

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MEIJER, INC.; MEIJER DISTRIBUTION, INC.; LOUISIANA WHOLESALE DRUG CO., INC.; ROCHESTER DRUG CO-OPERATIVE, INC.; AMERICAN SALES COMPANY, INC.; SAJ DISTRIBUTORS, INC.; and STEPHEN L. LaFRANCE HOLDINGS, INC., on behalf of themselves and all others similarly situated,

Civil Action No. 05-2195 (CKK)

Plaintiffs,

v.

BARR PHARMACEUTICALS, INC.,

Defendant.

**DIRECT PURCHASER CLASS PLAINTIFFS' COUNSEL'S MOTION FOR AN
AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND
INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES**

Direct Purchaser Class Plaintiffs' Counsel respectfully move this Court for an order (i) awarding attorneys' fees of 33-1/3% of the Settlement Fund of \$22 million¹ plus accrued interest, (ii) reimbursing Direct Purchaser Plaintiffs' Class Counsel for the costs and expenses of the litigation in the amount of \$1,126,686.91; and (iii) approving incentive awards of \$50,000 for each of the five certified Class Representatives: 1) Meijer, Inc./ Meijer Distribution, Inc.; 2)

¹ The direct purchaser class claims against defendants Barr Pharmaceuticals, Inc. ("Barr") and Warner Chilcott Holdings Company III, Ltd., Warner Chilcott Corporation, Warner Chilcott (US) Inc., Warner Chilcott Company Inc., and Galen (Chemicals), Ltd. ("Warner Chilcott") have been settled for a total of \$22 million in cash, plus interest (the "Settlement Fund"). This \$22 million recovery is made up of the payments from two settlements: 1) a \$9 million payment to the Class by Warner Chilcott which this court approved on July 10, 2008; and 2) a \$13 million payment to the Class by Barr preliminarily approved by this Court on December 18, 2008.

Louisiana Wholesale Drug Co. Inc.; 3) Rochester Drug Co-Operative, Inc.; 4) American Sales Company, Inc.; and 5) SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. A proposed Order and Final Judgment granting: 1) final approval of the settlement with Barr and; 2) Direct Purchaser Plaintiffs' Class Counsel's Motion For An Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards to the Certified Class Representatives will be filed in connection with Direct Purchaser Plaintiffs' Motion in Support of Final Approval of Settlement on February 27, 2009 as per the Court's order of December 18, 2008.

This recovery is a laudable result for a class of direct purchasers in a case that, as recognized in this Court's opinions on class certification and summary judgment, posed many difficult legal challenges. The settlements with Defendants offer the class of approximately 30 commercial entities that purchased Ovcon 35 directly from Warner Chilcott, a significant recovery for their losses. The settlement Notices, mailed to the direct purchaser class, notified Class members that Class Counsel intended to request (i) an award of attorneys' fees of up to one-third of the Settlement Fund, plus interest; (ii) the reimbursement of Plaintiffs' Counsel's costs and expenses; and (iii) incentive awards to the five Class Representatives.

Class Counsel hereby request that the Court award (i) attorneys fees of 33-1/3% of the Settlement Fund, plus accrued interest; and (ii) \$1,126,686.91 in costs and expenses. Class Counsel also requests that that the Court approve the incentive awards to the five Class Representatives listed herein in the amount of \$50,000 for each. In support of this Motion, Class Counsel submits the attached Memorandum of Law.

Dated: February 13, 2009

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**Executive Committee Members for Direct
Purchaser Class Plaintiffs**

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**MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S JOINT
PETITION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES AND INCENTIVE AWARDS
TO THE CERTIFIED CLASS REPRESENTATIVES**

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Class Counsel¹ respectfully submit this Memorandum in Support of the Joint Petition for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards to the Class Representatives, requesting: (i) an award of 33-1/3% of the \$22 million settlement fund, plus any interest earned on that amount until the date of payment,² (ii) reimbursement of the costs and expenses of the litigation in the amount of \$1,126,686.91, and (iii) approval of incentive awards of \$50,000 for each of the five certified Class Representatives.³

I. INTRODUCTION

Plaintiffs commenced this direct purchaser class action in November 2005 with the filing of complaints alleging that Barr Pharmaceuticals, Inc. ("Barr") and the Warner

¹ The members of the Executive Committee in this case included: 1) Kaplan Fox & Kilsheimer LLP (Kaplan Fox); 2) Berger & Montague, P.C.; 3) Boies, Schiller & Flexner LLP (BSF); 4) Garwin Gerstein & Fisher, LLP (Garwin Gerstein); 5) Hagens, Berman, Sobol & Shapiro, LLP (Hagens Berman); 6) Roda Nast P.C.; and 7) Cohen Milstein, Sellers & Toll P.L.L.C (Cohen Milstein). The Executive Committee will be referred to herein as "Class Counsel." As set forth in the Declaration of Linda Nussbaum in Support of Final Settlement Approval and Class Counsel's Joint Petition for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards to the Class Representatives ("Nussbaum Declaration"), additional law firms performed work on this case at the direction of Class Counsel.

² As set forth in more detail below, the one-third fee requested here is almost equal to Class Counsel's lodestar, thus resulting in virtually no multiplier. Using a lodestar cross-check, Plaintiffs' Counsel's total hours of 17,488.69 yields a combined lodestar value at current billing rates of \$7,226,504. Thus, if the Court awards the fee requested, the multiplier on Class Counsel's lodestar would be 1.01. When considering this figure, it is important to note that it excludes the not insignificant amount of attorney time yet to be spent on such tasks as preparing the papers in support of final approval and, over the course of several additional months, overseeing the efficient and appropriate allocation of the net settlement fund to members of the Class. The lack of any multiplier on Plaintiffs' Counsel's attorneys' fees demonstrates the reasonableness of the one-third fee request.

³ The certified Class Representatives were: 1) Meijer, Inc. and Meijer Distribution, Inc. (treated as one for these purposes); 2) Louisiana Wholesale Drug Co., Inc.; 3) Rochester Drug Co-operative, Inc.; 4) American Sales Company, Inc.; and 5) SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. (treated as one for these purposes).

Chilcott Defendants⁴ violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by illegally delaying the entry of generic Ovcon 35, an oral contraceptive. The complaints alleged that in exchange for a \$20 million payment, Barr agreed not to sell its generic Ovcon 35 in competition with Warner Chilcott's branded Ovcon 35. This agreement denied direct purchasers of Ovcon 35 of the benefits of generic competition and caused them to pay higher prices for Ovcon 35 Products (defined to include brand and AB-rated generic versions of Ovcon 35).⁵

The direct purchaser class claims against defendants Barr and Warner Chilcott have now been settled for a total of \$22 million in cash, plus interest (the "Settlement Fund").⁶ This \$22 million recovery is made up of the payments from two settlements.

On July 10, 2008, this Court granted final approval to the first settlement, which involved a \$9 million payment to the Class by Warner Chilcott, as well as other considerations, including Warner Chilcott's agreement to withdraw its experts from the case and to provide other forms of cooperation to the Class in the case against Barr (the "Warner Chilcott Settlement"). *See Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 565 F. Supp. 2d 49 (D.D.C. 2008). The proceeds of that settlement have been

⁴ The "Warner Chilcott Defendants" include Warner Chilcott Holdings Company III, Ltd., Warner Chilcott Corporation, Warner Chilcott (US) Inc., Warner Chilcott Company Inc., and Galen (Chemicals), Ltd.

⁵ The Class is defined as follows: "All persons and entities in the United States who purchased Ovcon 35 directly from Defendants at any time during the period April 22, 2004 through December 31, 2006." The definition of the Class excludes any claims asserted, whether by assignment or otherwise, by the following entities: Walgreen Co., Eckerd Corporation, Maxi Drug, Inc. dba Brooks Pharmacy, Albertson's Inc., The Kroger Co., Safeway, Inc., Hy-Vee, Inc., CVS Pharmacy, Inc., Rite Aid Corporation, and Rite Aid Hdqtrs. Corp.

⁶ As of February 10, 2009, the Settlement Fund, including interest, was valued at \$22,134,135.78.

invested in Treasury bills and have been earning interest on behalf of the Class (albeit at a very low rate given the current investment environment). In order to lower administrative costs and enhance efficiency, and because the allocation process was going to be delayed until the case resolved against Barr, Class Counsel did not seek the reimbursement of any expenses or any counsel fees in connection with the Warner Chilcott settlement, at the time of its final approval.

The second settlement, between Class Plaintiffs and Barr, which took place virtually on the eve of trial, is in the amount of \$13 million in cash (the “Barr Settlement”). The Court has scheduled the final approval hearing with respect to the Barr Settlement and to Class Counsel’s application for attorneys’ fees and costs for April 20, 2009. In accordance with that settlement, Barr has paid \$13 million into an escrow account.

This recovery is a laudable result for the Class in a case that, as recognized in this Court’s opinions on class certification and summary judgment, posed many difficult legal challenges.⁷ It was achieved by the skill, creativity, experience and hard work of Class Counsel, with the able assistance of two mediators, Magistrate Judge Kay and Professor Eric Green, over the course of several years. The joint settlement (collectively, the “Settlements”) offers a significant recovery for the Class, which comprises approximately 30 commercial entities that purchased Ovcon 35 directly from Warner Chilcott.⁸

⁷ See *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 293 (D.D.C. 2007) (class certification) and *Meijer, Inc. v. Barr Pharms. Inc.*, 572 F. Supp. 2d 38 (D.D.C. 2008) (summary judgment).

⁸ The efforts of Class Counsel in achieving this excellent result are described briefly below and in more detail in the Nussbaum Declaration submitted herewith.

Underscoring the merits of the Barr Settlement, to date, not a single member of the Class – which is composed of sophisticated business entities – has objected to the terms of the settlement or to the fee request, which were described in the Court-approved Notice.⁹ Moreover, as this Court previously recognized, no member of the Class objected to the Warner Chilcott Settlement. The absence of any objection to the Settlements and, specifically to the requested fee award, is further indication of its reasonableness and of the Class members' appreciation of Class Counsel's extensive efforts in this litigation.

Further bolstering the Settlements and fee request, the three largest members of the Class -- McKesson Corp. ("McKesson"), AmerisourceBergen Corp. ("Amerisource") and Cardinal Health, Inc. ("Cardinal Health") -- together comprising approximately 73% of the market for Ovcon 35 and its generic alternatives during the Class Period -- have affirmatively stated their support for the Settlements and Class Counsel's request for a fee equal to one-third of the gross settlement amounts. Class Counsel kept these companies, each of which is a large national wholesaler of prescription drugs and member of the Fortune 20 with billions of dollars of annual revenues, informed about the progress of the litigation and of the specific terms of both of the settlements. Each understands the merits of the Settlements and the fee request, given that each has served as a member of classes in several prior delayed generic entry cases prosecuted by some of the attorneys who serve as Class Counsel in this case. *See* Nussbaum Decl., Exhs. 1-2.

⁹ Notice was mailed on January 7, 2009. Pursuant to the Court-approved Notice, the last day on which such objections can be filed is February 23, 2009. The Notice informed Class members that counsel would be applying for attorneys' fees of up to one-third of the Settlement Fund, plus interest thereon, plus the reimbursement of costs and expenses, and an incentive award to the Class Representatives. If Class Counsel receives any objections to the request for fees, reimbursement of expenses or incentive awards between the date of this filing and the deadline for objections, Class Counsel will submit a supplemental memorandum addressing the objections.

Amerisource and Cardinal Health each have submitted letters to the Court stating that it approves of the Barr Settlement, Class Counsel's request for 33-1/3% of the Settlement Fund for attorneys' fees and Class Counsel's request for the reimbursement of expenses. *Id.* Cardinal Health, through its counsel, states:

Class counsel have repeatedly shown themselves experienced and highly skilled in cases alleging delayed or impeded generic drug competition. They efficiently provided legal services of the highest quality to the direct purchaser class in this complex case which was not without substantial risk. The benefit conferred upon this class of direct purchasers, including my client, by the settlement negotiated by class counsel is substantial.

Nussbaum Decl., Exh 1. Similarly, Amerisource, through its counsel, states:

ABC is satisfied that the proposed settlement is fair and adequate, and that the proposed attorneys' fee award of one third the settlement amount is appropriate in this case. In addition to the value of the \$22 million combined settlement achieved on behalf of the class, this award is justified by the time and expense that class counsel put into prosecuting this complex and hard fought litigation.

Nussbaum Decl., Exh 2. Moreover, representatives of McKesson have authorized Class Counsel to represent that McKesson also supports approval of the Barr Settlement, as well as the requested attorneys' fees and reimbursement of expenses. These interested parties, which purchased the bulk of Ovcon 35 directly from Warner Chilcott during the Class Period, together with the absence of any objections from other class members, have thus demonstrated not only that the Barr settlement is fair and adequate and should be finally approved, but also that the requested attorneys' fees and expenses are fair and reasonable and should be approved.

To date, Class Counsel has received no compensation of any kind for their efforts to investigate, bring and prosecute this matter for more than three years. Class Counsel have expended over \$1,126,686.91 of their own resources for experts, court reporter fees

and the like to prosecute this case. Indeed, the Barr Settlement was not achieved until discovery had been concluded, summary judgment motions briefed and decided, and counsel had substantially completed preparing the case for trial.

The excellent result of Class Counsel's efforts in this complex and risky litigation supports the requested attorneys' fee award. Class Counsel's fee request is in line with awards in many similar delayed generic pharmaceutical entry antitrust cases involving some of the same Class Members, namely major drug wholesalers and retailers. Indeed, attorneys' fee awards of 33-1/3% have been approved by other courts in this district and multiple other federal courts across the country where similar, excellent results have been achieved. This has been true even where the one-third fee resulted in a substantial multiplier of up to eight times counsel's lodestar. Here, the requested one-third fee is approximately the same as the current lodestar, thus resulting in no multiplier for Class Counsel, despite the substantial costs, risks, and excellent result achieved.

The fee award also is justified by the relevant factors typically considered by courts in this Circuit, including the risk of no recovery, and is consistent with the fees that Class Counsel could have obtained through negotiations with private parties in the open market. *See In re Vitamins Antitrust Litig.*, MDL No. 1285, Misc. No. 99-197, 2001 U.S. Dist. LEXIS 25067, at *68 (D.D.C. July 13, 2001) ("Since the percentage of recovery method is meant to simulate awards that would otherwise prevail in the market, the Court finds a one-third attorneys' fee recovery in this case to be reasonable.").

II. FACTUAL AND PROCEDURAL BACKGROUND

The full procedural background of the litigation will not be repeated in this brief. The Court is respectfully referred to the Nussbaum Declaration submitted herewith for a

detailed description of the history of this litigation, the claims asserted in the Consolidated Amended Complaint, the motion practice engaged in by the parties, the investigation and discovery undertaken by Class Counsel, the trial preparation completed, and the negotiations that led to the Warner Chilcott and the Barr Settlements.

In brief, this case has been aggressively prosecuted and vigorously defended for more than three years. The action was commenced in November 2005 with the filing of six complaints by different Direct Purchaser Class Plaintiffs, all alleging that Warner Chilcott and Barr violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by illegally delaying the entry of generic Ovcon 35. The complaints each alleged that in exchange for a \$20 million payment, Barr agreed not to sell its generic Ovcon 35 in competition with Warner Chilcott's branded Ovcon 35. The complaints alleged that this agreement denied direct purchasers of Ovcon 35 of the benefits of generic competition and caused them to pay higher prices for Ovcon 35 Products (defined to include brand and AB-rated generic versions of Ovcon 35).

Discovery commenced in March 2006. Defendants produced more than one million pages of documents, only a portion of which had previously been produced to the Federal Trade Commission ("FTC") in a related action. Nussbaum Decl. at ¶ 11. These documents were carefully reviewed and analyzed by teams of attorneys and paralegals. In addition, after Class Counsel drafted and served subpoenas, thousands of pages of third-party documents were produced, reviewed and analyzed. *Id.* at 12. Subsequently, Class Counsel took and defended more than 30 fact witness and 9 expert depositions. *Id.* at 14. Class Counsel retained experts in the following areas: 1) the pharmaceutical industry generally, (2) economics, (3) damages, (4) medical issues, and

(5) pharmaceutical supply chain issues. Class Counsel consulted extensively with their experts regarding economic, pharmaceutical and supply chain issues, including the quantification of damages incurred by the Class. Plaintiffs have also taken and analyzed the depositions of Barr's and Warner Chilcott's economic and industry experts.

On May 16, 2007, certain Consumer Class Plaintiffs settled their claims against Warner Chilcott and Barr. *See Cohen v. Warner Chilcott*, 522 F. Supp. 2d 105 (D.D.C. 2007). The FTC settled its claims with Barr on November 9, 2007. The remaining plaintiffs, including the Direct Purchaser Class Plaintiffs, the Individual Plaintiffs (the direct purchasers who opted out of the Class by filing individual complaints at the inception of the litigation), and 35 States (the "State Plaintiffs") worked cooperatively through summary judgment. In February 2008, the State Plaintiffs settled their claims with Barr. The Individual Plaintiffs settled their claims with Barr on November 21, 2008. This left only the Class claims against Barr.

After the close of expert discovery, Plaintiffs filed a motion for partial summary judgment, and prepared extensive papers in opposition to Barr's motion for summary judgment. Nussbaum Decl. at ¶¶ 27-29. While the Court denied Plaintiffs' motion for partial summary judgment, it granted in part, and denied in part, Barr's motion for summary judgment. *Id.* at 30. At the time of the Settlements, which were reached only after extensive arm's-length negotiations before Magistrate Judge Kay and then Professor Eric Green over more than a year, Class Plaintiffs and Barr were in the midst of trial preparations; they had already exchanged proposed lists of trial witnesses and exhibits, and had just filed and served motions *in limine* and *Daubert* motions. *Id.* at 38. Indeed, it was Class Counsel's willingness to take this case to trial - and much further than any of

the other plaintiffs or plaintiff groups, including the governmental entities - that ultimately led to the excellent recovery that has been achieved for the Class.

III. THE COURT SHOULD APPROVE THE JOINT FEE PETITION

A. Class Counsel Are Entitled to Compensation Based Upon the Benefits Created by the Litigation

Class Counsel are entitled to their requested fee based on the “common fund” approach. Courts have long recognized that a lawyer who recovers a “common fund” is entitled to a reasonable attorneys’ fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The rationale for such awards is that “persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched.” *Id.* “The ‘common fund’ doctrine is designed to spread the costs of litigation among all the beneficiaries of an identifiable fund over which a court can exercise legitimate control, in effect guarding against the unjust enrichment of passive beneficiaries at the expense of the active beneficiary.” *Bebchick v. Washington Metro. Area Transit Comm’n*, 805 F.2d 396, 402 (D.C. Cir. 1986).

The Supreme Court has repeatedly recognized the importance of private antitrust litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972). “In the absence of adequate attorneys’ fee awards, many antitrust actions would not be commenced. . . .” *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973). Substantial fee awards in successful cases, such as the present action, thus encourage and support meritorious class actions, and thereby promote private enforcement of, and compliance with, the antitrust laws. Moreover, awards of

counsel fees help to ensure adequate enforcement of Class members' legal rights. "[A] financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988). "To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding." *Eltman v. Grandma Lee's Inc.*, No. 82-1912, 1986 U.S. Dist. LEXIS 24902, at *25 (E.D.N.Y. May 29, 1986).

B. The Percentage-of-the-Fund Method Is the Appropriate Method for Calculating Attorneys' Fees in the District of Columbia Circuit

The "percentage of the fund" approach sought by Plaintiffs here is consistent with governing law and practice. Indeed, this is a "true common fund case," because the attorneys are to receive their fees "from a fund shared in common with class plaintiffs." *In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *36. In this Circuit, a percentage-of-the-fund, or "percentage-of-recovery," method is used by the courts. *See id.* at *29; *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[W]e join the Third Circuit Task Force . . . in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."); *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, No. 99-790, 2003 U.S. Dist. LEXIS 12344, at *24-*25 (D.D.C. June 16, 2003) ("The D.C. Circuit has joined other circuits in 'concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases'" (quoting

Swedish Hosp., 1 F.3d at 1271); *In re Newbridge Networks Sec. Litig.*, No. 94-1678, 1998 U.S. Dist. LEXIS 23238, at *10 (D.D.C. Oct. 22, 1998) (same).

As courts have recognized, using the percentage-of-the-fund method to award attorneys' fees in a common fund case "directly aligns the interests of the Class and its counsel for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *34 (quoting *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 414, 431-32 (S.D.N.Y. 2001)).

The trend in this Circuit is consistent with the decisions nationwide awarding fees in common fund cases based on a percentage of the total recovery. MANUAL FOR COMPLEX LITIGATION (THIRD) §24.13 (2003) (noting that "[t]he trend toward the percentage of the fund method . . . continues, or really, accelerates" across the country). In addition to this Circuit, at least eight other circuits – the First, Second, Third, Sixth, Seventh, Ninth, Tenth and Eleventh – have accepted the percentage-of-recovery method as an appropriate method for awarding attorneys' fees.¹⁰

¹⁰ See *In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995) ("[c]ontrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent"); *Gottlieb v. Barry*, 43 F.3d 474, 484 (10th Cir. 1994) (fee award should be calculated using the percentage method; "use of lodestar in common fund cases is 'out of fashion'"); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993) (noting "the recent trend toward adoption of a percentage of the fund method," and permitting use of the "percentage of the fund method" in common fund cases); *In re Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (fee award should not be based on "individual hours," but rather on the percentage that counsel "would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client"); *Camden I Condo Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991) (percentage method mandatory in common fund cases); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery"); *In re General Motors Corp. Pick-Up Truck*

C. The Requested Fee Award is Fair and Reasonable as a Percentage of the Benefits Achieved for the Class

1. The Fee Request Is Consistent with Other Fee Awards in Similar Cases and with the Private Market

The fee sought here is in line with fees awarded in analogous cases in this Circuit and others. In determining what percentage amount is reasonable to award as a fee, the Court of Appeals for the District of Columbia Circuit has advised that courts “enjoy substantial discretion.” *Swedish Hosp.*, 1 F.3d at 1271. Here, a 33-1/3% award is fair and reasonable in light of the complexity and duration of this litigation; the substantial risks borne by Class Counsel in litigating this case on a contingency fee basis; the time and resources that Class Counsel devoted to this litigation; the quality of the representation provided; and the reaction of the Class to the Settlement - including the complete support of the three largest Class Members (Cardinal Health, Amerisource, and McKesson) for approval of the Settlement and the request for attorneys’ fees. *See Newbridge*, 1998 U.S. Dist. LEXIS 23238, at *10-*12 (setting forth factors for courts to consider in determining reasonable fee award).

Moreover, the reasonableness of the fee requested is supported by Plaintiffs’ Counsel’s lodestar which is virtually the same as the one-third fee requested – thus resulting in little or no multiplier despite the risks taken and results achieved. Comparable cases involving allegations of delayed or impeded generic entry brought on behalf of a

Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995) (“[i]n common fund cases, a district judge can award attorneys’ fees as a percentage of the fund recovered,” and in prior cases “fee awards have ranged from nineteen percent to forty-five percent of the settlement fund”); *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 254-59 (3d Cir. 1985); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999) (describing a “ground swell of support” for percentage-of-the-fund approach and reviewing case law in eight circuits) (internal quotations omitted).

very similar class of direct purchasers illustrate the reasonableness of the request. For example, a case involving allegations of anti-competitive conduct against Bristol-Myers Squibb Company (“BMS”) for allegedly delaying generic competition to its branded drugs was brought by, *inter alia*, a class of direct purchasers of the brand drug BuSpar – a class similar to the Class here, and which also included the three national wholesalers, Amerisource, Cardinal Health and McKesson. Judge Koeltl of the Southern District of New York presided over the \$220 million direct purchaser class settlement in 2003. The Court awarded class counsel representing the direct purchaser class (some of the same counsel here) in BuSpar a fee award of 33-1/3% of the \$220 million settlement fund, plus expenses. *See In re Buspirone Patent & Antitrust Litig.*, MDL No. 1413, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 11, 2003). The multiplier in that case was well over eight times counsel’s lodestar. *See also In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005) (awarding 33-1/3% of \$75 million settlement); *In re Terazosin Hydrochloride Antitrust Litig.*, MDL No. 1317, 2005 U.S. Dist. LEXIS 43082, at *21 (S.D. Fla. Apr. 19, 2005) (awarding a 33-1/3% fee on a \$74.5 million settlement); *In re Relafen Antitrust Litig.*, No. 01-12239, 2004 U.S. Dist. LEXIS 28801, at *21 (D. Mass. Apr. 9, 2004) (awarding 33-1/3% of \$175 million settlement as attorneys’ fees).

A number of district courts in this Circuit have awarded attorneys’ fees of at least 33-1/3% of a settlement fund. In *In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *57, Judge Hogan approved fees of 34.06% of a \$359 million antitrust settlement fund. Indeed, Chief Judge Hogan noted that a one-third recovery is a common percentage arrived at in contingency fee cases. *Id.* at *68. More recently, in *North Shore*

Hematology-Oncology Assoc., P.C. v. Bristol-Myers Squibb Co., No. 04 Civ. 248

(D.D.C. Nov. 30, 2004), Judge Sullivan awarded class counsel (including some of the same counsel as here) 33 1/3% of a \$50 million settlement fund in a case where plaintiffs had alleged that BMS violated Section 2 of the Sherman Act by unlawfully delaying generic entry in the market for the anti-cancer agent Cisplatin.¹¹ The multiplier in the Cisplatin case was well over eight times counsel's lodestar. (Nussbaum Decl., Exh. 3).

Courts throughout the country routinely award one-third recovery for attorneys' fees in cases alleging Sherman Act violations on behalf of a class. *See, e.g., In re Flat Glass Antitrust Litig.*, MDL No. 1200, Misc. No. 97-550 (W.D. Pa. May 28, 2003) (awarding one-third of \$61.7 million settlement fund as attorneys' fees in antitrust class action) (Nussbaum Decl., Exh. 5); *In re Lithotripsy Antitrust Litig.*, No. 98-8394, 2000 U.S. Dist. LEXIS 8143, at *7 (N.D. Ill. June 9, 2000) (awarding fees of 33-1/3% in antitrust class action); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (awarding fees and expenses of 35.1% from \$190 million antitrust settlement fund); *In re Medical X-Ray Film Antitrust Litig.*, No. 93-5904, 1998 U.S. Dist. LEXIS 14888, at *20 (E.D.N.Y. Aug. 7, 1998) (awarding 33-1/3% of a total settlement fund amounting to \$39,360,000).¹²

The requested fee award is also consistent with practice in the private marketplace when attorneys negotiate percentage fee arrangements with their clients. *See In re*

¹¹ In 2003, a year before the *North-Shore Hematology* case, Judge Sullivan awarded attorneys' fees of 30% on a \$65 million settlement. *See Oncology & Radiation Assoc., P.A. v. Bristol-Myers Squibb Co., et al*, Civil Action No. 01 Civ. 02313 (D.D.C. Sept. 3, 2003) (Nussbaum Decl., Exh. 6). Similarly, Judge Hogan awarded attorneys' fees of 30% in *In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *31-*32.

¹² *See also In re Cardizem CD Antitrust Litig.*, No. 99-73259 (E.D. Mich. Nov, 25, 2002) (awarding 30% of a \$110 million settlement) (Nussbaum Decl. ¶ 59).

Synthroid Marketing Litig., 264 F.3d 712, 718 (7th Cir. 2001) (“[W]hen deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.”); *In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *68 (the “percentage of recovery method is meant to simulate awards that would otherwise prevail in the market”). Indeed, that is precisely what counsel for Cardinal Health stated in his letter to the Court: “In my view, and based upon my experience, had this litigation not been conducted on a class action basis, a contingency fee contract between a private client and its counsel in a complex case like this that proceeded to trial would have provided for a one-third attorneys’ fee or more.” Nussbaum Decl., Exh. 1.¹³

In fact, attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation. *See In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 U.S. Dist. LEXIS 68, at *44 (E.D. Pa. Jan. 4, 2001) (noting that in private contingency fee cases plaintiffs’ counsel often negotiate fees of at least 33.3% of any recovery). In sum, the fee request here is consistent with applicable law and practice, and in line with comparable awards in this district and others.

2. The Excellent Results Achieved by Class Counsel Strongly Support the Fee Request

A central factor in assessing the reasonableness of a fee request is the result achieved for the Class. *See Hensley v. Eckerhart*, 461 U.S. 424, 536 (1983); *In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *62 (“Courts have regarded exceptional

¹³ It is also consistent – and probably significantly less -- than what the Class members would have paid counsel if they had paid Class Counsel on an hourly basis to prosecute this case for three years as aggressively as they did.

benefits to a large class as grounds for a higher fee award.”). As discussed in detail in Class Plaintiff’s Motion for Final Approval of Settlement, serious obstacles were presented to the success of this case. *See* Nussbaum Decl. ¶ 76.

The \$22 million combined recovery represents a very substantial percentage of single damages to the Class – more than 50% (and depending upon the damages scenario, well more) – as estimated by Class Plaintiffs’ economist.¹⁴ In view of the substantial liability issues that confronted the Class, this recovery is aptly characterized as excellent, reinforcing the reasonableness of the fee request. *See In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, at *14-*15 (E.D. Pa. June 2, 2004) (awarding fees of 30% of the common settlement fund of \$202 million because the “settlements are highly favorable to the class when analyzed as percentage of total damages. . . . The settlement represents approximately 55 percent of the claimed [single] damages, as calculated by plaintiffs’ expert for the statute of limitations period”).

3. The Reaction of the Sophisticated Class Is a Significant Indicator of the Reasonableness of the Requested Fee

Here, the Class is comprised of approximately 30 business entities that directly purchased Ovcon 35 from Warner Chilcott during the Class Period. The three largest class members, McKesson, Amerisource and Cardinal Health, are the three largest drug wholesalers in the nation, and each has stated its support of the Settlement and Class Counsel’s request for attorneys’ fees and expenses. *See* Nussbaum Declaration, Exhs. 1-

¹⁴ Plaintiffs’ economics expert has calculated single damages as a range between \$26.9 million and \$46.1 million, depending on the date of “but-for” entry of generic Ovcon 35 and assumptions on the size of the market in the “but-for” world. Nussbaum Decl.¶ 75. Defendants’ experts opined that the damages suffered, if any, were far less.

2. These direct purchasers are well-equipped to evaluate the reasonableness of the Settlements, including Class Counsel's request for fees.

Thomas Long, Esq., counsel for Cardinal Health, writing on behalf of his client states:

Class counsel have, through me, fully informed Cardinal Health of the facts of the case, and the legal hurdles and other risks involved in *Ovcon 35*. The combined settlement from both defendants in this case -- \$22 million dollars -- is an excellent result for the direct purchaser class in what was hard-fought, complex, and expensive litigation.

Consequently, Cardinal Health fully supports approval of the settlement, and has no objection to class counsel's requested fee of one third of the settlement fund (similar to the fee awarded in the prior cases in which Cardinal Health took part), or to reimbursement of class counsel's expenses. Class counsel have repeatedly shown themselves experienced and highly skilled in cases alleging delayed or impeded generic drug competition. They efficiently provided legal services of the highest quality to the direct purchaser class in this complex case which was not without substantial risk. The benefit conferred upon this class of direct purchasers, including my client, by the settlement negotiated by class counsel is substantial. In my view, and based upon my experience, had this litigation not been conducted on a class action basis, a contingency fee contract between a private client and its counsel in a complex case like this that proceeded to trial would have provided for a one-third attorneys' fee or more.

For these reasons, Cardinal Health is supportive of the final approval of the proposed settlement and has no objection to class counsel's application for attorneys' fees and reimbursement of costs.

Nussbaum Decl., Exh 1.

Steven E. Bizar, Esq., legal counsel for Amerisource, writing on behalf of his client, states:

I write on behalf of my client, AmerisourceBergen Corporation ("ABC"), in support of the pending motion seeking final approval of the proposed settlement and fee award in the above-captioned litigation.

ABC, an absent class member in the current litigation, is one of the largest pharmaceutical distributors in the country. As a result, it is likely that our

claim to recovery in this case will be one of the three largest claims made to any class member.

ABC is satisfied that the proposed settlement is fair and adequate, and that the proposed attorneys' fee award of one third the settlement amount is appropriate in this case. In addition to the value of the \$22 million combined settlement achieved on behalf of the class, this award is justified by the time and expense that class counsel put into prosecuting this complex and hard fought litigation.

For this reason, ABC asks the Court to approve the settlement and makes no objection to class counsel's application for attorney's fees and reimbursement of costs.

Nussbaum Decl., Exh 2. In addition, representatives of McKesson have communicated with Class Counsel and authorized counsel to represent that McKesson also supports approval of the Barr Settlement, as well as Class Counsel's request for a fee of one-third of the Settlements plus reimbursement of expenses. Thus, Class Counsel's fee request has the full support of the largest members of the Class – comprising over 70% of the purchases, and thus entitled to more than 70% of the proceeds from the net settlement fund. That fact, combined with the lack of any objections to date, is evidence of an almost unprecedented and overwhelming support by a Class for a result and for a sought fee.

Where a class is composed of sophisticated business entities, such as here, the lack of objection by such class members to a requested attorneys' fee strongly supports approval of such fee. *See Cimarron Pipeline Constr. Inc. v. Nat'l Council on Comp. Ins.*, Nos. 89-822, 89-1186, 1993 U.S. Dist. LEXIS 19969, at *3 (W.D. Okla. June 8, 1993) (noting in approving a 33-1/3% fee from a common fund that no objection to the fee has been filed, and "the Class includes many large, sophisticated businesses that are familiar with attorneys' fees and can reasonably be expected to oppose any request for fees they

consider excessive”).¹⁵ Given that the absence of objections is persuasive to many courts of the worthiness of a fee request, it follows that the active and affirmative support of major class members, as Class Counsel have shown here, suggests the reasonableness of Class Counsel’s petition in this case.

4. The Quality of Class Counsel’s Representation of the Class Strongly Supports the Fee Request

The experience, reputation and ability of plaintiff’s counsel are additional factors in a court’s consideration of a fee request. *See Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 n.3 (10th Cir. 1995); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 748 (S.D.N.Y. 1985).

Class Counsel in this matter includes some of the preeminent antitrust firms in the country with decades of experience in prosecuting and trying complex actions.¹⁶ Not

¹⁵ *See also In re Swedish Hosp.*, 1 F.3d at 1272 (noting that the supportive response of Medicare provider class members to the attorneys’ fees notice is relevant to the court’s reasonableness determination); *Muehler v. Land O’Lakes, Inc.*, 617 F. Supp. 1370, 1374 (D. Minn. 1985) (“The turkey growers in this class are sophisticated business people, who possessed the degree of knowledge and ability sufficient to raise an objection if they believed the fee application was excessive.”); *M.D.C. Holdings Sec. Litig.*, No. 89-0090, 1990 U.S. Dist. LEXIS 15488, at *23 n.5 (S.D. Cal. Aug. 30, 1990) (commenting that lack of objections to a proposed fee “is significant since the class includes sophisticated financial institutions such as mutual and pension funds who have counsel available to advise and represent them and submit objections to either the settlement or the fees and expenses”); *In re Revco Sec. Litig.*, Nos. 851, 89-593, 1992 U.S. Dist. LEXIS 7852, at *12 (N.D. Ohio May 5, 1992) (where absent class members are “sophisticated financial institutions” the absence of objection to the proposed fee indicates that the class is “satisfied with the results achieved”); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 432 (E.D. Pa. 2001) (in approving a fee of 33% of a common fund, the court noted that no objection from the class of primarily “sophisticated institutional investors” was a “particularly significant” indication of reasonableness of requested attorney fee).

¹⁶ Moreover, Class Counsel have been involved in numerous other lawsuits alleging anti-competitive conduct by pharmaceutical manufacturers in delaying generic competition, including, *e.g.*: *Taxol* (Civil Action No. 1:01cv2313, D.D.C.), *Platinol* (Civil Action No. 1:04cv248, D.D.C.), *Children’s Ibuprofen* (Civil Action No. 04-mc535, D.D.C.), *Remeron* (Civil Action No. 03-0085, D.N.J.), *Relafen* (Civil Action No. 01-

only are Class Counsel experienced in antitrust class action litigation in general but they also have a sophisticated understanding, based on experience in other analogous cases, about the pharmaceutical industry and the anti-competitive concerns arising from the regulatory scheme for the commercialization of brand-name and generic pharmaceuticals.¹⁷ Class Counsel's experience, thus, weighs in favor of awarding the requested fee. Of course, "[t]he result achieved is the clearest reflection of petitioners' skill and expertise." *In re Linerboard*, 2004 U.S. Dist. LEXIS 10532, at *19. As noted above, the result achieved here amply supports the requested fee.

Moreover, Defendants are represented here by counsel from some of the most successful defense firms in the nation, and who are highly experienced antitrust attorneys. Throughout this litigation, Defendants' counsel have vigorously advocated their clients'

12239, D. Mass.), *Hytrin/Terazosin* (Civil Action No. 1:99cv1317, S.D. Fla.), *Buspar/Buspirone* (Civil Action No. 01cv7951, S.D.N.Y.), *Cardizem* (Civil Action No. 99md1278, E.D. Mich.), and *In re Lorazepam & Clorazepate Antitrust Litig.* (MDL Docket No. 1290, Civil Action No. 99-0790(TFH), D.D.C.).

¹⁷ Courts have commented on the quality of Class Counsel's representation in other antitrust class actions. *See, e.g., In re Remeron*, 2005 U.S. Dist. LEXIS 27013, at * 37 ("Class Counsel include some of the preeminent antitrust firms in the country with decades of experience in prosecuting and trying complex actions. Class Counsel also include firms with extensive patent experience, who are intimately involved in numerous lawsuits involving antitrust violations based on the improper use of patents. Class Counsel have significant experience in FDA regulatory matters. The settlement entered with Defendants is a reflection of Class Counsel's skill and experience"); *In re Vitamins*, 2001 U.S. Dist. LEXIS 25067 ("the attorneys involved are among some of the most highly skilled in the country with extensive experience in similar class action litigation, as evidenced by the biographies submitted to the Court. The experience, skill and professionalism of counsel and the performance and quality of opposing counsel all weigh in favor of the requested fee."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) ("Counsel for the Direct Purchaser Plaintiffs and the Defendants have considerable expertise in complex antitrust and class action litigation. Indeed, counsel for all of the pertinent parties are among the best and most experienced antitrust litigators in the country. Opinion of such experienced and informed counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement.").

positions and undoubtedly would have lodged a formidable defense at trial. This fact, too, weighs in favor of the reasonableness of Class Counsel's fee request. *See In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *62 ("experience, skill and professionalism of counsel and the performance and quality of opposing counsel all weigh in favor of the requested fee"); *In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *29-*30 (Defendants mounted an "aggressive and vigorous defense," and class counsel were "experienced antitrust litigators"); *In re Prudential Sec. Ind. Ltd. P'ships Litig.*, 912 F. Supp. 97, 101 (S.D.N.Y. 1996) ("The caliber of opposing counsel was clearly of the highest order and required that counsel for plaintiffs and the Class be capable of providing comparable services.").

Due to the quality of representation and the significant results achieved by Class Counsel, the requested fee award is reasonable.

5. Class Counsel Bore a Substantial Risk of Nonpayment

A determination of a fair fee must include consideration of several unique characteristics of a contingency-fee antitrust action, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs' counsel, and the fact that the risks of failure and nonpayment in an antitrust case are extremely high. Many cases, accordingly, emphasize that attorneys' risk is "perhaps the foremost factor" in determining an appropriate fee award. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (internal quotes omitted); *see also Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result.").

The history of antitrust litigation is replete with cases in which plaintiffs succeeded at trial on liability, but recovered no damages or very small damages at trial or after appeal. *See, e.g., United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (“the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only \$1.00 in damages”), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1166-67 (7th Cir. 1983) (remanding antitrust judgment for new trial and damages). One case, *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974), illustrates the risks faced by class counsel in an antitrust class action. After two trips to the Circuit Court and one to the U.S. Supreme Court, plaintiffs, the putative class and their counsel recovered nothing.

The present case is no exception to the rule. Indeed, as discussed in detail in the Nussbaum Declaration at ¶ 77, Defendants here asserted substantial defenses to liability. When Class Counsel undertook the representation of the named Plaintiffs and the Class, there were, therefore, no assurances that any fees would ever be received; indeed, there were major hurdles that needed to be overcome for the case to succeed. Class Counsel were aware that they would likely have to expend thousands of hours, and hundreds of thousands of dollars, in prosecuting this case over an extended period of time before having even a possibility of recovering a fee. Class Counsel bore the risk of the case being dismissed at the pretrial stage, of not prevailing at trial, or of losing on appeal.

To date, Class Counsel have received no compensation during the more than three year course of their investigation and litigation, yet they have spent over 17,488 hours and have incurred \$1,126,686.91 in out of pocket costs and expenses in prosecuting this

case to date. The complex nature of this case, including the technical, economic and legal defenses asserted by defendants, the risk involved in losing at trial and on appeal, along with the enormous financial risks and outlays incurred by Class Counsel in this contingency matter, all support the fee requested.¹⁸

6. The Time and Labor Expended by Class Counsel in Investigating and Litigating This Complex Case Support Their Fee Request

Class Counsel's fee request is also reasonable in light of the substantial time and effort expended in investigating and litigating the complex legal and factual matters involved in this action. *See In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *63 (noting that "the complex legal and factual matters implicated by the Settlement weigh in favor of the requested fee"); *In re Cendant Corp., PRIDES Litig.*, 243 F.3d 722, 738 (3d Cir. 2000) (finding that the "extensive time and effort exerted by the attorneys and the existence of complex legal and factual issues warranted higher fee awards").

Class Counsel's vigorous efforts on behalf of the Class continued unabated throughout the litigation. After the complaint was filed, Class Counsel diligently sought and reviewed over one million pages of documents from defendants and non-parties. Nussbaum Decl. at ¶ 11. Class Counsel completed fact discovery, including more than 35 party and third-party depositions, and expert discovery including 9 expert depositions. Nussbaum Decl. at ¶ 14. Class Plaintiffs filed approximately 40 motions (individual and joint motions) in this case. For example, Class Plaintiffs moved for class certification,

¹⁸ The Notice of the Barr Settlement that was sent to Class members states that a Claim Form will be sent to Class members to complete in order to participate in the distribution of the Settlement Fund, assuming that the Barr Settlement is finally approved. Plaintiffs anticipate that there will be additional costs and expenses in administering the Settlement Fund, and respectfully reserve the right to request additional compensation and reimbursement of such expenses at the time distribution is made.

working with a noted economist to demonstrate that the action was amenable to class treatment. *Id.* at ¶15. Class Plaintiffs also moved for partial summary judgment, arguing that the challenged Warner Chilcott-Barr Agreement was a *per se* violation of Section 1 of the Sherman Act and, in the alternative, that the Agreement was unlawful under a “quick look” analysis. *Id.* at ¶27. Class Plaintiffs also opposed Defendants’ comprehensive motion for summary judgment. This significant investment of time and effort necessarily precluded Class Counsel’s opportunity to work on other matters. *See* Nussbaum Decl. at ¶29.

Class Plaintiffs also expended substantial effort in preparing for trial. The parties exchanged original and revised versions of trial exhibit and trial witness lists, and conferred multiple times regarding these pretrial materials in an effort to streamline the number of exhibits and witnesses to be used or called at trial. Class Plaintiffs also prepared and filed motions *in limine* to exclude certain testimony and exhibits. *See* Nussbaum Decl. at ¶ 37.

Class Counsel’s fee request is further supported by a lodestar cross-check. Indeed, some jurisdictions advocate cross-checking the reasonableness of the fees against the lodestar method. *See In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *28.¹⁹ Here, Plaintiffs’ Counsel’s total hours of 17,488.69 yields a lodestar value at current billing rates of \$7,226,504. *See* Nussbaum Decl., at ¶¶ 62-63. Given the lodestar, if Class Counsel is awarded the fee requested, there would be no, or virtually no, multiplier on

¹⁹ Under the lodestar method, a court first determines the hours reasonably expended by counsel, then multiplies the number of compensable hours by a reasonable hourly rate. This computation yields the “lodestar.” The lodestar might then be increased or decreased by a “multiplier” based upon consideration of the risks or contingencies of the particular case, as well as the quality of the attorneys’ work. *See In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *30.

Class Counsel's current lodestar.²⁰ Indeed, by the time the claims administration and distribution process is complete, Class Counsel's lodestar will likely exceed the one third fee requested. This further supports the reasonableness of the fee request.

IV. REIMBURSEMENT AND PAYMENT OF CLASS COUNSEL'S EXPENSES

In addition to being entitled to reasonable attorneys' fees, it is well-settled that "an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund. Courts have routinely awarded expenses for which counsel would normally directly bill their clients." *In re Vitamins*, 2001 U.S. Dist. LEXIS 25067, at *69 (citations omitted).

Class Counsel seeks reimbursement of costs and expenses in the amount of \$1,126,686.91. These expenses are described in detail in the Nussbaum Declaration at ¶¶ 64-70. They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, computerized research, travel in connection with the litigation and similar costs. These expenses were reasonable and necessary for the prosecution of this litigation. The fact that Class Counsel were willing

²⁰ Multipliers ranging up to "four are frequently awarded in common fund cases when the lodestar method is applied." *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 341 (3d Cir. 1998); *accord In re Combustion, Inc.*, 968 F. Supp. 1116, 1133 (W.D. La. 1997); *In re Cardizem CD Antitrust Litig.*, No. 99-73259 (E.D. Mich. Nov. 25, 2002) (approving multiplier of approximately 3.7) (Nussbaum Decl. ¶59); *In re Linerboard Antitrust Litigation*, MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, at *49 (E.D. Pa. June 2, 2004) (approving 2.66 multiplier); *Nichols v. Smithkline Beecham Corp.*, No. Civ. A. 00-6222, 2005 WL 950616, at *24 (E.D. Pa. Apr. 22, 2005) (approving multiplier of 3.14); *Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *32 (noting that a fee award that is 1.15 or 1.36 times greater than the lodestar "falls near the low end of normal multipliers"); *In re Medical X-Ray*, 1998 U.S. Dist. LEXIS 14888, at *22 (noting that requested fee, which amounted to a multiplier of 1.67, "is at the low end of multipliers used in other cases"); *In re Terazosin*, 2005 U.S. Dist. LEXIS 43082, at *20 (multiplier of 1.27 approved); *In re Remeron*, 2005 U.S. Dist. LEXIS 27013, at *48 (multiplier of 1.8 approved, as "on the low end of spectrum.").

to expend their own money as an investment whose reimbursement was entirely contingent on the success of this litigation is perhaps the best indicator that the expenditures were reasonable and necessary.

V. REQUEST FOR PAYMENT OF INCENTIVE AWARDS TO CLASS REPRESENTATIVES

Class Counsel respectfully request that the Court approve incentive awards in the amount of \$50,000 for each of the following five Class Representatives: 1) Meijer, Inc. and Meijer Distribution, Inc. (treated as one for these purposes); 2) Louisiana Wholesale Drug Co., Inc.; 3) Rochester Drug Co-operative, Inc.; 4) American Sales Company, Inc.; and 5) SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. (treated as one for these purposes). The Notice to the Class advised Class members that Class Counsel would apply for such incentive awards. *See* Nussbaum Decl., Exh. 7.²¹ To date, no objections to incentive awards have been received.

The Class Representatives in this action all actively and effectively fulfilled their obligations as representatives for the Class. They fully complied with all demands placed upon them during this litigation – most of which was necessitated by Defendants’ extensive discovery demands - and offered invaluable assistance in Class Counsel’s investigation of this matter. Indeed, in addition to providing documents, both in electronic and paper form, and responses to interrogatories, each of the Class Representatives prepared for and participated in day-long depositions. *See* Nussbaum

²¹ The Notice of the Barr Settlement states the following: “If the Court approves the settlement with Barr, the Court will be asked to approve ...a \$50,000 payment to each of the Class Representatives for their efforts in prosecuting this case, which has included, among other things, production of documents, providing written discovery responses, sitting for depositions and regular communications with Class Counsel.” Nussbaum Decl, Exh 7 (Notice at p.7). The Notice also sets forth the names of the five certified Class Representatives. *Id.* at 4.

Decl. ¶¶ 85-86. And, as a result of repeated discovery disputes, the Class Representatives were required to search for, collect, and provide to Class Counsel documents and electronic data multiple times during the course of this litigation. Such efforts, which inured to the benefit of all Class members, entailed substantial distraction from the operation of the Class Representatives' respective businesses.

In instituting this litigation, the Class Representatives have effectively acted as private Attorneys General, seeking a remedy for what was alleged to be a public wrong. It is well recognized that private class action suits are a primary means for the effective enforcement of laws to the benefit of the public. *See, e.g., Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970); *P.D.Q. Inc. of Miami v. Nissan Motor Corp. in USA*, 61 F.R.D. 372, 379-80 (S.D. Fla. 1973) (private civil suits are an important tool in enforcing the antitrust laws).

Incentive awards to the Class Representatives “are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.” *In re Lorazepam*, 205 F.R.D. at 400 (internal quotation marks and alterations omitted).²²

²² *See also Collins v. Pension Benefit Guar. Corp.*, Nos. Civ. A. 88-3406, 89-2997, 1996 WL 335346, at *6 (D.D.C. June 7, 1996). “[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *In re Lorazepam*, 205 F.R.D. at 400 (quotation omitted). “Numerous courts, recognizing that serving as a class representative involves a substantial time commitment to the litigation, have permitted such awards.” *In re Revco*, 1992 U.S. Dist. LEXIS 7852, at *21; *see also In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366, 373 (S.D. Ohio 1990). In light of the responsibilities of being class representatives, and the existence of certain disincentives to taking them on, “[t]he propriety of allowing modest compensation to class representatives seems obvious.” *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 32 (E.D. Pa. 1985).

Courts have awarded incentive payments to class representatives that equal or exceed the award requested here. *See, e.g., In re Revco*, 1992 U.S. Dist. LEXIS 7852, at *21 (awarding \$200,000 to the named plaintiff); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 203-04 (S.D.N.Y. 1997) (awarding \$85,000 to a named plaintiff); *In re Dun & Bradstreet*, 130 F.R.D. at 374 (awarding \$55,000 each to two named plaintiffs); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 914 (S.D. Ohio 2001) (awarding \$50,000 fee to the class representative); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (awarding each class representative \$50,000); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (awarding \$50,000 to the named plaintiff).

For these reasons, Class Counsel respectfully submit that the requested incentive awards for the five Class Representatives are appropriate and reasonable.

VI. CONCLUSION

Without any guarantee of success, Class Counsel prosecuted this litigation undertaking substantial risk and expense for over three years. They entered into effective and lengthy arm's-length negotiations with opposing counsel mediated by Magistrate Judge Kay and Prof. Eric Green, and achieved an excellent recovery for the benefit of the Class. Class Counsel respectfully and jointly request that the Court approve the fee and expense petition and enter an order awarding Class Counsel 33-1/3% of the Settlement Fund, plus accrued interest, for attorneys' fees, reimbursement of \$1,126,686.91 in costs and expenses, and approve an award of incentive payments to each of the five Class Representatives of \$50,000 for their participation in the prosecution of this action.

Dated: February 13, 2009

Respectfully Submitted,

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**Executive Committee Members for
Direct Purchaser Class Plaintiffs**

CERTIFICATE OF SERVICE

I, Tirek J. Gayle, hereby certify that on February 13, 2009, the following:

1. **Direct Purchaser Class Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards to the Class Representatives;**
2. **Memorandum in Support of Class Counsel's Joint Petition for an Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards to the Certified Class Representatives;**
3. **Certificate of Service.**

were served upon all parties via ECF.

Dated: February 13, 2009



Tirek J. Gayle