-79 (48 class members); *Neurontin*, 2011 WL 286118, at *3; *Seroquel XR*, ECF No. 582 (51 members).[25] The Court should do the same here.

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plaintiffs in a different jurisdiction, the Eastern District of Pennsylvania (instead of the Northern District of Georgia, where the putative class action was pending)).

[24] *See* Ex. 5 (Leitzinger Settlement Class Certification Decl.), ¶ 51 ("53 Class members have pro rata shares of less than 1 percent" of Class damages under the Plan of Allocation) & Ex. 4.

[25] *See also In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, at 221 (S.D.N.Y 2018) (62 class members); *Solodyn*, 2017 WL 4621777, at *4 (48); *Lidoderm*, 2017 WL 679367, at *14 (53).

(b) Commonality

Rule 23(a)(2) is met if the class representatives, here the Named Plaintiffs, share at least one question of fact or law with the Class.[26] The claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution" and have the capacity to "generate common answers apt to drive the resolution of the litigation."[27] "In the antitrust context 'courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy the Rule 23(a)(2) prerequisite.'"[28]

Here, as in dozens of previous cases alleging impaired generic entry,[29] commonality is "easily met."[30] The common issues here include, *inter alia*: whether Wyeth violated the antitrust laws by conspiring with Teva to suppress generic competition to Effexor XR; whether antitrust injury occurred in the form Defendants' conduct causing Class members to pay higher prices than they

[26] *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015); *Castro*, 134 F. Supp. 3d at 844.

[27] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted).

[28] *Natchitoches Par. Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253, 264 (D. Mass. 2008) (quoting *Newberg on Class Actions* § 3.10 (4th ed. 2002)).

[29] *Suboxone*, 421 F. Supp. 3d at 64-65 (commonality met); *Niaspan*, 397 F. Supp. 3d at 679 (same); *In re Wellbutrin XL Antitrust Litig.*, 2011 WL 3563385, at *4 (E.D. Pa. Aug. 11, 2011) (same); *K-Dur*, 2008 WL 2699390, at *4-5 (same); *supra* n.9.

[30] *Bing Li*, 324 F.R.D. at 339; *Neurontin*, 2011 WL 286118, at *3 ("Because only one issue must be in common, 'the burden for meeting this requirement is low' … and is routinely found to be satisfied in antitrust cases alleging monopolization.") (citations omitted).

otherwise would have; whether damages in the form of overcharges can be readily and reliably measured; whether Teva agreed to delay launching generic Effexor XR; whether Wyeth possessed market or monopoly power over Effexor XR.[31]

(c) Typicality

Rule 23(a)(3) requires that the Plaintiffs' claims are typical of the Class's claims. The Third Circuit has a "low threshold" for satisfying typicality.[32] "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct."[33] As in prior similar cases, typicality is met here because Plaintiffs assert that Defendants' scheme impaired generic competition market-wide, and the overcharges Plaintiffs seek for themselves and the Class are based on the same factual allegations and legal theories.[34]

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[31] *See also* Proposed Order (filed herewith), ¶ 5 (listing common questions); Compl. ¶ 404 (same).

[32] *E.g.*, *Niaspan*, 397 F. Supp. 3d at 680; *Chimenti v. Wetzel*, 2018 WL 2388665, at *6 (E.D. Pa. May 24, 2018).

[33] *Chimenti*, 2018 WL 2388665, at *6 (citation omitted). *See also Castro*, 134 F. Supp. 3d at 844 (claims are typical if they "'arise from the same alleged wrongful conduct' and are based upon 'the same general legal theories'") (citation omitted).

[34] *See Suboxone*, 421 F. Supp. 3d at 49 (typicality generally satisfied where defendants engaged in a scheme common to all class members); *Loestrin*, 2019 WL 3214257, at *11 (typicality satisfied because "members' claims plainly stem from a unitary course of conduct" in delayed generic entry antitrust case); *Celebrex*, 2017 WL 3669604, at *11; *Neurontin*, 2011 WL 286118, at *4; *K-Dur*, 2008 WL 2699390, at *6; *TriCor*, 252 F.R.D. at 226; *Wellbutrin SR*, 2008 WL 1946848, at *3.

(d) Adequacy of Representation

Rule 23(a)(4) requires that "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class."[35] Here, both criteria are met. Proposed Lead Class Counsel are well-qualified, as the Court recognized in appointing them Interim Class Counsel. ECF No. 85. Since then, as the Court is aware, Interim Class Counsel worked vigorously and diligently on behalf of the Class. The Named Plaintiffs are likewise adequate, as they vigorously litigated this case on behalf of the Class, including through an appeal to the Third Circuit. Courts have repeatedly found these Named Plaintiffs adequate.[36]

Plaintiffs' interests also align with, and are not in conflict with, the Class. Plaintiffs, on their own and on behalf of all Class members, seek to recover overcharges caused by Defendants' alleged unlawful conduct. As the Third Circuit held in *K-Dur* (and as is true here), "all of the class members have the same financial incentive for purposes of the litigation - *i.e.*, proving that they were overcharged and

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[35] *Suboxone*, 967 F.3d at 272 (the adequacy analysis "serves to uncover conflicts of interest between named parties and the class they seek to represent") (rejecting defendant's challenge to class representatives' adequacy); *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (similar).

[36] *E.g.*, *Niaspan*, 397 F. Supp. 3d at 680-81 (Rochester Drug adequate); *In re Prograf Antitrust Litig.*, 11-cv-10344, ECF No. 216, at 3-4 (D. Mass Apr. 23, 2013) (LaFrance and Uniondale Chemists adequate).

recovering damages based on that overcharge."[37] "Only 'fundamental' conflicts 'will defeat the adequacy requirement.'"[38] There are no conflicts here, much less "fundamental" conflicts defeating certification.

2. The Requirements of Rule 23(b)(3) Are Satisfied

Rule 23(b)(3), which is met here, requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

(a) Predominance

Predominance is "readily met" in antitrust cases like this one.[39] Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each 'elemen[t] of [its] claim [is] susceptible to classwide proof.' What the rule does require is that common questions '*predominate* over any questions affecting only individual [class] members.'"[40] Rule 23(b)(3) requires only that "*questions* common to the class

[37] *K-Dur*, 686 F.3d at 223.

[38] *Suboxone*, 967 F.3d at 272 (citation omitted).

[39] *See, e.g.*, *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). *See also Castro*, 134 F. Supp. 3d at 845 ("Common issues predominate when the focus is on the defendants' conduct and not on the conduct of the individual class members.") (citation omitted); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 108 (D.N.J. 2012) ("Given that antitrust class action suits are particularly likely to contain common questions of fact and law, it is not surprising that these types of class actions are also generally found to meet the predominance requirement").

[40] *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 469 (2013) (citing Fed. R. Civ. P. 23(b)(3)) (alterations in original).

predominate, not that those questions will be answered, on the merits, in favor of the class."[41] "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'"[42] Thus, Rule 23(b)(3) is satisfied when common issues predominate, even if there are some individualized questions.[43]

Here, the evidence at trial will consist mostly or exclusively of evidence common to the Class as a whole, including testimony and documents from Defendants' employees and files and expert testimony based on that common evidence concerning questions common to the Class,[44] so Rule 23(b)(3) is met.

i. Common Issues Predominate as to Violation of the Antitrust Laws

Plaintiffs allege Defendants violated Section 1 and Wyeth violated Section 2

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[41] *Id.* at 459.

[42] *Id.* at 460 (quotation omitted).

[43] *See*, *e.g.*, *Halliburton Co. v. Erica P. John Fund*, *Inc.*, 573 U.S. 258, 276 (2014) (even if there are "individualized questions of reliance in the case, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate") (citation omitted); *Tyson Foods*, *Inc. v. Bouaphakeo*, 577 U.S. 442, 453-54 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'") (citation omitted); *Reyes*, 802 F.3d at 489 ("Rule 23 does not require . . . the elimination of all individual circumstances."); *TriCor*, 252 F.R.D. at 227 ("[T]he existence of an individual inquiry does not preclude class certification, especially where all members face the necessity of proving the same fraudulent scheme.").

[44] *See* Proposed Order, ¶ 5 (listing common questions); Compl. ¶ 404 (same).

of the Sherman Act by, *inter alia*, entering an agreement to delay the entry of generic Effexor XR.[45] The elements of a Section 1 claim are "(1) concerted actions; '(2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that [plaintiffs were] injured as a proximate result of the concerted action.'"[46] The elements of a Section 2 claim are "(1) the possession of monopoly power in the relevant market[,]" "(2) the willful acquisition or maintenance of that power," and (3) that the "monopolist's anticompetitive conduct [] have an anticompetitive effect."[47] If litigating separately, each Class member would have to prove, *e.g.*, the same anticompetitive conduct of Defendants, using the same documents and witnesses. Predominance is therefore satisfied on the issue of antitrust violation alone.[48]

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[45] Compl. ¶¶ 407-427.

[46] *In re Generic Pharms. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404, 438 (E.D. Pa. 2018) (quoting *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005)).

[47] *In re Lipitor Antitrust Litig.*, 855 F.3d 126, 147 (3d Cir. 2017) (citing *LePage's Inc. v. 3M*, 324 F.3d 141, 146 (3d Cir. 2003) (en banc)).

[48] *See TriCor*, 252 F.R.D. at 228 ("[E]ach putative class member, had they pursued their claims individually, would have been required to prove identical facts, such as defendants' monopoly power, exclusionary scheme, effect on interstate commerce, conspiracy, and unreasonable restraint of trade. Therefore, these common issues predominate[.]"); *Flonase*, 274 F.R.D. at 135 (predominance met because plaintiffs' Section 2 claim requires proof of "actions and intent. Such proof will necessarily be classwide"); *K-Dur*, 2008 WL 2699390, at *12 ("Courts routinely find that proof of a violation of the antitrust law focuses on the defendants' conduct and not on the conduct of individual class members.") (citations omitted).

ii. Common Issues Predominate as to Injury

Antitrust injury, or impact, requires showing "some damage" due to the antitrust violation.[49] "[F]or certification[,] plaintiff need not prove antitrust injury actually occurred."[50] Plaintiffs must provide a plausible theory of injury that can be proven through common evidence.[51] Class certification is proper even if the class includes some uninjured members.[52]

Plaintiffs allege, as in all prior impaired generic competition cases, injury in the form of overcharges, a classic form of antitrust injury.[53] Plaintiffs allege that the reverse payment from Wyeth to Teva unlawfully delayed the market entry of generic Effexor XR (first, the entry of Teva and the authorized generic — which would have launched at the same time as Teva — and then additional generics, who would have launched earlier absent Wyeth's payments to Teva), causing all or nearly all Class

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[49] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). *See also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 325 (3d Cir. 2008); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151 (3d Cir. 2002).

[50] *K-Dur*, 686 F.3d at 222.

[51] *See Modafinil*, 837 F.3d at 262-63 (a class should be certified "if such impact is plausible in theory [and] . . . susceptible to proof at trial through available evidence common to the class") (citation omitted) (alteration in original).

[52] *K-Dur*, 686 F.3d at 221-22 (certification appropriate even if some class members might have "zero or negative damages"); *Linerboard*, 305 F.3d at 158 (affirming certification despite "limited exceptions" of uninjured class members); *Castro*, 134 F. Supp. 3d at 847 (uninjured class members do not preclude certification).

[53] *E.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 489 (1968) ("[W]hen a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage"); *K-Dur*, 686 F.3d at 221.

members to suffer overcharges.

Plaintiffs will prove classwide injury using three forms of common evidence: (a) economic studies on the predictable and substantial market-wide effects of generic competition showing that generic competition causes the brand to lose significant sales to the lower-priced generic and that generic prices fall even lower as additional generics enter the market; (b) Defendants' and non-party generics' documents showing they knew generic competition would cause brand Effexor XR sales to be lost to cheaper generic Effexor XR and that as additional generics enter, generic Effexor XR prices would fall further; and (c) the actual market experience after delayed generic competition began in July 2010, showing that the majority of the Class's brand Effexor XR purchases converted to lower-priced generic Effexor XR and that generic Effexor XR prices fell further as additional generics launched.[54] Significantly, it is highly likely that *all* Class members were injured because, *inter alia,* all Class members that purchased brand and generic Effexor XR paid lower prices for the generic than the brand, and all Class members who purchase generic Effexor XR with both one and multiple generics on the market paid lower generic prices with multiple generics on the market. *Id.* ¶¶ 40-41.

These are the same types of common evidence found sufficient in finding that the predominance requirement was met in numerous similar cases involving similar

[54] Ex. 5 (Leitzinger Settlement Class Certification Decl.), ¶ 37.

classes, including by the Third Circuit in *K-Dur*, 686 F.3d 197 and *Modafinil*, 837 F.3d 238.[55] Likewise, predominance is satisfied as to class-wide impact here.

iii. Common Issues Predominate as to Damages

Common issues also predominate with respect to damages. The Third Circuit in *Lamictal* explained that courts "apply a more lenient predominance standard for damages" and that "damages need not be susceptible of measurement across the entire class for purposes of Rule 23(b)(3)[.]"[56] In *Suboxone*, the Third Circuit reaffirmed that predominance is readily satisfied as to damages where, as here, aggregate Class damages can be reliably measured using Class-wide evidence.[57]

Here, Dr. Leitzinger can use the same basic methodology to measure Class overcharge damages as courts have approved in similar cases.[58] Any individualized

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[55] *K-Dur*, 2008 WL 2699390, at *14-19 (studies, defendants' forecasts and projections, and sales data showing the effect of generic entry on pricing satisfy predominance); *King Drug Co. of Florence v. Cephalon, Inc.*, 309 F.R.D. 195, 209-12 (E.D. Pa. 2015) (similar), *Rule 23(b)(3) holding aff'd sub nom. Modafinil*, 837 F.3d at 260-66; *Niaspan*, 397 F. Supp. 3d at 685-88 (similar) (collecting cases). *See also Opana*, 2021 WL 3627733, at *5 (similar); *Glumetza*, 336 F.R.D. at 476-79; *Loestrin*, 2019 WL 3214257, at *13-14; *Namenda*, 331 F. Supp. 3d at 215-17; *Solodyn*, 2017 WL 4621777, at *7-8; *Lidoderm*, 2017 WL 679367, at *9-10; *Wellbutrin XL*, 2011 WL 3563385, at *12; *TriCor*, 252 F.R.D. at 229-30.

[56] *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, at 195 (3d Cir. 2020) (quotation and citations omitted).

[57] *Suboxone*, 967 F.3d at 272.

[58] Ex. 5 (Leitzinger Settlement Class Certification Decl.) ¶¶ 43-50. *See*, *e.g.*, *Niaspan*, 397 F. Supp. 3d at 689 ("Dr. Leitzinger's aggregate damages model properly captures damages only attributable to DPPs' single theory of unlawful conduct"); *Loestrin,* 2019 WL 3214257, at *16 (approving Dr. Leitzinger's

damages determinations and allocation issues do not preclude certification; nor do variations in pricing and damage amounts among Class members.[59]

(b) A Class Action is Superior

The "superiority" requirement of Rule 23(b)(3) ensures that a class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or

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methodology); *Solodyn*, 2017 WL 4621777, at *9-10 (same); *Lidoderm*, 2017 WL 679367, at *10 (same); *Wellbutrin XL*, 2011 WL 3563385, at *14-15 (same); *K-Dur*, 2008 WL 2699390, at *19 (same).

[59] *See e.g.*, *Suboxone*, 967 F.3d at 272 ("Individualized determinations, however, are of no consequence in determining whether there are common questions concerning liability."); *K-Dur*, 686 F.3d at 221-22 (certification affirmed despite pricing variation among class members); *Niaspan*, 397 F. Supp. 3d at 688 ("[I]ndividualized rebuttal does not cause individual questions to predominate.") (citation omitted); *Neurontin*, 2011 WL 286118, at *9 n.24 ("Any arguments regarding the variable rates at which Class Members substituted generic . . . for [brand] relate to the quantum of injury, rather than the fact of injury, and therefore do not defeat predominance with respect to the impact element."); *Wellbutrin XL*, 2011 WL 3563385, at *12-14 (similar); *In re Mushroom Direct Purchaser Antitrust Litig.*, 319 F.R.D. 158, 206 (E.D. Pa. 2016) (rejecting arguments "premised on the notion that variation of damages between and among class members defeats predominance. . . . The determination of the aggregate classwide damages is something that can be handled most efficiently as a class action, and the allocation of that total sum among the class members can be managed individually") (citations omitted), *recon. denied*, 2017 WL 696983 (E.D. Pa. Feb. 22, 2017); *Lidoderm*, 2017 WL 679367, at *11 (variation in direct purchasers' prices and damages amounts no bar to certification); *Tricor*, 252 F.R.D. at 231 (approving aggregate damages analysis); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 318-19 (E.D. Mich. 2001) (similar); *Nexium*, 296 F.R.D. at 57-58 (similar); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 370-71 (D.D.C. 2007) (similar); 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1781, at 235 (3d ed. 2005) ("[I]t uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate.").

bringing about other undesirable results."[60] For certification of a settlement class, the Court is not required to analyze the superiority factors in great detail.[61] Regardless, superiority is readily met here. This case concerns overwhelmingly common issues and evidence. Certification avoids congesting the courts with multiple suits, prevents inconsistent results, and allows Class members with smaller claims an opportunity for redress they might otherwise be denied. Courts in similar cases have uniformly found superiority met. *Supra* n.9 (citing certified cases). Certification of the Class for settlement purposes is clearly superior.

3. Lead Class Counsel Meet the Requirements of Rule 23(g)

Under Rule 23(g), a court that certifies a class must appoint Lead Class Counsel, charged with fairly and adequately representing the interests of the class. Fed. R. Civ. P. 23(g)(1)(B). In appointing Lead Class Counsel for the purposes of settlement, the Court must consider: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted; (3) counsel's knowledge

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[60] *Amchem*, 521 U.S. at 615 (citation omitted).

[61] *See*, *e.g.*, *Amchem*, 521 U.S. at 620 (since a proposed settlement avoids trial, a court need not consider whether there would be manageability issues at trial); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 378 (3d Cir. 2013) ("certain Rule 23 considerations, such as whether the case, if tried, would present intractable management problems, are not applicable in the settlement class context") (quotations omitted); *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 333 F.R.D. 364, 374 (E.D. Pa. 2019) ("because a settlement obviates the need for trial, concerns regarding the manageability of a Rule 23(b)(3) class disappear.").

of the applicable law; and (4) the resources counsel will commit to the case.[62]

The Court previously appointed Thomas M. Sobol and his firm Hagens Berman Sobol Shapiro LLP, David F. Sorensen and his firm Berger Montague PC, Peter Kohn and his firm Faruqi & Faruqi LLP, Barry S. Taus and his firm Taus, Cebulash & Landau LLP, Dianne M. Nast and her firm Nastlaw LLC, and Don Barrett and his firm Barrett Law Group, P.A. as the Interim Class Counsel for the proposed Class on December 13, 2011. ECF No. 85. Plaintiffs respectfully request that the Court reaffirm these appointments.

Harnessing decades of experience in litigating pharmaceutical antitrust cases, Interim Class Counsel have vigorously pursued this litigation on behalf of the proposed Class for more than twelve years, including by investigating and filing this action, appealing the Court's decision on the motion to dismiss, engaging in fact discovery, and engaging in significant, substantive briefings and discussions through the mediation process. Interim Class Counsel have capably represented the Class throughout the litigation and should be appointed as Lead Class Counsel.

B. The Proposed Settlement Should Be Preliminarily Approved

As the Third Circuit has recognized, "a strong public policy exists, which is particularly muscular in class action suits, favoring settlement of disputes, finality

[62] *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir 2010) (citing Fed. R. Civ. P. 23(g)(1)(A)(i-iv)).

of judgments and the termination of litigation."[63]

There are two steps to approval: preliminary and final approval. *See* Fed. R. Civ. P. 23(e).[64] At preliminary approval, the Court must assess whether it "will *likely be able to* approve the proposal" under the four factors enumerated by Rule 23(e)(2):

> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.[65]

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[63] *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010). *See In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation").

[64] *See also Easterday v. USPack Logistics LLC*, 2023 WL 4398491, at *5 (D.N.J. July 6, 2023) ("Review of a proposed class action settlement is a two-step process: (1) preliminary approval and (2) a subsequent fairness hearing.")

[65] Fed. R. Civ. P. 23(e)(2) (emphasis added). *See also* 4 Newberg on Class Actions § 13:14 (5th ed.) ("Rule 23(e)(1) authorizes a court to grant ***preliminary approval*** of a proposed class action settlement—and hence send notice of it to the class—so long as the moving parties demonstrate that the court will ***'likely be able to' grant final approval*** to the settlement.") (citing Fed. R. Civ. P. 23(e)(1)(B)) (emphases added). Preliminary approval does not require a hearing (though Plaintiffs will make

This analysis enables the Court to determine that the "terms of the parties' Settlement Agreement appear fair, reasonable, and adequate such that notice of the proposed Settlement should be directed to the preliminarily certified class."[66] "Generally, preliminary approval should be granted [w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, [and] does not improperly grant preferential treatment to class representatives or segments of the class[.]" *Id.* (citation omitted).

1. Rule 23(e)(2)(A): The Class Representatives and Lead Class Counsel Have Adequately Represented the Class

This factor focuses on "the actual performance of counsel acting on behalf of the class." Fed. R. Civ. P. 23(e)(2) Advisory Committee Note on 2018 Amendments.[67] Interim Class Counsel engaged in fact discovery and motion

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themselves available should the Court desire one); *Manual for Complex Litigation (Fourth)* § 21.632 ("this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties.").

[66] *Dong v. Johnson*, 2022 WL 2818481, at *2 (D.N.J. Jan. 10, 2022). *See also Easterday*, 2023 WL 4398491, at *5 ("At the preliminary fairness evaluation stage, the court must determine whether the proposed settlement falls 'within the range of fairness, reasonableness and adequacy' required by Rule 23(e)."") (citation omitted). In contrast, "Rule 23(e)(2) in turn authorizes ***final approval*** only upon a showing that the settlement is 'fair, reasonable, and adequate,' made after a consideration of four factors." 4 Newberg on Class Actions § 13:14 (5th ed.) (emphasis added) (citing Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment).

[67] *See also Caddick v. Tasty Baking Co.*, 2021 WL 1374607, at *6 (E.D. Pa. Apr. 12, 2021) (adequate representation under Rule 23(e)(2)(a) where "class counsel expanded considerable time and effort on this case, engaged in extensive discovery,

practice, an appeal to the Third Circuit, and extensive arm's length mediation, including mediation briefing, prior to entering this Settlement. *Supra*, Section II.A. This factor will likely be satisfied, weighing in favor of preliminarily approval.

2. Rule 23(e)(2)(B): The Proposed Settlements Were Reached After Arm's Length Negotiations

"A settlement is presumed fair when it results from 'arm's-length negotiations between experienced, capable counsel after meaningful discovery.'"[68]

This Settlement is the result of hard-fought, arm's length negotiations,

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including reviewing and analyzing a substantial volume of documents."); *Hall v. Accolade, Inc.*, 2019 WL 3996621, at *4 (E.D. Pa. Aug. 23, 2019) (representation adequate where class counsel logged hundreds of attorney hours on the litigation, took depositions, requested and reviewed written and electronic discovery, constructed a damages model, and interviewed class members).

[68] *Easterday*, 2023 WL 4398491, at *5 (*citing Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). *See also Atis v. Freedom Mortg. Corp.*, 2018 WL 5801544, at *2 (D.N.J. Nov. 6, 2018) ("A settlement is presumed fair when it results from arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (citations and quotations omitted); *Kanefsky v. Honeywell Int'l Inc.*, 2022 WL 1320827, at *4 (D.N.J. May 3, 2022) ("The law encourages and favors the settlement of civil actions in federal court, particularly in complex class actions where, as here, the settlement is the result of arm's-length negotiations between experienced counsel after meaningful discovery"); *Block v. RBS Citizens, Nat'l Ass'n, Inc.*, 2016 WL 8201853, at *4 (D.N.J. Dec. 12, 2016) (preliminarily approving settlement reached "in the absence of collusion, and [which was a] product of informed, good-faith, arms-length negotiations between the parties and their capable and experienced counsel"); *Kress v. Fulton Bank, N.A.*, 2022 WL 2357296, at *2 (D.N.J. June 30, 2022) (granting preliminary approval of settlement where it had "key indicia of fairness" including "extensive negotiations were contentious [and] arm's-length"). Further, "when evaluating a settlement, a court should be 'hesitant to undo an agreement that has resolved a hard-fought, multi-year litigation.'" *Comcast Corp. Set-Top*, 333 F.R.D. at 378 (quoting *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013)).

including mediation led by Judge Hochberg starting in 2020. Interim Class Counsel and Wyeth's counsel are all capable attorneys, experienced in complex antitrust class actions like this one, who vigorously advocated for their respective clients and were prepared to continue with the litigation. *Supra,* Section II. The proposed Settlement was reached more than 12 years into the litigation, after significant fact discovery and issue briefing. *Id.* This factor weights in favor of preliminary approval.

3. Rule 23(e)(2)(C): The Relief Provided for the Class is Adequate

In approving class action settlements, courts in the Third Circuit defer to the judgment of experienced counsel who conducted the arm's length settlement negotiations.[69] Here, Interim Class Counsel have extensive experience litigating antitrust claims and have demonstrated that they are well-versed in this area of law and committed to vigorously prosecuting this case to achieve the best result for the Class. *Supra*, § II.A. Interim Class Counsel endorse this Settlement and believe the recovery ($39 million) it provides is a fair and reasonable result for the Class. Their experienced opinion should be given great weight.

Consideration of each of the four Fed. R. Civ. P. 23(e)(2)(C) factors relevant

[69] *See*, *e.g.*, *Sheinberg v. Sorensen*, 2016 WL 3381242, at *9 (D.N.J. June 14, 2016) ("The opinion of experienced counsel supporting the settlement is entitled to considerable weight."); *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *24 (D.N.J. Nov. 15, 2016) (similar); *Davis v. Kraft Foods N. Am., Inc.*, 2007 WL 9807443, at *1 (E.D. Pa. Aug. 10, 2007) (similar).

to determining whether the proposed settlement provides adequate relief to the Class weighs in favor of preliminary approval.

(a) Rule 23(e)(2)(C)(i): The Costs, Risks, and Delay of Trial and Appeal

"This factor balances the 'relief that the settlement is expected to provide to class members' against 'the costs and risks involved in pursuing a litigated outcome."[70] "Antitrust actions are inherently complex."[71] Here, layered on top of the complex economic issues associated with a typical antitrust case are additional regulatory and patent issues about which the jury would need to be educated.[72] In addition, resolving Plaintiffs' claims would require "conflicting testimony by experts" and credibility assessments.[73]

Wyeth, represented by one of the largest and most capable law firms in the world, has vigorously defended Plaintiffs' claims, class certification, causation, and injury. *Supra,* § II. While Interim Class Counsel are confident they will prevail on, *e.g.*, class certification and summary judgment and present a strong case at trial,

[70] *Caddick*, 2021 WL 1374607, at *6 (quoting Fed. R. Civ. P. 23 Advisory Comm. Notes (Dec. 1, 2018)); *In re Suboxone Antitrust Litig.*, 2024 WL 815503, at *9 (E.D. Pa. Feb. 27, 2024) (granting final approval and explaining that settlement "becomes even more favorable when considered against the attendant risks of litigation").

[71] *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 533 (E.D. Mich. 2003).

[72] *See id.* at 533-34 (identifying "regulatory issues arising out of the Hatch-Waxman Act; patent law issues . . . and the FDA regulations applicable to reviewing and approving pharmaceutical products [.]").

[73] *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *20 (S.D.N.Y. Sept. 9, 2015).

there is always a risk of no recovery at all, or delayed recovery due to appeals.[74] The proposed Settlement affords Class members immediate economic relief. Accordingly, this factor weighs in favor of preliminary approval.

(b) Rule 23(e)(2)(C)(ii): The Effectiveness of the Proposed Method of Distributing Settlement Proceeds to the Class

This factor examines how the claims of Class members are processed to ensure the facilitation of the filing of legitimate claims in a manner that is not unduly demanding.[75] Together, the proposed Form and Manner of Notice (*infra,* III.C) and proposed Plan of Allocation ensure that Class members are provided with all relevant information concerning, *inter alia*, the terms of the proposed Settlement, the process for obtaining a portion of the Settlement proceeds, and the method of allocation of the Settlement proceeds to Class members. As explained in the proposed Notice (Settlement Agreement Ex. B) and the proposed Plan of Allocation (Ex. 2), the proceeds of the proposed Settlement in this case, net of Court-approved attorneys' fees, any Court-approved Named Plaintiff service

[74] *See State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."); *In re Elec. Carbon Prod. Antitrust Litig.*, 447 F. Supp. 2d 389, 399 (D.N.J. 2006) ("It is especially in antitrust cases that the legal and factual issues involved are always numerous and uncertain in outcome.") (quotation and citation omitted).

[75] *In re Mercedes-Benz Emissions Litig.*, 2021 WL 7833193, at *8 (D.N.J. Aug. 2, 2021).

awards, and Court-approved costs and expenses, including settlement-related costs and expenses ("Net Settlement Fund"), will be paid to Class members (or their assignees) who submit timely and valid claims based on each Class member's *pro rata* share of brand and generic Effexor XR capsules purchased directly from Wyeth or Teva during the Class period.[76]

This proposed Plan of Allocation is "similar to plans that have previously been approved by courts in analogous cases and implemented with a high degree of success and efficiency"[77] and should be approved here as well.

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[76] *See* Ex. 3 (Decl. of Jeffrey J. Leitzinger, Ph.D. Related to Proposed Allocation Plan and Net Settlement Fund Allocation) ("Leitzinger Allocation Decl."), ¶¶ 6-7.

[77] *In re Namenda Direct Purchaser Antitrust Litig*., 462 F. Supp. 3d 307, 316-17 (S.D.N.Y. 2020) (collecting cases). *See also* 4 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 12.35, at 350 (4th ed. 2002) (noting that pro-rata allocation of a settlement fund "is the most common type of apportionment of lump sum settlement proceeds for a class of purchasers" and "has been accepted and used in allocating and distributing settlement proceeds in many antitrust class actions"); *In re Lipitor Antitrust Litig.*, 3:12-cv-02389, ECF Nos. 1363-3, 1374 at ¶ 13 (D.N.J.) (preliminarily approving plan of allocation where *pro rata* shares of settlement fund are computed on basis of brand and generic purchases); *Beneli v. BCA Fin. Servs., Inc*., 324 F.R.D. 89, 105-06 (D.N.J. 2018) ("In particular, pro rata distributions are consistently upheld...") (citation omitted); *Suboxone*, 2024 WL 815503, at *12 (approving plan of allocation that "provides a straightforward method for determining each Class Member's *pro rata* share of the Net Settlement Fund based upon purchases"); *Solodyn*, 1:14-md-02503, ECF Nos. 1163, 1179 (D. Mass. 2018) (pro rata shares calculated based on brand and generic purchases); *Lidoderm*, 3:14-md-02521, ECF Nos. 1004-5, 1004-6, 1054 (N.D. Cal. 2018) (same); *Loestrin*, 1:13-md-02472, ECF No. 1462 (D.R.I. Sept. 1, 2020) (same); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 752 (E.D. Pa. 2013) (same); *In re Aggrenox Antitrust Litig*., 14-md-2516, ECF Nos. 733-1 at 16-18, 739 (D. Conn. 2017) (same); *Doryx*, 12-cv-3824, ECF Nos. 452-3, 665 (E.D. Pa. 2014) (same); *Tricor*, 05-cv-340, ECF

The proposed Plan of Allocation is efficient and will ensure timely distribution of the Settlement funds. Using data produced in discovery, Dr. Leitzinger has already performed a preliminary computation of each Class member's relevant purchases of brand and generic Effexor XR. Ex. 3 (Leitzinger Allocation Decl.) ¶ 9. Class members will be sent pre-populated Claim Forms listing the amounts of their relevant purchases of brand and generic Effexor XR. *Id.* In addition, Class members will have the option to submit their own purchase data (though they will not be required to do so, as they can simply verify that the purchase numbers in the pre-populated Claim Forms are correct), and any such data that is submitted will be reviewed by the claims administrator, Dr. Leitzinger and his staff, and Lead Class Counsel before finalizing calculations to determine each Claimant's[78] *pro rata* share of the Net Settlement Fund. Ex. 3 (Leitzinger Allocation Decl.) ¶ 10.

Finally, both Dr. Leitzinger and Class Counsel endorse the fairness of the proposed Plan of Allocation, weighing in favor of preliminary approval.[79] In Dr.

Nos. 536-1, 543 (D. Del. 2009) (same); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *11 (D.N.J. Nov. 9, 2005) (same).

[78] "Claimant" is defined in the proposed Plan of Allocation to mean any entity that timely submits a completed claim form. A Claimant's percentage share will be zero if that Claimant timely submits a claim form but that Claimant's claim is rejected because, for example, the Claimant did not purchase brand or generic Effexor XR during the relevant time period and does not have any valid assignment covering any such direct purchases. Plan of Allocation (Ex. 2), at n.5.

[79] *See In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, 2021 WL 358611, at *3 (D.N.J. Feb. 1, 2021) ("In determining whether a plan of allocation is fair, reasonable and adequate, courts give great weight to the opinion of qualified counsel").

Leitzinger's opinion, the proposed Plan of Allocation is fair, reasonable, and reflects the type and approximate extent of the injury alleged by Class members. Ex. 3 (Leitzinger Allocation Decl.) ¶ 11.[80]

(c) Rule 23(e)(2)(C)(iii): The Terms of Any Proposed Award of Attorney's Fees

Under the proposed Settlement, Class Counsel will apply for an award of attorneys' fees plus reimbursement of litigation costs and expenses (and service awards for the Named Plaintiffs). If the Court approves the proposed schedule set forth in the accompanying proposed preliminarily approval order, Interim Class Counsel will brief their application for such awards 14 days in advance of the deadline for Class members to object to the proposed Settlement, including to any award of fees, expenses or service awards, and the Court may consider any such request for fees and any objections thereto in determining whether to grant final approval of the proposed Settlement.[81] Accordingly, this factor does not weigh against preliminary approval.

[80] *Sullivan*, 667 F.3d at 328 (quotation omitted) ("Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.").

[81] *E.g.*, *McRobie v. Credit Prot. Ass'n*, 2020 WL 6822970 at *5 (E.D. Pa. Nov. 20, 2020) (deferring a finding as to this factor because counsel's fee request was forthcoming); *In re K-Dur Antitrust Litig.*, 2017 WL 3124429, at *2 (D.N.J. May 23, 2017) (preliminarily approving settlement and setting schedule for application for award of attorney's fees).

(d) Rule 23(e)(2)(C)(iv): Any Agreements Made in Connection With the Proposed Settlement

By its terms, the proposed Settlement Agreement represents the full agreement of the parties with one caveat: as the Settlement Agreement makes clear, Wyeth and Plaintiffs agreed that Wyeth may, in its sole discretion, terminate the Settlement in the event that Class members representing in the aggregate more than a certain percentage of total brand and generic Effexor XR purchases opt out of the Class following preliminary approval of the Settlement. Settlement Agreement ¶ 17. The details are set forth in a confidential side letter between Plaintiffs and Wyeth, which can be filed under seal with the Court at the Court's request.[82]

4. Rule 23(e)(2)(D): The Proposed Plan of Allocation Treats All Class Members Equitably Relative to Each Other

The final Rule 23(e)(2) factor requires the Court to assess whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P.

[82] *See, e.g.*, *Gordon v. Vanda Pharms. Inc.*, 2022 WL 4296092, at *5 (E.D.N.Y. Sept. 15, 2022) (allowing parties to file under seal for *in camera* review a supplemental agreement allowing termination of the settlement if a certain percentage of class members exclude themselves because "there is sufficient reason to keep the document confidential–for instance, to prevent objectors from attempting to manipulate responses to undermine the settlement") (holding that "[t]he existence of such an agreement does not preclude preliminary approval" and granting preliminary approval) (internal citation omitted). In addition, if the Settlement is not approved, including because the Court does not certify a class for purposes of settlement, for any reason other than because the Settlement is not fair, reasonable or adequate, Wyeth has agreed to offer Class members at least their *pro rata* shares. *See* Settlement Agreement ¶ 16.

23(e)(2)(D). As set forth above at § III.B.3(ii), the proposed Plan of Allocation (Ex. 2), which is similar to plans of allocation repeatedly accepted by other courts, treats Class members equitably by distributing Settlement proceeds on a *pro rata* basis. Accordingly, this factor weighs in favor of preliminary approval.

C. The Proposed Form and Manner of Notice Are Appropriate

1. Form of Notice

Under Rule 23(e), Class members are entitled to reasonable notice of a proposed settlement before it is finally approved by the Court, and to notice of the final fairness hearing.[83] For 23(b)(3) classes, the Court must "direct to class members the best notice that is practical under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). There are two components of notice: (1) the form of the notice; and (2) the manner in which notice is sent to Class members. The proposed form of Notice (Settlement Agreement Ex. B) is based on and substantially similar to notices approved by courts in similar cases.[84] It is designed to alert Class members to the

[83] *See* MANUAL, §§ 21.312, 21.633.

[84] *See, e.g.*, *In re Lipitor Antitrust Litig.*, 3:12-cv-02389, ECF No. 1374, ¶ 10 (D.N.J. Mar. 8, 2024) (approving form and manner of notice); *id.* at ECF No. 1363-2, Exhibit B (notice); *In re Generic Pharms. Pricing Antitrust Litig.*, 16-md-2724, ECF Nos. 2093, ¶¶ 15-18 (E.D. Pa. May 11, 2022) (approving form and manner of notice); *K-Dur*, 01-cv-1652, ECF No. 1044-5, at Ex. B (D.N.J.) (notice); *id.* at ECF No. 1045, ¶ 5 (approving form and manner of notice); *Suboxone*, 13-md-2445, ECF No. 984, ¶¶ 4-6 (E.D. Pa. Oct. 30, 2023) (approving form and manner of notice); *Exforge*, 18-cv-04361, ECF No. 595, ¶ 13 (S.D.N.Y. Jan. 26, 2023) (approving form

proposed Settlement by using a bold headline. The plain language text provides important information regarding the terms of the proposed Settlement, including the nature of the action, the definition of the Class, the identity of the counter party (Wyeth), the significant terms of the proposed Settlement (including the $39 million Settlement amount), the right to opt out of or object to any or all of the proposed Settlement and the process for doing so, the process for obtaining a portion of the Settlement proceeds, the final approval process and related schedule, the submission of the motion for attorneys' fees, expenses, and service awards to the Named Plaintiffs, and the binding effect of a final judgment on Class members. The proposed Notice prominently features proposed Lead Class Counsel's contact information and the websites where the Settlement documents, including the proposed Plan of Allocation, Lead Class Counsel's requests for fees, expenses and service awards for the Named Plaintiffs, and any supplemental information will be provided, as well as contact information for the claims administrator.[85]

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and manner of notice); *Namenda*, 1:15-cv-07488, ECF No. 919-1, at Ex. B (S.D.N.Y.) (notice); *id*. at ECF No. 920, ¶ 7 (approving the form and manner of notice); *Solodyn*, 1:14-md-02503, ECF No. 1094-1, at Ex. B (D. Mass.) (notice); *id.* at ECF No. 1095, ¶¶ 6-9 (approving the form and manner of notice); *Lidoderm*, 3:14-md-02521, ECF No. 1004-7 (N.D. Cal.) (notice); *id.* at ECF No. 1018, ¶¶ 6-9 (same).

[85] *See Block*, 2016 WL 8201853, at *4 (approving notice that "is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, class certification, the terms of the Settlement, their rights to opt-out of the Settlement Class and object to the Settlement, Class Counsel's Fee Application, and the request for a Service Award for Plaintiff.").

As noted above, for efficiency, each Class member will also receive, contemporaneously with their Notice, a pre-populated Claim Form that will be due 60 days from the date the Notice and Claim Form are mailed.

2. Manner of Notice

Plaintiffs propose to send Notice by first-class U.S. mail to each Class member, all of which are business entities. The list of Class members was drawn from Wyeth and Teva's electronic transactional sales data and/or are otherwise known to Interim Class Counsel from having sent similar notices to most or all of the Class members in previous cases. In circumstances in which all class members can be identified, the best method of notice is individual notice.[86] Individual notice by first-class United States mail has been repeatedly recognized as appropriate.[87] As discussed above, courts have approved similar notice plans in similar cases.

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[86] *See* MANUAL, § 21.311 at 488 ("Rule 23(c)(2)(B) requires that individual notice in 23(b)(3) actions be given to class members who can be identified through reasonable effort.").

[87] *See, e.g.*, Fed. R. Civ. P. 23(c)(2)(B) ("the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means."); *Smith*, 2007 WL 4191749, at *5 ("first-class mail . . . is unquestionably the best notice practicable under the circumstances"); *K-Dur*, 2017 WL 3124429, at *1; *Block*, 2016 WL 8201853, at *4; *Neurontin,* 02-cv-01390, ECF No. 727, ¶ 6 (D.N.J. May 2, 2014); *Suboxone*, 13-md-2445, ECF No. 984, ¶¶ 4-6 (E.D. Pa. Oct. 30, 2023). *See also* 5 MOORE'S FEDERAL PRACTICE § 23.102[3][a] (2020) ("Courts most often have ordered the class proponent to give notice of the class action by first-class mail to all individual class members who can be identified with reasonable effort").

D. RG/2 Should Be Appointed Notice and Claims Administrator

Plaintiffs request that RG/2 be appointed Notice and Claims Administrator.[88] RG/2 will oversee the administration of the Settlement, including disseminating Notice to the Class, calculating (with Dr. Leitzinger) Claimants' *pro rata* shares of settlement funds, and distributing the Net Settlement Fund. RG/2 has been appointed claims administrator in similar cases, including in this Court and Circuit.[89]

E. The Huntington National Bank Should Be Appointed Escrow Agent

Plaintiffs request that the Court approve The Huntington National Bank to serve as Escrow Agent, just as courts have previously done in other cases.[90] Wyeth has approved this selection. *See* Settlement Agreement Ex. D (Escrow Agreement).

F. The Plan of Allocation Should Be Preliminarily Approved

As outlined in Sections §§ III.B.3(b) and III.B.4, *supra*, the proposed Plan of

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[88] As stated in the attached RG/2 Decl., RG/2 consents to be subject to the jurisdiction of the United States District Court for the District of New Jersey for matters related to its work in connection with this matter. Ex. 4 (RG/2 Decl.), ¶ 14.

[89] *See, e.g.*, *Lipitor*, 3:12-cv-02389, ECF No. 1374, ¶ 13 (D.N.J. Mar. 8, 2024); *Suboxone*, 13-md-2445, ECF No. 984, ¶ 9 (E.D. Pa. Oct. 30, 2023); *Exforge*, 18-cv-04361, ECF No. 595, ¶ 16 (S.D.N.Y. Jan. 6, 2023); *Opana*, 14-cv-10150, ECF No. 1054, ¶ 10 (N.D. Ill. Jul. 28, 2022); *Loestrin*, No. 13-md-2472, ECF No. 1426, ¶ 11 (D.R.I. Mar. 23, 2020). *See also* Ex. 4 (RG/2 Decl.), ¶ 5.

[90] *See e.g.*, *Lipitor*, 3:12-cv-02389, ECF No. 1374, ¶ 13 (D.N.J. Mar. 8, 2024) (The Huntington National Bank appointed escrow agent); *In re Broiler Chicken Grower Antitrust Litig. (No II)*, 21-cv-00033, ECF No. 326, ¶¶ 10-12 (E.D. Okla. Apr. 17, 2023) (same); *Loestrin*, 13-md-02472, ECF No. 1426, ¶ 12 (D.R.I. Mar. 23, 2020) (same); *Solodyn*, 14-md-2503, ECF No. 1095, ¶ 11 (D. Mass); *Cook v. Rockwell Int'l Corp.*, 90-cv-00181, ECF No. 2418 (D. Colo. Jul. 15, 2016) (same).

Allocation (Ex. 2) is fair and equitable, is endorsed by Interim Class Counsel and Dr. Leitzinger, and should be approved. A similar Plan of Allocation was recently preliminarily approved in *In re Lipitor Antitrust Litigation*.[91]

G. The Proposed Schedule is Fair and Should Be Approved

As set forth in the proposed order filed herewith, Plaintiffs propose the following schedule for completing the Settlement approval process:

- Within 10 days of filing of the Settlement Agreement and motion for preliminary approval, Wyeth shall serve notices pursuant to the Class Action Fairness Act of 2005 ("CAFA notices");
- Within 15 days from the date of preliminary approval, Notice shall be mailed to each member of the Class;
- No later than 14 days before the expiration of the deadline for Class members to object to the Settlement and/or attorneys' fees, expenses and service awards, Interim Class Counsel will file all briefs and materials in support of the application for attorneys' fees, costs and expenses, and service awards;
- Within 45 days from the date that Notice is mailed to each member of the Class, Class members may opt out of the Class or object to the Settlement and/or attorneys' fees, costs and expenses, and service awards;
- No later than 21 days after the expiration of deadline for Class members to object to the Settlement and/or attorneys' fees, costs and expenses, and service awards, Interim Class Counsel will file all briefs and materials in support of final approval of the Settlement; and
- On a date to be set by the Court after the expiration of the deadline for Class members to file any objections to the Settlement and/or attorneys' fees, expenses, and service awards, the Court will hold a final fairness hearing.[92]

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[91] *Lipitor*, 3:12-cv-02389, ECF Nos. 1363-3, 1374 at ¶ 13 (D.N.J.) (preliminarily approving plan of allocation where *pro rata* shares of settlement fund are computed on basis of claimants' brand and generic purchases).

[92] Pursuant to 28 U.S.C. § 1715(d), a court may not finally approve a proposed

This schedule is fair to Class members since it provides ample time for consideration of the Settlement and Class Counsel's request for fees, costs and expenses, and service awards before the deadline for submitting objections. Specifically, Class members will have 45 days from when the Notice is sent to opt out of the Class or object to the Settlement, and will have Class Counsel's request for fees, costs and expenses, and service awards for two weeks before the objection deadline. In addition, the schedule allows the full statutory period for Wyeth to serve its Class Action Fairness Act notices pursuant to 28 U.S.C. § 1715 and for regulators to review the proposed Settlement and, if they choose, advise the Court of their view. Cours have approved similar schedules in similar cases, including in *Lipitor*.[93]

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter the accompanying proposed order.

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settlement until 90 days from service of the CAFA notices. However, the final fairness hearing may be held prior to the expiration of that 90-day period.

[93] *See, e.g.*, *Lipitor*, 3:12-cv-02389, ECF No. 1374, ¶¶ 15-18 (D.N.J. Mar. 8, 2024) (adopting a similar schedule); *Exforge*, 18-cv-04361, ECF No. 595, ¶¶ 13-21 (S.D.N.Y. Jan. 26, 2023) (objections 45 days after notice, fee brief 14 days before objections, final approval brief 21 days after objections); *Opana*, 14-cv-10150, ECF No. 1054 (N.D. Ill. Jul. 28, 2022) (same); *K-Dur*, 2017 WL 3124429, at *1 (objections 60 days after notice, fee brief 21 days before objections, final approval brief 14 days after objections); *Neurontin*, 02-cv-01390, ECF No. 727 (D.N.J. May 2, 2014) (fee brief and final approval brief 30 days before fairness hearing, objections 14 days before fairness hearing).

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Respectfully submitted,

/s/ Peter S. Pearlman

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