IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VISTA HEALTHPLAN, INC., et al., Plaintiffs, v. CEPHALON, INC., et al., Defendants.	:	Case No. 2:06-cv-1833 (MSG) Honorable Mitchell S. Goldberg

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Consumer Plaintiff Shirley Panebianco and Third-Party Payor ("TPP") Plaintiffs Vista Healthplan, Inc. (n/k/a Coventry Health Care of Florida, Inc.), District Council 37 Health & Security Plan, Pennsylvania Employees Benefit Trust Fund, and Pennsylvania Turnpike Commission, as representatives of the End-Payor Class ("Class Representatives"[1] or "Plaintiffs") and as a result of their settlements with Defendants Cephalon, Mylan and Ranbaxy,[2] respectfully move the Court for an Order: (1) awarding End-Payor Co-Lead Counsel for the Settlement Classes ("Class Counsel")[3] and the other participating firms[4] one-third of the Class Settlement Fund[5] ($ 21,959,200, plus interest, as attorneys' fees); (2) reimbursing Class Counsel $2,663,468 in litigation costs and expenses; (3) awarding the Consumer Class Representative Shirley Panebianco an incentive award of $15,000 for her contributions to the litigation; and (4) awarding each TPP

[1] In its August 8, 2019 Order granting Preliminary Approval of Proposed Settlements with Cephalon, Mylan, and Ranbaxy, for Preliminary Certification of Settlement Classes, and for Permission to Disseminate Notice of the Proposed Settlements to Members of the Settlement Classes ("August 8, 2019 Order"), the Court appointed Plaintiffs Shirley Panebianco, Vista Healthplan, Inc. (n/k/a Coventry Health Care of Florida, Inc.), District Council 37 Health & Security Plan, Pennsylvania Employees Benefit Trust Fund, and Pennsylvania Turnpike Commission as representatives of the End-Payor Class. *See* ECF Doc. No. ("Doc.") 592 at ¶ 6.

[2] As used herein "Cephalon" refers collectively to (a) Cephalon, Inc. ("Cephalon"); (b) Barr Laboratories, Inc. ("Barr"); and (c) Teva Pharmaceutical Industries Ltd. and Teva Pharmaceuticals USA, Inc. (collectively "Teva"). "Mylan" refers collectively to Mylan Inc., (formerly known as Mylan Laboratories Inc.) and Mylan Pharmaceuticals Inc. "Ranbaxy" refers collectively to Sun Pharmaceutical Industries, Ltd. as successor in interest to Ranbaxy Laboratories, Ltd. and Ranbaxy Pharmaceuticals, Inc. "Defendants" as used herein refers to Cephalon, Mylan and Ranbaxy.

[3] This Court appointed Spector Roseman & Kodroff, P.C., Criden & Love, P.A., and Kessler Topaz Meltzer & Check, LLP as Co-Lead Counsel for the Settlement Classes in its August 8, 2019 Order, Doc. 592 at ¶ 9.

[4] Two additional law firms did work in support of the Plaintiffs and the Class; Finkelstein Thompson and the Law Offices of Robert Sink.

[5] As discussed below, three separate settlements have been achieved with Cephalon, Mylan and Ranbaxy in the amounts of $48,000,000, $14,377,600, and $3,500,000, respectively. Thus, the separate settlement funds provided by each of the settlements have been combined into a single Class Settlement Fund totaling $65, 877, 600 (before certain Court approved administrative costs) to be used to pay Consumer and TPP claims, as well as attorneys' fees and expenses and incentive awards to the Class Representatives.

Class Representative an incentive award of $50,000 for its contributions to the litigation, all to be paid from the Class Settlement Fund.

I. INTRODUCTION

This settlement is the result of more than 13 years of litigation, during which Class Counsel and supporting firms devoted over 41,000 hours of time and advanced over $2.6 million of expenses to pursue antitrust claims on behalf of the End-Payor Plaintiffs who paid for Provigil and/or modafinil, a wakefulness promoting agent used to treat narcolepsy and other sleep disorders.[6] This work included:

- ***Claim development.*** The initial complaint was filed on May 1, 2006, and stemmed not from a prior government investigation, but from Class Counsel's pre-filing factual investigation.

- ***Merits discovery.*** Plaintiffs engaged in substantial merits discovery, including reviewing approximately 5 million pages of documents produced by Defendants, participating in over 180 depositions, defending the depositions of all five Class Representatives, submitting highly qualified reports from eight separate experts and participating in extensive motion practice and lengthy court discovery hearings.

- ***Summary judgment.*** In 2013, the Parties sought summary judgment with respect to certain claims and/or elements of the claims. After briefing and argument on those motions were completed, on March 13, 2014, the court issued an opinion granting in part and denying in part End-Payors' motion and, on June 23, 2014, granted Defendants' motions on End-Payors' allegations of an overall conspiracy. *See* Doc. 285, 286, 366, 367. The parties also submitted extensive briefing on the impact and application of *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013), a U.S. Supreme Court decision announced in the middle of this litigation concerning pay-for-delay agreements. *See* Doc. 295, 302, 207. At the time, no Court had yet considered the application of the *Actavis* opinion. This Court ultimately rejected the Defendants' various arguments about *Actavis*. *See* Doc.

[6] The extensive efforts of counsel are detailed more fully in the Declaration of Joseph H. Meltzer ("Meltzer Decl.") filed contemporaneously herewith in support of End-Payor Plaintiffs': (1) Motion for Final Approval of Proposed Settlements with Cephalon, Mylan and Ranbaxy, for Certification of Settlement Classes, and for Final Approval of Plan of Allocation ("Final Approval Motion"); and (2) Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards for the Class Representatives.

389. Mylan subsequently filed a motion for reconsideration that was opposed by End-Payors and denied by the Court on March 27, 2015. *See* Doc. 418.

- ***Class certification.*** On May 12, 2014, End-Payors filed their motion for class certification. *See* Doc. 337. Hearings were held on March 24 and 25 and May 6, 2015. The Court denied the motion, focusing on Plaintiffs' inability, in a litigation context, to ascertain absent class members and to remove uninjured persons on a class-wide basis. The End-Payors subsequently filed a Rule 23(f) petition which the 3rd Circuit denied. The End-Payors then remedied the deficiencies recognized by the Court by providing new evidence, including new expert reports that this Court relied upon when certifying the settlement class for purposes of preliminary approval.

- ***Trial Preparation.*** End-payors worked with the other groups of plaintiffs and engaged in extensive trial preparation by reviewing, summarizing and preparing deposition designations, formulating trial strategies, and preparing expert witnesses for testimony at trial.

Class Counsel's substantial efforts in litigating this action is evident in the three significant settlements that they have negotiated with Cephalon, Mylan and Ranbaxy, totaling $65,877,600, plus interest. As a result of the efforts of Class Counsel and the initiative and participation of the Class Representatives, these settlements were achieved after prolonged and difficult negotiations with Defendants, each of which had significant resources at its disposal and was represented by highly capable and experienced counsel. For each settlement, Class Counsel prepared the settlement agreement and the attendant notices, orders, and preliminary and final approval documents, and supervised the work of the settlement administrator. The work is, of course, not over as Class Counsel is preparing for the February 26, 2020 final approval hearing and is overseeing the claims processing and the distribution of settlement funds to the class member claimants.

Despite over thirteen years of litigation and over $22 million in accrued lodestar, Class Counsel have waited until now—the conclusion of the litigation—to request an award of attorneys' fees, reimbursement of Counsel's out-of-pocket litigation expenses, and incentive awards for the Class Representatives. The record in this case and the law of this Circuit fully support Class

Counsel's request for a fee award of one-third of the Class Settlement Fund, a request that is reasonable and well within the range of approval in the Third Circuit. *See, e.g., Kirsch v. Delta Dental*, 534 Fed. Appx. 113, 116 (3d Cir. 2013) (upholding fee of "roughly 36% of the District Court's conservative valuation" of the settlement value); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907, at *2-3 (E.D. Pa. July 14, 2014); *In re Fasteners Antitrust Litig.* ("*Fasteners*"), No. 08-md-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014); *see also* § III.B.7, *infra*. Moreover, this fee request represents a multiple of only approximately 0.96 of Class Counsel's lodestar, based on current rates and time expended through November 30, 2019. Accordingly, Plaintiffs respectfully request that the Motion be granted.

II. BACKGROUND

A. Prosecution of the Case

This litigation began almost 14 years ago, in 2006, when Plaintiffs filed lawsuits against Defendants on behalf of a class of end-payors who paid for Provigil (a wakefulness promoting agent used to treat narcolepsy and other sleep disorders) in 27 states and the District of Columbia.[7] Plaintiffs alleged that Defendants violated antitrust, consumer protection and unjust enrichment laws of the included states by participating in an unlawful "reverse payment" scheme and related fraudulent conduct concerning Provigil. Plaintiffs alleged that Cephalon, which owned the patents for Provigil, made payments to keep the four generic defendants from bringing cheaper generic versions of Provigil to the market.

The filing followed Class Counsel's investigation, which included a review of publicly available information, interviews with health plans and pharmaceutical pricing experts, and

[7] These were states that had "Illinois Brick repealers" or state antitrust laws that allowed claims by indirect purchasers.

significant analysis of economic conditions. By Order dated August 8, 2006, the Court appointed Kessler Topaz Meltzer & Check, LLP, Spector Roseman & Kodroff, P.C. and Criden & Love, P.A. as Interim Class Counsel to conduct the litigation on behalf of the class. *See* Doc. 21. As noted above, these same firms have been appointed by the Court as Co-Lead Counsel for the Settlement Classes. *See* August 8, 2019 Order, Doc. 592 at ¶ 9.

For over thirteen years, Class Counsel, along with other counsel working under their supervision, have devoted over 21,000 hours to advancing the End-Payor Plaintiffs' claims. End-Payors coordinated their efforts with other groups of plaintiffs pursing the same claims, including a group of retail pharmacies, direct payors, the Federal Trade Commission ("FTC") and a competing drug maker, Apotex. The work done by Class Counsel included:

- Investigating the pharmaceutical drug industry generally, and the Provigil and modafinil market specifically; as well as working with the Class Representatives to draft and file a comprehensive consolidated amended complaint, *see* Meltzer Decl., at ¶¶ 11-13;

- Successfully defending motions to dismiss, *see id.* at ¶¶ 18-21;

  Negotiating with Defendants and coordinating with the other plaintiffs on discovery matters, including the coordination of discovery requests, status reports to the Court, and trial preparation and strategy, *see id.* at ¶ 22;

- Drafting and negotiating a Protective Order governing confidential information, *id.* at ¶ 22 and Doc. 91;

  Responding to a multitude of written discovery requests (including several sets of interrogatories, requests for production of documents, and requests for admission), negotiating the scope of that discovery, and processing, reviewing, and analyzing document productions from each Class Representative for potential production to Defendants, *see id.* at ¶ 22;

- Drafting discovery requests directed to each Defendant, followed by extensive meet-and-confer negotiations with defense counsel, in coordination with other plaintiff groups, *see id.* at ¶ 22;

- Working with the other plaintiffs to process more than 5 million pages of documents produced by Defendants and third parties, and reviewing, analyzing and

coding documents selected with the aid of technology-assisted review tools and a data base vendor, *see id.* at ¶ 22;

- Briefing and arguing discovery motions, *e.g.*, *see id.* at ¶ 24;

- Consulting with expert economists to analyze Defendants' transactional data, cost data, and other information produced in discovery to develop opinions relating to the Provigil and modafinil market, antitrust impact, and damages, for purposes of class certification, summary judgment, and trial, *e.g.*, *see id.* at ¶¶ 22-23;

- Preparing for and taking the depositions of 180 defense and third-party fact witnesses, in coordination with the other groups of plaintiffs, *see id.* at ¶ 22;

- Preparing for and defending depositions of 5 class representatives, *see id.* at ¶ 22;

- Identifying, hiring, preparing for and defending the depositions of eight experts, including Raymond S. Hartman, Ph.D. (economist); John R. Thomas (expert on pharmaceutical patent issues); John J. Doll (expert on processes and procedures of the Patent and Trademark Office ("PTO"); Emmanuel Mignot, M.D., Ph.D. (psychiatrist and pharmacist specializing in sleep disorders); Harry G. Brittain, Ph.D. (chemist with expertise in physical chemistry, pharmacy chemistry and the characterization of drug substances); Thomas Hoxie, Esq. (patent attorney with vast experience in licensing patents); W. Shannon McCool, Ph.D. (pharmacist with extensive experience in the development of pharmaceutical substances); Jacques Warcoin (a French patent attorney), *see id.* at ¶ 23. During the course of the litigation one of Plaintiffs' experts died and another retired, necessitating further expert work by counsel *see id.* at ¶ 23;

- Briefing and arguing multiple motions for summary judgment filed by both Plaintiffs and Defendants, including motions on the novel issues raised by the Supreme Court's *Actavis* ruling and the impact of this Court's ruling in the related Apotex patent infringement trial, *see id.* at ¶¶ 25-26;

- Briefing and arguing Plaintiffs' motion for class certification, including a Rule 23(f) Petition and the subsequent briefing on the motion to approve a settlement class, *see id.* at ¶ 27;

- Coordinating with the Class Plaintiffs, preparing for and attending a multi-day mediation before Magistrate Judge Strawbridge and the two Special Masters he selected, Robert Heim and Lloyd Constantine, *see id.* at ¶ 28. End-Payors paid $48,531.13 towards the costs of the Special Masters, *see id.* at ¶¶ 28, 59;

- Negotiating 3 separate settlements with Defendants and preparing the settlement agreements and attendant notices, orders, and preliminary and final approval briefs; obtaining approval from the Court, *see id.* at ¶¶ 29-33, 37.

- Working with the Settlement Administrator to prepare and serve subpoenas on 25 providers of retail pharmacy services and pharmacy benefits managers in order to obtain Class Member addresses for purposes of direct notice: coordinating with the State Attorney General of California ("CAAG") and the Settlement Administrator to design and send notices to the members of the Settlement Classes; implement publication and digital media notice, and to create and maintain a settlement website, to provide notice of these Settlements and a settlement achieved by the CAAG with Teva and Cephalon, Inc. for alleged violations of state and federal antitrust and consumer protection laws relating to the sale and pricing of Provigil and Nuvigil, pursuant to which $25,250,000 will be distributed to eligible California consumers, *see id.* at ¶¶ 4-7, 42-43.

- The collateral litigation with United Healthcare, forcing UHC to abide by the settlement with Cephalon it had previously agreed to. That involved written and deposition discovery and motion practice as well as the deposition and trial testimony of SRK's Counsel John Macoretta, *see id.* at ¶¶ 34-36; and

- Negotiated coordinated settlements between End-Payor Plaintiffs, a group of the largest separately represented health insurers ("SHPs") and Cephalon, along with a "true-up" of how the settlement fees would be fairly split between Third party payor class members and the SHPs, *see id.* at ¶ 38.

B. <u>The Settlements and the Class Settlement Fund</u>

Each of the three Settlement Agreements was arrived at only after extensive negotiations, during which the strengths and weaknesses of the respective parties' positions were thoroughly discussed, evaluated, and negotiated. The negotiations started during a January 2014 mediation conducted by Magistrate Judge Strawbridge and Special Masters Heim and Constantine. The Consumer and TPP Class Representatives attended and participated in this mediation process. *See* Meltzer Decl. at ¶ 28.

Further settlement negotiations occurred after discovery was completed, allowing Class Counsel to continue meaningful discussions after having reviewed millions of pages of documents, participating in approximately 180 depositions, evaluating comprehensive expert reports and

financial data, as well as this Court's prior rulings on summary judgment and the impact of the Supreme Court's decision in *Actavis*. *See* Meltzer Decl. at ¶ 30.

Plaintiffs and Mylan announced that they had reached a settlement on March 24, 2015, during oral argument on class certification. Class Counsel delayed seeking preliminary approval of that settlement with Mylan because it believed a settlement with Cephalon was imminent, resulting in significant cost savings if both settlements could be administered together. *Id*. at ¶ 31.

After several months of negotiation with Cephalon and a group of large, independently represented insurers, Plaintiffs and Cephalon orally agreed to a settlement in October 2015, which was memorialized in a binding and enforceable Memorandum of Understanding ("MOU") in December 2015. The parties agreed the MOU would be followed up with separate, final settlement agreements with the Plaintiffs and other various Settling Health Plans ("SHP"), respectively. *See* Meltzer Decl. at ¶¶ 32-33. Plaintiffs' Counsel and counsel for the other parties began drafting the final settlement papers.

However, execution of final settlement agreements was delayed because United Healthcare Services, Inc. ("United Healthcare"), one of the SHPs that had agreed to settle separately with Cephalon, tried to renounce its agreement to settle. This led Cephalon and the End-Payor Plaintiffs to sue United Healthcare to enforce the MOU (the "United MOU Dispute"). As this Court well knows, UHC lost at trial and was forced to abide by the MOU it had signed previously. *See Teva Pharmaceutical Industries, Ltd. v. United Healthcare Services, Inc.*, 341 F. Supp. 3d 475 (E.D. Pa. 2018); *see* Meltzer Decl. at ¶ 36.

Plaintiffs and Cephalon ultimately executed final settlement documents, in the form of a Class Settlement Agreement in May 2018, but excluded United Healthcare from the Settlement Classes so that the class settlement could move forward without being contingent on the outcome

of the United MOU Dispute. *See* Meltzer Decl. at ¶ 35. United Healthcare's actions also delayed a final Settlement Agreement between Plaintiffs and Ranbaxy. Plaintiffs were forced to reduce the Ranbaxy settlement due to UHC's position. Nevertheless, a Settlement Agreement was signed in June 2018. *See Id*. at ¶ 37.

The Settlement with Cephalon is for $48 million. The Settlement with Mylan is for $14,377,600 (reflecting a reduction for UHC's exclusion from the Class). The Settlement with Ranbaxy is for $3.5 million.

C. Notice Regarding Co-Lead Counsel's Request for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards

In the Preliminary Approval Order, the Court approved dissemination of notice to the members of the Settlement Classes. *See* August 8, 2019 Order, Doc. 592 at ¶ 12. As required by Fed. R. Civ. P. 23(h), the Long Form Notice provided at www.provigilsettlement.com informed potential members of the Settlement Classes that Class Counsel would request attorneys' fees, reimbursement of litigation expenses, and incentive awards for the Class Representatives:

> 20. How Will the Lawyers Be Paid?
>
> Class Counsel will request an award from the Court for attorneys' fees of up to one-third of the total amount of the Settlement Funds plus any accrued interest, plus reimbursement for the costs and expenses they advanced in litigating the case. All awards for attorneys' fees and expenses shall be paid from the Settlement Funds after the Court approves them. In addition, pursuant to an agreement between Class Counsel and the lawyers for the Settling Health Plans or SHPs (a group of TPPs who separately settled with the Cephalon Defendants), Class Counsel received 40% of the fees paid to the SHP's lawyers from their separate agreement with the Cephalon Defendants. The fees paid pursuant to this agreement are separate from any attorney fees the Court awards to Class Counsel from the Settlement Funds in this case. Further, also pursuant to the agreement between the SHPs' lawyers and Class Counsel, Class Counsel will pay the SHPs' lawyers approximately 32.2% of any fees awarded by the Court in connection with the settlement with the Cephalon Defendants.
>
> Class Counsel will also request awards be paid to the Class Representatives who worked with the Class Counsel on behalf of the entire Class. For the Consumer

> Class Representative, Class Counsel will request an award of $15,000. For the four Third-Party Payor Class Representatives, Class Counsel will request an award of $50,000 each.

See Long Form Notice, attached to the Declaration of Eric Miller (the "Miller Decl.")[8] as Exhibits C and D. The deadline for objections is January 15, 2020, and Class Counsel will provide the Court with a final report on any objections and responses thereto in its supplemental filings due on February 15, 2020.

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

Plaintiffs, on behalf of Class Counsel, respectfully request an award of attorneys' fees of one-third of the Class Settlement Fund of $65,877,600, plus accrued interest,[9] equaling $21,959,200, plus interest.

Class Counsel's fee request is well within the range of awards regularly approved by courts in this Circuit, particularly in light of the length and complexity of this case, the nature and extent of Class Counsel's efforts in negotiating the substantial settlements, and the litigation risks assumed. Moreover, cross-checking this fee request against Class Counsel's lodestar of $22,823,274 (based upon current rates) validates its reasonableness.

The Court should also be aware of two other issues that impact Class Counsel's fees. First, Class Counsel has an agreement with the SHPs to share fees related to the Cephalon Settlement only. Under this agreement, Class Counsel received forty percent (40%) of the SHP Counsel's fee from the Teva settlement, for a total of $4,960,000. In exchange, Class Counsel will provide the SHP's Counsel 32.21% of the fees awarded by this Court relating to the Teva settlement only. This agreement was necessary to offer a global resolution to Cephalon, which Cephalon insisted

[8] The Miller Decl. is attached to the Meltzer Decl. as Exhibit 4
[9] To date, the accumulated interest is approximately $ 220,000.

was a pre-requisite to any settlement. As was detailed during the UHC case, the SHP's represented most of the largest health insurers in America, and therefore a substantial portion of the End-Payor Class. After the Court denied the motion to certify a class, Class Counsel (which had done all the work litigating the case) worked with SHP counsel (representing the largest class members) to reach the best possible settlement with Cephalon. Class Counsel and the SHPs counsel agreed to share the fees each would receive for their collective settlement efforts. This type of arrangement has been used in other pharmaceutical class action settlements. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 62-67 (D. Mass. 2005) and *In Re: Pharmaceutical Industry Average Wholesale Price Litigation*, No.01-CV-12257, Doc No. 7979 (12/08/11 Final Approval Order).

Second, Class Counsel has potential claims for attorney fees against UHC relating to UHC's settlements with the defendants. Class Counsel does not believe the potential to recover fees from UHC should impact the Court's analysis, as it will not change the amount of fees due from the Class. And even if Class Counsel receives the full amount of fees they are seeking from UHC, such fees, when combined with the Court's maximum fee award, would result in less than a 1.5 multiple on lodestar, which is still well within the bounds of reasonableness for a case this size, as discussed below at Section III C2, pp 26-27.

A. A Reasonable Percentage of the Fund is the Appropriate Method for Awarding Class Counsel's Attorneys' Fees in this Common Fund Settlement.

In the Third Circuit, district courts have discretion to award fees in common fund cases based on either the lodestar/multiplier method or the percentage-of-the-fund method. *See In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 539 (3d Cir. 2009); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 163-164 (3d Cir. 2006). However, the percentage-of-the-fund method of awarding fees is the preferred method in common fund cases in this Circuit and throughout the United States.

See King Drug Company of Florence, Inc. v. Cephalon, Inc. ("*King Drug Co.*"), No. 2:06-cv-01797, 2015 WL 12843830, at *5 (E.D. Pa. Oct. 15, 2015) (Goldberg J.) citing *In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) ("The 'percentage of the fund' method is the proper method for calculating attorneys' fees in common fund class actions in this Circuit."); *Kirsch*, 534 Fed. Appx. at 115 ("'The percentage of recovery method is generally favored in common fund cases...'") (quoting *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d Cir. 2009)); *Diet Drugs*, 582 F.3d at 540 ("the percentage-of-recovery method is generally favored."); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) ("percentage-of-recovery method preferred in common fund cases").[10]

Courts have long recognized that "'a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to

[10] *See also linerboard v. Cigna Corp.*, No. 2:16-cv-03967-NIQA, 2019 U.S. Dist. LEXIS 146899, at *30-31 (E.D. Pa. Aug. 29, 2019) ("The percentage-of-recovery approach is more appropriate where, as here, there is a common fund.") (*citing In re AT&T Corp. Sec. Litig.*, 455 F.3d 160 164 (3d Cir. 2006) and *Harshbarger v. Penn Mut Life Ins. Co.*, 2017 U.S. Dist. LEXIS 209642, 2017 WL 6525783, at *2 (E.D. Pa. Dec. 20, 2017);.*In re Domestic Drywall Antitrust Litigation ("Drywall")*, MDL No. 2437, 2018 WL 3439454 at *2 (E.D. Pa. July 17, 2018) quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) ("The percentage-of-recovery method is favored in class action settlements involving common fund, allowing the court to award attorneys' fees 'in a manner that rewards counsel for success and penalizes it for failure.'" *Report of Third Circuit Task Force: Court Awarded Attorney Fees*, 108 F.R.D. 237, 255-56 (1985); *Report of Third Circuit Task Force: Selection of Class Counsel*, 208 F.R.D. 340, 355 (2002) ("A percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel."); *Castro v. Sanofi Pasteur Inc.*, Civ. No. 11-7178, 2017 WL 4776626, at *7 (D. N.J. Oct. 23, 2017) ("In common fund cases such as this one, attorneys' fees are typically awarded through the percentage-of-recovery method."); *In re Viropharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *15 (E.D. Pa. Jan. 25, 2016) ("The percentage-of-recovery method is 'generally favored' in cases involving a settlement that creates a common fund.") quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 330 (3d Cir. 2011); *In re Linerboard Antitrust Litig.*, MDL 1261, 2004 WL 1221350, at *3 (E.D. Pa. June 2, 2004) ("the percentage of recovery method is the proper one to calculate attorneys' fees."); *Manual for Complex Litigation*, § 14.121 (4th ed. 2004) (reporting that "the vast majority of courts of appeals now permit or direct district courts to use the percentage method in common-fund cases").

recover from the fund the costs of his litigation, including attorneys' fees.'" *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 187 (3d Cir. 2005) (quoting *In re graphite Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 n.39 (3d Cir. 1995)). The purpose of compensating counsel using the percentage method is to ensure that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). Furthermore, the Supreme Court has consistently endorsed awarding attorneys' fees using the percentage-of-the-fund method. *See, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).[11] Thus, the percentage-of-the-fund method is properly applied here.

B. <u>A Fee Award of One-Third of the Combined Settlement Fund is Fair and Reasonable.</u>

In determining what constitutes a reasonable percentage fee award, a district court must consider the ten factors identified by the Third Circuit in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000), and *Prudential*, 148 F.3d at 283. As the Third Circuit explained in *Diet Drugs*, the *Gunter/Prudential* factors which guide this Court's required "robust assessment" are:

> (1) the size of the fund created and the number of beneficiaries;
>
> (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;
>
> (3) the skill and efficiency of the attorneys involved;
>
> (4) the complexity and duration of the litigation;
>
> (5) the risk of nonpayment;
>
> (6) the amount of time devoted to the case by plaintiffs' counsel;
>
> (7) the awards in similar cases;

[11] *See also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-67 (1939).

> (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations;
>
> (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and
>
> (10) any innovative terms of settlement.

582 F.3d at 541 (internal citations omitted). Applying these factors clearly demonstrates that Class Counsel's request for one-third of the Class Settlement Fund as a fee award is reasonable.

1. **An award of one-third is reasonable based on the size of the Class Settlement Fund and the number of entities benefitted.**

The total recovery achieved in this case— $65,877,600—is substantial, particularly in light of the complexity, duration, and expense of ongoing litigation and the thousands of health plans and consumer class members who will participate. A request for a one-third fee is common and courts have approved such awards in analogous cases, *King Drug Co.*, 2015 WL 12843830, at *6 (Court acknowledging that courts in numerous Hatch-Waxman cases alleging delayed generic entry "have routinely granted a fee award of 33 1/3 %.").[12] Considering that the establishment of liability and damages at trial and securing recovery for those class members would have been risky and uncertain, this factor weighs in favor of the requested fee award.

2. **There are no objections to date to the proposed awards**

The Long Form Notice posted on www.provigilsettlement.com advised class members that Class Counsel would apply for an award of attorneys' fees of "up to one-third of the total amount

[12] *See: Med. Mut. of Ohio v. Smithkline Beecham Corp. (In re Flonase Antitrust Litig. This Document Relates To: Indirect Purchaser Actions)* (hereinafter *"Flonase Indirect Purchasers"*), 291 F.R.D. 93, 104 (E.D. Pa. 2013) (noting that "[a] one-third fee award is standard in complex antitrust cases of this kind" and "'is consistent with awards in other complex antitrust actions involving the pharmaceutical industry.'") (quoting *In re Remeron Direct Purchaser Antitrust Litig.* (*"Remeron"*), No. 03-0085, 2005 WL 3008808, at *16 (D. N.J. Nov. 9, 2005) and collecting cases). *See also* § III.B.7 & ns.12-13, *infra* (citing numerous cases awarding one-third fee).

of the Settlement Funds plus any accrued interest, plus reimbursement for the costs and expenses they advanced in litigating the case," and incentive awards for the Class Representatives in the amount $15,000 for the Consumer Representative and $50,000 each for the four TPP Representatives. *See* Miller Decl., Exhibits C and D at ¶¶ 8, 19, 20. The Long Form Notice also advised class members that they could object to Class Counsel's application, the Settlements, and incentive awards and provided instructions on how to do so. *See id.* at ¶¶ 16-17. To date no objections have been received. However, the deadline for objections is January 15, 2020, after the filing of the motion for such awards with the supporting memorandum of law and exhibits. Class Counsel will address any objections to the Settlements including any objections to the awards sought herein, in their supplemental filings due on February 14, 2020.

3. Class Counsel are skilled and efficient litigators.

As this Court recognized by appointing them as Co-Lead Counsel for the Settlement Classes, Class Counsel are highly experienced in litigating complex class actions and antitrust cases. *See* August 8, 2019 Order at ¶ 9. Class Counsel combed through millions of pages of documents and took scores of depositions to build the necessary evidentiary record in this case, fully briefed and argued Plaintiffs' motion for class certification, rectified the concerns the Court had in denying class certification by offering new evidence, and successfully defended against summary judgment motions related to the Supreme Court's decision on pay-for-delay agreements in *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013). Indeed, "[t]he result achieved is the clearest reflection of petitioners' skill and expertise." *Linerboard*, 2004 WL 1221350, at *5.[13]

[13] *See also King Drug Co.*, 2015 WL 12843830, at * 5 ("The Settlement here is directly attributable to the skill and efforts of Class Counsel, who are highly experienced in prosecuting these types of cases."); *In re OSB Antitrust Litig.*, No. 2:06-cv-00826-PD, Order, Doc. 947 at *5 ("'[T]he most significant factor [in evaluating claims for counsel fees] . . . is the quality of representation, as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and

Here, the total recovery achieved over a span of thirteen years – which encompasses not only the $65,877,600 achieved in the Class Settlements but also the $77,000,000 achieved by the SHPs in settlement largely as a result of the work of Class Counsel– is substantial. This result was achieved despite a vigorous defense by Defendants, which were represented by skilled counsel at some of the leading defense law firms in the United States. The size of these settlements further evidences the skill and efficiency of Class Counsel. Accordingly, this factor weighs in favor of the requested fee award.

4. The complexity and duration of the litigation.

"[C]omplex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel" are the "factors which increase the complexity of class litigation." *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 741 (3d Cir. 2001).

First, this case involved extensive efforts by Class Counsel (as well as this Court) over a period of thirteen years, as reflected in the over 590 entries in Docket No. 2:06-cv-1833. The litigation could continue for substantial additional time if it were to go to trial.[14]

Second, Class Counsel was required to navigate through the developing legal issue of reverse-payment settlements in the wake of the Supreme Court decision in *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013), and was successful in thwarting Defendants' attempts to have the case dismissed on summary judgment based on same.

---

professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'") (quoting *In re Ikon Office Solutions, Inc.* ("*Ikon*"), 194 F.R.D. 166, 194 (E.D. Pa. 2000)); *demmick v. Whitman Medical Corp.*, 197 F.R.D. 136 at 149 (E.D. Pa. 2000) ("[t]he single clearest factor reflecting the quality of class counsel's services to the class are the results obtained.").

[14] *See Linerboard*, 2004 WL 1221350, at *10 (noting "there is authority for approving a 30 percent fee in litigation that concluded much earlier in the proceeding.").

Third, as to the complexity of the case, "'[a]n antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome.'" *Linerboard*, 2004 WL 1221350, at *10 (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)). This case is no exception. Indeed, during the course of the action, Plaintiffs were faced with several rounds of intense briefing, including motions for summary judgment and a hard-fought class certification proceeding. Moreover, the parties completed merits and class certification discovery, which included the production and review of approximately 5 million pages of documents produced by Defendants, taking over 180 depositions, and defending the depositions of all five Plaintiffs, submitting highly qualified reports from eight separate experts and participating in extensive motion practice and lengthy court hearings concerning discovery, and related ancillary proceedings.

Fourth, Plaintiffs' case was delayed several times, first for the Court to conduct the Apotex patent infringement trial, and then to await the Supreme Court's ruling in *Actavis*. UHC's attempts to avoid the settlement with Cephalon added an additional two years of delay.

Fifth, Plaintiffs also had to overcome this Court's decision to deny class certification. That led to a Petition for Appeal under Rule 23(f) and substantial additional briefing and evidence in support of the Settlement Classes. Despite being denied a litigation class, Class Counsel still obtained class settlements of more than $65 million.

As this Court has recognized, the complexity and duration of the Provigil litigation weighs strongly in favor of finding the fee request reasonable. *See King Drug Co.*, 2015 WL 12843830, at *2 ("Every issue in this highly complex antitrust case has been vigorously litigated for almost a decade. The litigation between the Direct Purchaser Class and the Cephalon Defendants is in an advanced stage, with all discovery having been completed and the parties having dispositive

motion briefing, and was poised for trial at the time of the Settlement. Class Counsel thus had an adequate appreciation of the merits of the case.").

5. Class Counsel faced a risk of nonpayment.

Class Counsel undertook this case on a wholly contingent basis and ran a substantial risk of no recovery whatsoever, and "did not benefit from the fruits of a prior government investigation." *See Linerboard*, 2004 WL 1221350, at *11 (lack of prior government investigation or prosecution increased risk of nonpayment). Class Counsel have devoted enormous time and resources to the vigorous litigation of this case for more than thirteen years, while deferring all compensation for their time during that lengthy period (and risking receipt of little or no compensation if the case was not litigated to a successful conclusion). *See King Drug Co.*, 2015 WL 12843830, at * 3 ("Class Counsel faced significant risks in taking their claims against the Cephalon Defendants to trial, including the risk that a jury might not find in their favor on any of a number of issues and that any jury verdict could result in a lengthy post-trial motion and appellate process.").[15] Class Counsel advanced over $2.5 million in unreimbursed expenses to prosecute the litigation,[16] which would not have been reimbursed absent a successful result. *See In re Rent-Way Sec. Litig.* ("*Rent-Way*"), 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money. . . . Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."). Accordingly, this factor weighs in favor of the requested fee award.

---

[15] *See also Flonase Indirect Purchasers*, 291 F.R.D. at 104 ("as a contingent fee case, counsel faced a risk of nonpayment in the event of an unsuccessful trial. Throughout this lengthy litigation, Class Counsel have not received any payment. This factor supports approval of the requested fee."); *Hall v. Best Buy Co.*, 274 F.R.D. 154, 173 (E.D. Pa. 2011) ("while this case has been pending, Class Counsel have not received any payment, and, by proceeding on a contingent-fee basis, ran substantial risk of nonpayment….").

[16] *See* Meltzer Decl. at ¶ 52 and Exhibits 6, 6, 9 and 10

6. Class Counsel devoted over 41,000 hours to prosecuting this action.

Class Counsel devoted substantial time and effort to prosecuting the End-Payor Plaintiffs' antitrust claims during the litigation, and even beforehand in their investigation that led to the initial complaints. As set forth in the declaration of Joseph H. Meltzer submitted with this application, through November 30, 2019 Class Counsel devoted 41,000 hours to prosecuting this case, resulting in a total lodestar of $ $22,823,274. *See* Meltzer Decl. at ¶¶ 46-52 and Exhibit 6, 7, 8 and 10. Class Counsel could have spent those attorney hours litigating other matters, which counsels in favor of awarding the requested fees. *See, e.g.*, *King Drug Co.*, 2015 WL 12843830, at * 5 ("In prosecuting this action, Class Counsel have expended more than 59,000 hours of uncompensated time, and incurred substantial out of pocket expenses, with no guarantee of recovery. Class Counsel's hours were reasonably expended in this highly complex case that was vigorously litigated for almost a decade, and their time was expended at significant risk of non-payment."); *Drywall*, 2018 WL 3439454 at *20 ("A significant factor in awarding the full one-third requested is the delay in payment. Class counsel have labored for approximately six years, including pre-suit investigation, without any payment."); *In re Flonase Antitrust Litigation*, (hereinafter *"Flonase Direct Purchasers")*, 951 F. Supp. 2d 739, 748 (E.D. Pa. 2013) (finding factor weighed in favor of 33% fee award where class counsel devoted more than 40,000 combined hours to prosecuting the antitrust class action); and *Lazy Oil Co. v. Wotco Corp.*, 95 F. Supp. 2d 290, 323 (W.D. Pa. 1997).

The substantial amount of time and money invested by Class Counsel in this litigation fully justifies the fees being sought.

7. One-third of the Class Settlement Fund is a typical and reasonable fee award for cases like this one.

The law is well-established that a one-third fee is typical, reasonable, and justified by extensive authority from courts in this District and Circuit. *See, e.g.*, *Castro*, 2017 WL 4776626, at *9 ("The one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method; the Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund…Thus, the requested fee in this matter [of one-third of the settlement fund] is within the normal range." (internal citation omitted)); *Drywall*, 2018 WL 3439454, at *20 (awarding "the requested one-third of the $190,059,056 Combined Settlement Fund as attorneys' fees…"); *In re K-Dur Antitrust Litig.*, No. 01-cv-1652, ECF 1058 (D.N.J. Oct. 5, 2017) (awarding 33⅓% of settlement). *See also Fasteners*, 2014 WL 296954, at *7 ("Counsel's request for one third of the settlement fund is consistent with other direct purchaser antitrust actions.") (internal citation omitted); *Flonase Direct Purchasers*, 951 F. Supp. 2d at 746, 748 (approving requested one-third of $150 million settlement fund (plus interest), and noting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees"); *Flonase Indirect Purchasers*, 291 F.R.D. at 104 ("A one-third fee award is standard in complex antitrust cases of this kind."); *Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907, at *2 (E.D. Pa. July 14, 2014) ("fee awards of one-third of the settlement amount are commonly awarded in this Circuit"); *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431, ECF 485 (E.D. Pa. Nov. 7, 2012) (awarding fee of 33⅓% of settlement); *In re Auto. Refinishing Paint Antitrust Litig.*, No. 1426, 2008 WL 63269, at *1, 8 (E.D. Pa. Jan. 3, 2008) (same); *OSB*, No. 2:06-cv-00826-PD, Order, Doc. 947, at *3 (finding fee award of one-third of $120 million in settlement funds "reasonable and well-earned"); *Bradburn Parent Teacher Store, Inc. v. 3M* ("*Bradburn*"), 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (approving a percentage

of recovery of 35%, plus reimbursement of expenses).[17] Moreover, a one-third fee award is consistent with awards nationwide.[18] A fee that fully compensates counsel for their time and the inherent risk posed by antitrust litigation of this magnitude and complexity is also strongly supported by the policies favoring private enforcement of the antitrust laws.[19] Accordingly, this factor supports the requested fee.

---

[17] *See also Steele v. Welch*, No. 03-6596, 2005 WL 3801469, at *2 (E.D. Pa. May 20, 2005) (finding requested fee of 33%, plus expenses, to be reasonable) (Baylson, J.); *Mylan Pharms., Inc. v. Warner Chilcott Public Ltd., Co.*, No. 12-3824, 2014 WL 12778314, at *7 (E.D. Pa. Sept. 15, 2014) ("*Doryx*") (awarding 33⅓% of settlement); *In re Hypodermic Prods. Antitrust Litig.*, No. 05-1602, Doc. 461 (D.N.J. Apr. 10, 2013) (same); *Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc.*, No. 1:07-cv-00142, Doc. 243 (D. Del. May 31, 2012) ("*Miralax*") (same); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52, Doc. 193 (D. Del. Feb. 21, 2012) (same); *In re Corel Corp. Sec. Litig.* ("*Corel*"), 293 F. Supp. 2d 484, 497-98 (E.D. Pa. 2003) (awarding 331/3% of settlement fund and noting, "[t]his District has observed that fee awards frequently range between nineteen and forty-five percent of the common fund."); *In re Ravisent Techs., Inc. Sec. Litig.*, No. Civ.A.00-CV-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005; and *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002) ("Scores of cases exist where fees were awarded in the one-third to one-half of the settlement fund.") (citations omitted).

[18] *See, e.g., In re U.S. Foodservice, Inc. Pricing Litig.*, No. 07-md-01894, Doc. 521 (D. Conn. Dec. 9, 2014) (attorneys awarded one-third of a $297 million settlement fund); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) (attorneys awarded 33% of a $163.9 million settlement fund); *Shaw v. Interthinx, Inc.*, No. 13–cv–01229–REB–NYW, 2015 WL 1867861 at *6 (D. Colorado Apr. 22, 2015) ("The customary fee awarded to class counsel in a common fund settlement is approximately one-third of the total economic benefit bestowed on the class.") (Internal quotations and citation omitted); *Menkes v. Stolt-Nielsen S.A.*, No. 3:03CV00409(DJS), 2011 WL 13234815, at *4-5 (D. Conn. Jan. 25, 2011); *In re Universal Service Fund Telephone Billing Practices Litigation*, No. 02–MD–1468–JWL, 2011 WL 1808038 at *2 (D. Kan. May 12, 2011); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit" and collecting cases); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (33.33% fee award); and *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2002 WL 31720381, at *1 (S.D.N.Y. Dec. 4, 2002).

[19] *See, e.g., In re Southeastern Milk Antitrust Litig.*, No. 2:07-CV 208, 2013 WL 2155387, at *5 (E.D. Tenn. May 17, 2013) ("[F]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors. Simply put, anti-competitive conduct such as that alleged in this case

8. Class Counsel prosecuted the litigation cooperatively with the Federal Trade Commission and other Plaintiffs.

Courts in this Circuit are instructed to consider whether counsel benefitted from "the efforts of other groups, such as government agencies conducting investigations." *AT&T*, 455 F.3d at 165 (citation omitted). As in *In re Diet Drugs Prods. Liab. Litig.*, "this case is quite different from the typical antitrust or securities litigation" in which the *Gunter/Prudential* factors are often considered, "where government prosecutions frequently lay the groundwork for private litigation." 553 F. Supp. 2d 442, 481 (E.D. Pa. 2008). Here, Class Counsel filed suit almost two years before the Federal Trade Commission ("FTC"). *See FTC v. Cephalon, Inc.* Complaint, No. 08-cv-2141 (February 13, 2008). Indeed, Class Counsel conducted their own comprehensive investigation of the pharmaceutical industry generally and the Provigil and/or modafinil segment specifically, and developed their own theory of liability and damages. Unquestionably, Class Counsel worked with Counsel for other Plaintiffs, including the direct purchasers, Apotex and the FTC, to share the burdens of discovery and the cost of expert witnesses. Class Counsel's cooperative sharing of work and expenses should not be used against Class Counsel in considering their fee.

9. The requested fee is consistent with the percentage fee that would have been negotiated in a private contingent fee arrangement.

"What the market would pay" for fees in a similar litigation is "significant because…the goal of the fee setting process it [sic] to 'determine what the lawyer would receive if he were selling his services in the market rather than being paid by Court Order.'" *Linerboard*, 2004 WL 1221350, at *15 (citing *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992)). There is widespread consensus that "a 33 1/3% contingent fee is [what is] commonly negotiated in the

would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation.").

private market." *OSB*, No. 2:06-cv-00826-PD, Order, Doc. 947, at *7 (citing *Linerboard*, 2004 WL 1221l350, at *15); *see also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004), at 35 ("Substantial empirical evidence indicates that a one-third fee is a common benchmark in private contingency fee cases.").[20] Indeed, "a one-third contingency fee arrangement is not out of the ordinary in a complex [antitrust] case like this one." *Fasteners*, 2014 WL 296954, at *7.[21] Therefore, this factor weighs in favor of approval of the fee request.

10. Innovative Terms of Settlement.

Class Counsel has been able to maximize the reach of the notice of the Settlements by including in its Notice Program direct mail to those individuals identified in the State Attorney General Settlements. Furthermore, Class Counsel also subpoenaed records of purchases of Provigil and/or modafinil from large pharmacies and pharmaceutical benefit managers ("PBMs") in order to identify as many potential class members as possible. *See* Meltzer Decl. at ¶ 5 and Miller Decl. at ¶¶ 8-12. Class Counsel is also coordinating notice (and sharing notice costs) with the California Attorney General, who is providing notice of a parallel settlement to California consumers.

---

[20] *Accord Remeron*, 2005 WL 3008808, at *16 ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *Montague v. Dixie Nat. Life Ins. Co.*, No. 3:09-00687-JFA, 2011 WL 3626541, at *2 & *3 (D.S.C. Aug. 17, 2011) ("In non-class contingency fee litigation, a 30% to 40% contingency fee is typical.").

[21] *See also Doryx*, 2014 WL 12778314 at *7 ("[A] one-third contingency is standard in individual litigation; in antitrust litigation, a higher contingency would be reasonable, given the complexities and risks involved. In these circumstances, the requested 33⅓% fee award is fair and reasonable."); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 464 n.18 (E.D. Pa. 2008) (citing *Bradburn*, 513 F. Supp. 2d at 340 (finding a fee of 30% to be consistent with private contingent fee arrangements)); *Ikon*, 194 F.R.D. at 194 ("[I]n private contingency fee cases … plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.").

Nevertheless, even absent any innovative terms of settlement, this factor would not detract from a decision to award the requested fee. *See Drywall*, 2018 WL 3439454 at *19 ("the Court is not aware of any innovative terms in this settlement agreement. However, class counsel have had extensive experience in other class settlements in antitrust cases and bring that experience to this case. Also, the Court is assured that the settlement process will be moving forward, including the distribution of the settlement funds to class members, will be handled [sic] efficiently and expertly."); *In re Merck & Co. Vytorin ERISA Litig.*, Civ. No. 08-CV-285, 2010 WL 547613, at *12 (D.N.J. Feb. 9, 2010) (finding factor neutral when no innovative terms are highlighted).

* *

In sum, at least eight of the ten *Prudential/Gunter* factors support Class Counsel's request for one-third of the Combined Settlement Fund as a fee award, and none of the *Prudential*/*Gunter* factors counsels against that request. *See King Drug Co.*, 2015 WL 12843830, at *5 citing *Gunter* and *Prudential*, *supra* ("The Court has fully considered the *Gunter* factors and the *Prudential* factors and finds that, considered together, the factors overwhelmingly favor granting Class Counsel's requested attorneys' fee, reimbursement of expenses and incentive awards for the class representatives.").

C. A Cross-Check of Class Counsel's Lodestar Confirms the Reasonableness of the Requested fee.

Courts in the Third Circuit often examine the lodestar calculation as a cross-check on the percentage fee award. *See*, *e.g.*, *Linerboard*, 2004 WL 1221350, at *4. The cross-check is not designed to be a "full-blown lodestar inquiry," but rather an estimation of the value of counsel's investment in the case. *Report of Third Circuit Task Force, Selection of Class Counsel*, 208 F.R.D. at 422-23 (noting that "[t]he lodestar remains difficult and burdensome to apply"); *Rite Aid*, 396 F.3d at 307 n.17 ("[T]he lodestar cross-check does not trump the primary reliance on the

percentage of common fund method."). The Third Circuit recommends the use of the lodestar cross-check "as a means of assessing whether the percentage-of-recovery award is too high or too low," not as a substitute for the percentage-of-the-fund method. *Diet Drugs*, 582 F.3d at 545 n.42 (citing *Rite Aid*, 396 F.3d at 306-07).

The cross-check analysis is a two-step process. First, the lodestar is determined by multiplying the number of hours reasonably expended by the reasonable rates requested by the attorneys.[22] Second, the court determines the multiplier required to match the lodestar to the percentage-of-the-fund request made by counsel, and determines whether the multiplier falls within the accepted range for such a case. Here, the lodestar cross-check confirms that the one-third fee request is eminently reasonable.

1. Class Counsel's lodestar is reasonable.

As of November 30, 2019, Class Counsel had spent 41,000 hours working on this case on behalf of the class.[23] As explained in the Declaration of Joseph Meltzer, the stated hours were incurred by, among other things, investigating the claims against Defendants; preparing the initial complaints and the Consolidated Amended Class Action Complaint; conducting necessary legal research; conducting extensive discovery; briefing Defendants' multiple motions for summary judgment; briefing and presenting Plaintiffs' motion for class certification at oral argument; working with experts submitting Rule 26(a)(2) disclosures; beginning trial preparation; engaging in a mediation and extensive negotiations of the three settlements; and preparing the necessary agreements and pleadings related to the three settlements.[24] Given this effort, the complexity of

[22] *See Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th Cir. 2000).
[23] *See* Meltzer Decl. at ¶ 50 and Exhibits 6,7,8 and 10.
[24] "The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid*, 396 F.3d at 306-307. *See also Prudential*, 148 F.3d at

the legal issues involved, and the intensity of the defense mounted by skillfully-represented Defendants, the hours incurred by Class Counsel are reasonable.

Class Counsel anticipate expending additional hours on this litigation to monitor the settlement and claims process and bring the litigation to a close. Class Counsel will not seek additional compensation for these additional hours, however the Court should consider them in evaluating the reasonableness of the fee request.

The current hourly rates charged by Class Counsel are reasonable based on each person's position, experience level, and location and the fact that much of the attorney time expended was over a decade ago. Taking into account the several factors discussed above, including the result achieved, the complexity and risk of the litigation, and the skill and experience of counsel, Class Counsel's rates are reasonable and appropriate. These reasonable rates resulted in a total lodestar of $22,823,274.00.

2. The negative multiplier mitigates in favor of the requested fee.

Courts may increase or decrease the lodestar amount by applying a multiplier. "Consideration of multipliers used in comparable cases may be appropriate" to gauge the reasonableness of a percentage fee award. *Rite Aid*, 396 F.3d at 307 n.17. Multipliers of up to four are frequently awarded in common fund cases.[25] Here, the multiplier, at .96, produced by cross-

341 (finding no abuse of discretion where district court "reli[ed] on time summaries, rather than detailed time records"). Of course, Class Counsel will make detailed billing records available to the Court *in camera* upon request.

[25] *See, e.g.*, *Steele*, 2005 WL 3801469, at *2 (finding multiplier of two reasonable, "given the complexity of the case, the risk of undertaking a case of this nature, and the delay in payment following the performance of services.") (Baylson, J.). *See also Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (4.77 multiplier); *c* (3.15 multiplier); *Ravisent*, 2005 WL 906361, at *12 (3.1 multiplier); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005) (2.83 multiplier); *Linerboard*, 2004 WL 1221350, at *16 (2.66 multiplier); *Rent-Way*, 305 F. Supp. 2d at 517 (2.36 multiplier).

checking the requested one-third fee award against the reported lodestar of $ $22,823,274.00 (based upon current hourly rates), means Counsel would receive slightly less than their total lodestar, and is thus well ***below*** the accepted range in the Third Circuit.[26] The settlements achieved here resolved this litigation before trial and any other steps in the proceedings that would have generated a substantially larger lodestar than presented at this point. Accordingly, a lodestar cross-check further evidences the reasonableness of the requested fee.

IV. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR REASONABLE LITIGATION EXPENSES

Plaintiffs also request reimbursement to Class Counsel for the reasonable and necessary expenses they advanced to prosecute this litigation since its inception in May 2006. "Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." *Nichols*, 2005 WL 950616, at *24 (quoting *In re Aetna Inc. Securities Litig.*, No. CIV. A. MDL 1219, 2001 WL 20928 at *13 (E.D. Pa. Jan. 4, 2001)); *see also Rent-Way*, 305 F. Supp. 2d at 519 ("There is no doubt 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."); *Corel*, 293 F. Supp. 2d at 498 (same) (quoting *Ikon*, 194 F.R.D. at 192).[27]

[26] *See*, *e.g.*, *Diet Drugs*, 582 F.3d at 545 n.42 (finding that a multiplier, in a lodestar crosscheck, in the range of "2.6, 3.4, or somewhere in that neighborhood, [] is not problematically high. It is either below or near the average multiplier…."); *In re Cendant Corp. PRIDES Litigation*, 243 F.3d at 722, 735, 742 ("strongly suggest[ing]" a multiplier of 3 as the ceiling for an award in a simple case where "no risks pertaining to liability or collection were pertinent"); *Prudential*, 148 F.3d at 341 ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.") (internal quotation and citation omitted).

[27] *See also Meijer*, 2006 WL 2382718 at *18 (granting plaintiffs' motion for approval of expenses "incurred in connection with the prosecution and settlement of the litigation, and include costs related to the following: travel; computerized legal research; copying; postage; telephone and fax; transcripts; retention of a mediator; the document database; expert services; and claims administration.").

Since the inception of the case, Class Counsel have incurred $2,663,468.00 in unreimbursed expenses The categories of expenses for which reimbursement is now sought are the type of expenses routinely charged to hourly clients, such as expert costs, document repository rent, document management, travel, photocopying, overnight mail, deposition services and transcripts, legal research, and jury research costs, among others. *See* Meltzer Decl. at ¶ 52.

V. CLASS REPRESENTATIVES SHOULD BE AWARDED THE REQUESTED INCENTIVE AWARDS.

Plaintiffs also request approval for a $15,000 incentive award for Consumer Plaintiff Shirley Panebianco, and a $50,000 incentive award for each of the TPP Plaintiffs, Vista Healthplan, Inc. (n/k/a Coventry Health Care of Florida, Inc.), District Council 37 Health & Security Plan, Pennsylvania Employees Benefit Trust Fund, and Pennsylvania Turnpike Commission, to be paid from the Class Settlement Fund. Such awards are common in class actions resulting in a common fund for distribution to the class, because the class representatives "have conferred benefits on all other class members and they deserve to be compensated accordingly." *In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004), *amended*, 2004 WL 1240775 (E.D. Pa. June 4, 2004). As the Third Circuit has noted, such awards exist "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation." *Sullivan*, 667 F.3d at 333 n.65 (citation omitted). They are also "particularly appropriate" where, as in this case, "there was no preceding governmental action alleging a conspiracy and taking a high-profile role threatened to jeopardize class representatives' relationships with their suppliers." *Linerboard*, 2004 WL 1221350, at *18. Factors that courts consider in determining incentive awards include "the risk to the plaintiff in commencing litigation, both financially and otherwise; the notoriety and/or personal difficulties

encountered by the representative plaintiff; the extent of the plaintiff's personal involvement in the lawsuit in terms of discovery responsibilities and/or testimony at depositions or trial; the duration of the litigation; and the plaintiff's personal benefit (or lack thereof) purely in her capacity as a member of the class." *McGee v. Ann's Choice, Inc.*, No. 12-2664, 2014 WL 2514582, at *3 (E.D. Pa. June 4, 2014) (citing *In re Plastic Tableware Antitrust Litig.*, No. 94-3564, 1995 WL 723175, at *2 (E.D. Pa. Dec. 4, 1995)).

Here, each of the five named plaintiffs spent a significant amount of time assisting the litigation of this case. Each Plaintiff responded to written discovery and produced documents relating to its claims and sat for a deposition by defense counsel. Each Plaintiff was also actively involved in monitoring the litigation, by reviewing and approving the Consolidated Amended Class Action Complaint and other substantive pleadings and by receiving updates from Class Counsel. Each Plaintiff also participated in the multi-day mediation with Magistrate Judge Strawbridge. Each Plaintiff also reviewed and approved the settlements.[28] The Plaintiffs took on this risk and responsibility, on behalf of the entire class, even though their claims were not among the largest in the class.

The requested incentive awards are also in accord with amounts approved in other class action litigations in this Circuit and around the country. *See, e.g., King Drug Co.*, 2015 WL 12843830, at *6 (approving $100,000 incentive award for four of the class representatives, and $50,000 for the other two class representatives."); *Drywall*, 2018 WL 3439454, at *20 (awarding "incentive awards to the four named Plaintiffs in the amount of $50,000 each as in line with other cases."); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL

[28] *See* Meltzer Decl. at ¶ 53 and Plaintiff Declarations, Exhibits 13-16 to the Declaration of Joseph Meltzer in Support of Preliminary Approval, ECF No. 586.

12738907, at *3-4 (E.D. Pa. July 14, 2014) (awarding $150,000 to one class representative and $75,000 each to two others); *Demmick v. Cellco Partnership*, C.A. No. 06-2163, 2015 WL 13643682, at *19 (D.N.J. May 1, 2015) (approving $15,000 incentive award to each plaintiff); *Flonase Direct Purchasers*, 951 F. Supp.2d at 757 (awarding one class representative $50,000 from settlement fund as an incentive award); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (awarding $75,000 to class representative); *In re Graphite Electrodes Antitrust Litig.*, No. 2:10-md-01244-NS, ECF 527 (E.D. Pa. Sep. 8, 2003) (awarding $80,000 each to three class representative); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 480 (D.N.J. 2008) (awarding $60,000 to each class representative); *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-04062, 2017 WL 2423161, at *14-16 (N.D. Cal. June 5, 2017) (awarding each of three class representatives $100,000 total for all settlements); and *In re High-Tech Employee Antitrust Litig.*, No. 11–CV–02509, 2015 WL 5158730, at *16-18 (N.D. Cal. Sept. 2, 2015) (awarding $100,000 to each of four original class representatives).

VI. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court: (1) award Class Counsel one-third of the Class Settlement Fund, as attorneys' fees; (2) order reimbursement of litigation expenses incurred by Class Counsel in the amount of $2,663,468.00; and (3) award Consumer Class Representative Shirley Panebianco an incentive award of $15,000, and each TPP Class Representative an incentive award of $50,000, to be paid from the Class Settlement Fund.

Dated: December 16, 2019

Respectfully submitted,

s/ Joseph H. Meltzer
Kessler Topaz Meltzer & Check, LLP
Joseph H. Meltzer
Terence S. Ziegler

280 King of Prussia Road
Radnor, PA 19087
Tel.: (610) 667-7706

Spector Roseman & Kodroff, P.C.
John A. Macoretta
Jeffrey L. Kodroff
2001 Market Street- Suite 3420
Philadelphia, PA 19103
Tel.: (215) 496-0300

Criden & Love, P.A.
Kevin B. Love
7301 SW 57th Court, Suite 515
South Miami, FL 33143
Tel.: (305) 357-9000

Counsel for End-Payor Plaintiffs