Jonathan D. Clemente
CLEMENTE MUELLER, P.A.
222 Ridgedale Avenue
Cedar Knolls, NJ 07927
(973) 455-8008
Liaison Counsel for Direct Purchaser Class Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re Neurontin Antitrust Litigation	**Master File No. 02-1390**
THIS DOCUMENT RELATES TO:	
LOUISIANA WHOLESALE DRUG COMPANY, INC., MEIJER, INC. and MEIJER DISTRIBUTION, INC., on behalf of themselves and all others similarly situated,	**Civil Action No. 02-1830** **Civil Action No. 02-2731**
Plaintiffs,	
v.	
PFIZER, INC. and WARNER-LAMBERT CO.,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

I. INTRODUCTION.

Louisiana Wholesale Drug Company, Inc. ("LWD"), Meijer, Inc., and Meijer Distribution, Inc. (together, "Meijer", and, with LWD, collectively, "Plaintiffs"),[1] on behalf of the previously-certified Class,[2] respectfully submit this Memorandum of Law in Support of Class Plaintiffs' Motion for Final Approval of Settlement pursuant to FED. R. CIV. P. 23(e).

Plaintiffs and Defendants Pfizer Inc. and Warner-Lambert Co. (together, "Defendants" or "Pfizer") have agreed to settle this class action (this "Action")[3]

---

[1] This Court appointed LWD and Meijer as representatives of the Class (the "Class Representatives"). Doc. No. 412 at ¶ 6.

[2] On January 25, 2011, this Court certified a class (the "Class") consisting of:

> All persons or entities in the United States that purchased Neurontin from Pfizer at any time during the period of December 11, 2002 through August 31, 2008 and who have purchased generic gabapentin. Excluded from the Class are Defendants and each of their respective parents, employees, subsidiaries, affiliates, and franchisees, and all government entities.

Doc. No. 412 at ¶ 4. Also excluded from the Class are CVS Pharmacy Inc., Caremark, L.L.C., Rite Aid Corporation, Rite Aid HDQTRS Corp., Walgreen Co., American Sales Co, Inc., HEB Grocery Co. LP, Safeway Inc., SuperValu Inc., and The Kroger Co., in their own right as direct purchasers of Neurontin from Pfizer and as assignees limited to their purchases of Neurontin from Class members.

[3] This Action consolidated the cases *Louisiana Wholesale Drug Company, Inc., et al. v. Pfizer, Inc. and Warner-Lambert*, No. 2:02-cv-01830-FSH (D.N.J.) and *Meijer, Inc., et al. v. Pfizer, Inc. and Warner-Lambert*, No. 2:02-cv-02731 (D.N.J.).

for a cash payment by Defendants of $190 million, plus interest, to Plaintiffs and members of the Class in exchange for dismissal of this litigation, with prejudice, and certain releases (the "Settlement"). The parties have set forth the terms of the Settlement in an agreement (the "Settlement Agreement").[4] Plaintiffs now seek final approval of the Settlement from the Court.[5]

As detailed below, and in the Joint Declaration of Co-Lead Counsel, Bruce E. Gerstein and Richard J. Kilsheimer (the "Joint Declaration" or "Joint Decl.") submitted herewith, the Settlement is an outstanding recovery for the Class and should be approved by this Court as "fair, reasonable, and adequate." *See* FED. R. CIV. P. 23(e)(2); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (articulating nine-factor test for approval of class settlements); *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998) (providing additional, non-exclusive helpful factors to be considered in granting approval of class settlements). Though a detailed description of this Action is set

---

[4] The Settlement Agreement was previously provided to the Court as "Exhibit 1" to the Declaration of Richard J. Kilsheimer, dated April 21, 2014. Doc. No. 104-2.

[5] Pursuant to the terms of the Settlement Agreement, on June 2, 2014, Defendants deposited $190,416,438.36, representing the agreed-upon $190 million plus 1% per annum interest that had accrued since March 14, 2014 (the date that the parties first orally agreed to the terms of the Settlement), into an escrow account held in trust by UBS AG that is earning interest for the benefit of the Class (the "Settlement Fund"). *See* Joint Decl. at ¶ 91.

forth in the Joint Declaration, certain of this Action's important and unique characteristics bear mention here at the outset.

First and foremost, this case's unique Class – which consists of approximately 45 national and regional pharmaceutical resellers, all of whom are highly sophisticated and knowledgeable – supports the Settlement. As of this writing, no Class member has filed an objection. More significantly, the core of the Class – a group of sophisticated business entities that made approximately 93% of all Class purchases in this case – has written to the Court to express its *affirmative support* for the Settlement. Specifically, the Class Representatives (LWD and Meijer), the "Big 3" national wholesalers (consisting of Cardinal Health, Inc. ("Cardinal"), McKesson, Inc. ("McKesson") and AmerisourceBergen Co. ("Amerisource")), as well as 11 regional wholesalers have written to the Court to express their resounding support for the Settlement. *See* Exhibits 2 through 16 to the Joint Decl. These core Class members have been class members in a series of Hatch-Waxman antitrust cases – most of which were prosecuted by the same Class Counsel[6] as here – that challenged conduct that allegedly impeded generic

---

[6] This Court has designated the following law firms to serve as "Class Counsel" pursuant to Fed. R. Civ. P. 23(c)(1)(B) and 23(g): Garwin Gerstein & Fisher, LLP and Kaplan Fox & Kilsheimer, LLP as Co-Lead Counsel; Clemente Mueller, P.A. as Liaison Counsel; and Odom & Des Roches, LLP, Smith Segura & Raphael, LLP (formerly The Smith Foote Law Firm), Sperling & Slater, P.C., and Berger & Montague, P.C., to serve as an Executive Committee in combination

competition. In supporting the Settlement, these Class members recognize the legal hurdles and risks involved in this twelve-year-old case and the extraordinary results obtained as a result of the Settlement.

The judgment of these sophisticated entities is especially meaningful because – based upon their experience as class members in numerous Hatch-Waxman antitrust class actions – these entities have a particular ability to assess the reasonableness of the Settlement. Indeed, because these entities have the largest financial stake in the Settlement, they have the greatest incentive to critically assess the Settlement and object if they feel it is unreasonable or inadequate.

The Class's support for the Settlement is well-founded. As this Court is well-aware, this Action has been vigorously hard-fought over a twelve-year lifespan – both by Class Counsel and Defendants' highly-respected counsel. Plaintiffs reached agreement with Defendants to resolve this litigation only after Class Counsel had: (a) conducted extensive background research and discovery from Defendants and various third parties, including the review of millions of pages of documents and participation in numerous fact and expert depositions; (b) briefed and defeated Defendants' motion to dismiss; (c) litigated numerous

---

with Co-Lead Counsel. Doc. No. 412 at ¶ 7.

discovery motions; (d) successfully moved for class certification; (e) retained and worked with experts on issues relating to liability and damages; (f) briefed and defeated Defendants' motion for summary judgment; (g) obtained favorable rulings with respect to collateral estoppel; (h) conducted trial preparations; and (i) prepared for, and participated in, three substantive mediation sessions over the course of the last three and a half years, which were conducted by Eric Green, a nationally-recognized mediator, who provided both sides with his unbiased assistance and expertise to enable the parties to reach a resolution of this case. *See* Joint Decl. at ¶¶ 12-83.

In addition, besides the typical battles that are to be expected in high-stakes litigation, this Action included additional difficult conflicts: (1) protracted disputes regarding Defendants' privilege logs (which required the involvement of a Special Master), *see* Joint Decl. at ¶¶ 38-40; (2) litigation relating to Plaintiffs' filing of two motions to obtain discovery on the basis of the crime-fraud exception (which also required the involvement of a Special Master), *see* Joint Decl. at ¶¶ 41-46; and (3) Defendants' failure to provide, on multiple occasions, an adequate Rule 30(b)(6) witness on issues relating to the illegal marketing of Neurontin for off-label uses and the factual bases for Defendants' denials concerning their promotion of Neurontin for off-label uses in their Answer in this case, which led to Plaintiffs'

highly-contested and partially-successful motion for sanctions, adjudicated by a Magistrate Judge and the Court (on appeal), *see* Joint Decl. at ¶¶ 47-57.

Furthermore, this Action was exceptionally complicated. It raised a multitude of difficult and complicated legal matters, as well as many complex factual issues regarding highly-technical subjects. Plaintiffs alleged that Defendants maintained their exclusivity for Neurontin, and thus delayed generic competition, through an overarching, multi-faceted scheme over a ten-year period that included illegal off-label promotion, manipulation of the patent application process, violation of Hatch-Waxman Act procedures, repeated filing and maintenance of sham patent suits, and perpetration of fraud on the courts hearing those cases. Plaintiffs' case required an understanding and appreciation of the complicated details involved in a multi-year overall scheme that consisted of components that, at first blush, might appear disparate and unrelated.

In turn, Defendants presented defenses to each aspect of Plaintiffs' case that the Class would have had to overcome in order to prevail before the jury, in post-trial motions, and on appeal. Among other things, Defendants asserted that Plaintiffs would be unable to establish sham litigation, monopoly power, unlawful maintenance of monopoly power, inappropriate manipulation of the Hatch-Waxman Act and causation. Though Plaintiffs believe in the strength of their

arguments and positions, it is unclear how the jury, this Court, and appellate courts would assess the case going forward.

In light of these complexities and risks, the Settlement is an outstanding resolution to this complicated case. Absent the Settlement, this litigation would continue, resulting in an enormous additional expenditure of resources, likely over the course of many years, with no assurance that the Class would achieve a better – or, indeed, any – recovery.

For these reasons, Plaintiffs request that the Court approve the Settlement as fair, reasonable and adequate pursuant to FED. R. CIV. P. 23(e). Additionally, Plaintiffs request that the Court find that Plaintiffs' Settlement Notice satisfied due process requirements and that the Court approve Plaintiffs' Plan of Allocation (which provides a fair and reasonable method of determining damages for each member of the Class).

II. ARGUMENT.

A. Settlements of Class Actions Are Encouraged.

This Court should grant final approval of the Settlement for several reasons. As an initial matter, it is well-settled that courts favor and encourage settlements of lawsuits. *See, e.g., Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (there is a "strong

presumption in favor of voluntary settlement agreements, which [the Third Circuit has] explicitly recognized with approval")); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). Courts particularly encourage settlements in complex litigation because such settlements promote the interest of judicial economy and encourage litigants to determine their respective rights among themselves. *See Sullivan*, 667 F.3d at 311; *In re General Motors Corp. Pick-Up Truck Fuel Tank Product Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"); *Warfarin*, 391 F.3d at 535 ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged").

B. The Proposed Settlement Is Fair, Reasonable and Adequate.

1. The Settlement is Presumptively Fair.

A class action settlement warrants final approval if it is "fair, reasonable and adequate." FED. R. CIV. P. 23(e)(2). An initial presumption of fairness may apply in cases in which: "(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Sullivan*, 667 F.3d at 320 n. 54. (3d Cir.2011). Moreover, settlement negotiation before an independent mediator "virtually insures that the negotiations were conducted at

arm's length and without collusion between the parties." *Hall v. AT&T Mobility LLC*, No. 07-5325, 2010 WL 4053547, at *7 (D.N.J. Oct. 13, 2010) (citation omitted). Furthermore, "[e]xperienced class counsel's approval is entitled to considerable weight and favors finding that the settlement is fair." *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 386 (D.N.J. 2012).

The Settlement should be entitled to this presumption of fairness because (a) the settlement negotiations were hard-fought and occurred at arm's-length with the able assistance of a renowned mediator, Eric Green, *see* Joint Decl. at ¶¶ 80-83; Doc. No. 727, Preliminary Approval Order (noting that the Settlement "was arrived at by arm's-length negotiations by highly experienced counsel"); (b) the settlement negotiations concluded only after discovery was complete and after this Court had ruled on the parties' motions for summary judgment (and thus the parties were fully aware of the strengths and weaknesses of their respective cases), Joint Decl. at ¶¶ 73-75, 79; (c) counsel for both Plaintiffs and Defendants are highly experienced in litigating complex antitrust and pharmaceutical class action cases, *see* Doc. No. 727, Preliminary Approval Order (noting that the Settlement "was arrived at by arm's-length negotiations by highly experienced counsel"); and (d) as of this writing, not a single Class member has objected to the Settlement and sophisticated Class members who have an interest in approximately 93% of the Settlement Fund have expressed explicit and affirmative support, *see infra*.

Accordingly, the Settlement is presumptively fair.

2. Application of the *Girsh* Factors Support Final Approval of the Settlement.

In *Girsh v. Jepson*, the Third Circuit set forth a list of nine factors – often referred to as the "*Girsh* factors" – for courts to evaluate in deciding whether a settlement warrants final approval:

> …(1) the complexity, expense and likely duration of the litigation …; (2) the reaction of the class to the settlement …; (3) the stage of the proceedings and the amount of discovery completed …; (4) the risks of establishing liability …; (5) the risks of establishing damages …; (6) the risks of maintaining the class action through the trial …; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery …; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation….

Girsh, 521 F.2d at 157 (citations omitted). No one factor is dispositive. *See Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154, 169 (E.D. Pa. 2011). "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh*, 521 F. 2d at 156.

Application of the nine *Girsh* factors to the Settlement here demonstrates that the Settlement is "fair, reasonable and adequate" and should, therefore, be approved.

a. The First *Girsh* Factor – the Complexity, Expense and Likely Duration of the Litigation – Favors Approval of the Settlement.

"The first [*Girsh*] factor 'captures the probable costs, in both time and money, of continued litigation.'" *Warfarin*, 391 F.3d at 535-36 (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 (3d Cir. 2001)). "Courts must balance a proposed settlement against the enormous time and expense of achieving a potentially more favorable result through further litigation." *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *4 (citation omitted).[7] In view of the long, complicated litigation road already traveled, and the long, uncertain road that would be traveled absent the Settlement, this factor clearly supports approval of the Settlement.

An "antitrust action is a complex action to prosecute," *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 102 (D.N.J. 2012), as the "legal and factual issues involved are always numerous and uncertain in outcome." *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 399 (D.N.J. 2006) (internal quotation and citation omitted). As this Court well knows, this case is no exception as it raised many complicated legal matters, as well as many complex factual issues surrounding an alleged ten-year scheme to forestall generic competition in

[7] *In re Remeron* was a Hatch-Waxman direct purchaser antitrust class action litigated in this very Court by many of the same firms that comprise Class Counsel.

violation of the antitrust laws. *See* Joint Decl. at ¶¶ 84-87. As evidenced by Defendants' motion for summary judgment, Defendants presented defenses to each aspect of Plaintiffs' case that the Class would need to overcome in order to prevail before the jury, in post-trial motions, and on appeal. Among other defenses, Defendants asserted that Plaintiffs would be unable to establish causation because Plaintiffs would be unable to prove that the cause of the delay in generic entry was due to Pfizer's alleged scheme (which Defendants denied), rather than the result of actions unrelated to Defendants' conduct. *See* Joint Decl. at ¶ 65. Defendants also challenged Plaintiffs' ability to prove monopoly power or the existence of exclusionary conduct. *See* Joint Decl. at ¶ 66. In an effort to meet and overcome these challenges, Class Counsel took extensive fact discovery and worked closely with expert witnesses in the fields of antitrust economics, patent prosecution and chemistry. *See* Joint Decl. at ¶¶ 19-27, 31-37, 67, 69-71.

Moreover, this Action has been hard-fought by both Class Counsel and Defendants' highly-regarded counsel for over twelve years. *See* Joint Decl. at p.3. If this case were not resolved through the Settlement, Plaintiffs would continue to litigate until a complex jury trial would be brought to verdict. Regardless of the outcome of such a trial (*i.e.*, regardless of a Plaintiffs' or Defendants' verdict), a lengthy post-trial motion and appellate process would ensue. Given the size and complexity of the case, this process would likely include appeals to the Third

Circuit and Supreme Court on multiple issues, including the jury's verdict, the jury instructions, this Court's class certification opinion and the rules of law set forth in this Court's motion to dismiss and summary judgment orders. Any such continued litigation would likely take many years, and would require tens of thousands of additional hours and significant additional costs (in addition to those already incurred), with no certainty of a favorable outcome. *See, e.g., Warfarin*, 391 F.3d at 536 (". . . it was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class").

By contrast, the Settlement provides the Class with immediate and definite relief without the delay, risk, and uncertainty of continued litigation. *See Ins. Brokerage Antitrust Litig.*, 282 F.R.D at 103 ("By reaching a favorable Settlement . . . Class Counsel have avoided significant expense and delay, and have also provided an immediate benefit to the Settlement Class."); *General Motors*, 55 F.3d at 812 (concluding that lengthy discovery and ardent opposition from the defendant with "a plethora of pretrial motions" were facts favoring settlement, which offered immediate benefits and avoided delay and expense).

Accordingly, analysis of the first *Girsh* factor strongly supports approval of the Settlement.

b. The Second *Girsh* Factor – the Reaction of the Class to the Settlement – Favors Approval of the Settlement.

The second *Girsh* factor "attempts to gauge whether members of the Class support the settlement." *Prudential*, 148 F.3d at 318. The Third Circuit has found that "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement . . ." *Cendant*, 264 F.3d at 235. Here, it is clear that the members of the Class strongly support the Settlement.

As of this writing, not a single Class member has objected to any aspect of the Settlement.[8] More significantly, many Class members – all of whom are sophisticated national and regional pharmaceutical resellers – *affirmatively support* the Settlement. These Class members, who together made approximately 93% of the purchases of Neurontin at issue in this case (and would thus be entitled to a like percentage of the Settlement Fund), have also been class members in a series of Hatch-Waxman antitrust cases – most of which were prosecuted by the same Class Counsel as here – that challenged conduct that impeded generic competition.

---

[8] The time for objections to be filed will not expire until July 17, 2014. In the event that any objection is received, Class Counsel will promptly inform the Court.

Specifically, each of the "Big 3" national pharmaceutical wholesalers – Cardinal, McKesson and Amerisource – through their longtime antitrust counsel, has communicated its express support for the Settlement. Antitrust counsel for these entities has monitored this case and has been in constant contact with Class Counsel. *See* Exhibits 2 through 4 to the Joint Decl. Likewise, 11 regional pharmaceutical wholesalers have also affirmatively expressed support for the Settlement. *See* Exhibits 5 through 13 to the Joint Decl. Additionally, LWD and Meijer, the two Class Representatives, expressly support the Settlement. *See* Exhibits 14 through 16 to the Joint Decl. In supporting the Settlement, these sophisticated Class members, all of whom have a substantial stake in this twelve-year old case, recognize the legal hurdles and risks involved and the extraordinary results obtained via the Settlement.

"Such acceptance of the Settlement on the part of the Class is convincing evidence of the Settlement's fairness and adequacy." *Remeron,* 2005 WL 3008808 at *6 (citing *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) ("'only'" 29 objections in 281 member class "'strongly favors settlement'")). *See also Prudential*, 148 F.3d at 318 (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted out and 300 objected). And, where, as here, the Class is composed largely of sophisticated business entities with a substantial stake in the case – all of whom could be expected to

oppose any settlement they find unreasonable – the absence of objections is indicative of the adequacy of the Settlement. *See, e.g., Remeron*, 2005 WL 3008808 at *6 ("The absence of objections from the sophisticated Class is particularly significant here because many Class members here have also been members of classes certified in other pharmaceutical antitrust actions . . . and are therefore well suited to evaluate a proposed settlement in an action of this type") (citations omitted); *Warfarin*, 391 F.3d at 536 (court finds the low number of objections from third party payors was particularly significant because they were "sophisticated businesses with very large potential claims").

Accordingly, examination of the second *Girsh* factor strongly supports approval of the Settlement.

c. The Third *Girsh* Factor – the Stage of the Proceedings and the Amount of Discovery Completed – Favors Approval of the Settlement.

"The third *Girsh* factor "'captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Warfarin*, 391 F.3d at 537 (quoting *Cendant*, 264 F.3d at 235.) "To ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken." *Prudential*, 148 F.3d at 319. "Where [the] negotiation

process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent." *Elec. Carbon Prods.*, 447 F. Supp. 2d at 400. *See also Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 (3d Cir. 1993) (post-discovery settlements are viewed as more likely to reflect true value of claim).

Given the stage at which the Settlement was negotiated and finalized, application of this factor strongly supports approval. Indeed, the parties' settlement negotiations did not begin until eight years into the litigation, and then, after they commenced, spanned an additional three years. All fact and expert discovery had been completed (save for some supplemental discovery concerning Defendants' settlements of the patent actions against certain generic companies). Plaintiffs and Defendants had engaged in extensive motion practice, including the full briefing and ultimate denials of Defendants' motion to dismiss and motion for summary judgment, and Plaintiffs' motion for partial summary judgment. *See* Joint Decl. at ¶¶ 16-18, 64-71. And, at the time the parties reached agreement on the Settlement, Plaintiffs were in the midst of preparing for trial. See Joint Decl. at ¶ 79. As a result, Class Counsel was intimately familiar with the strengths and weaknesses of the Class's claims and Defendants' defenses to those claims. *See Bonett v. Educ. Debt Serv., Inc.*, No. 01-6528, 2003 WL 21658267, at *6 (E.D. Pa. May 9, 2003) ("The parties arrived at an arms-length settlement only after a thorough round of document discovery and depositions. Therefore, during the

numerous and adversarial settlement conferences, 'the parties certainly [had] a clear view of the strengths and weaknesses,' of their cases.") (internal quotation omitted). As evidenced by the extensive briefing and factual record created in connection with the cross motions for summary judgment, Class Counsel had an excellent understanding of the case, which they called upon during the negotiation of the Settlement. *See, e.g.*, *Warfarin*, 391 F.3d at 537 (finding this factor supported final approval of the settlement since class counsel pursued the litigation for over three years, engaged in substantial discovery, reviewed voluminous documents and took numerous depositions, and consulted with experts).

Accordingly, application of the third *Girsh* factor strongly supports approval of the Settlement.

d. The Fourth *Girsh* Factor – The Risk of Establishing Liability – Favors Approval of the Settlement.

"The fourth *Girsh* factor 'examine[s] what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them.'" *Sullivan*, 667 F.3d at 322 (quoting *Cendant*, 264 F.3d at 237). Here, examination of this factor weighs heavily in favor of approving the Settlement.

As a general proposition, antitrust class action cases are "arguably the most complex action[s] to prosecute." *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000). Indeed, cases such as this one are

among the riskiest – even where there is considerable evidence of anticompetitive conduct – given the interplay of, among other things, antitrust law, patent law, the Hatch-Waxman Act and complex economic principles.

In this case, there were no guarantees that Plaintiffs would receive a favorable jury verdict and would be able to uphold that verdict in post-trial motions and on appeal. As this Court knows, this case was exceptionally complex, making it impossible for one to predict its outcome with any reasonable certainty.

Although Plaintiffs developed evidence to support all necessary elements and to rebut Defendants' defenses, there was significant risk that this case could be lost any number of ways, including: (a) the risk of the jury finding that Defendants' conduct was not anticompetitive; (b) the risk of the jury finding that Defendants did not have monopoly power, and/or that the relevant market was broader than that defined by Plaintiffs; (c) the risk of the jury finding that Defendants did not cause the Class to suffer antitrust injury; and (d) the risk that even if the Class obtained a favorable jury verdict, that verdict could be overturned by post-trial motions or on appeal.

In conducting settlement negotiations, Class Counsel was cognizant of the numerous and multi-layered risks and complexities facing the Class with respect to establishing liability. Absent the Settlement, these risks and complexities could

have resulted in the Class receiving no recovery at all. Accordingly, analysis of the fourth *Girsh* factor strongly supports approval of the Settlement.

e. The Fifth *Girsh* Factor – The Risk of Establishing Damages – Favors Approval of the Settlement.

"As with the fourth *Girsh* factor, 'this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *Sullivan*, 667 F.3d at 322 (quoting *Cendant*, 264 F.3d at 238–39 (citation and quotations omitted)). Analysis of this factor, too, strongly supports approval of the Settlement.

There was a risk that the Class would not be able to prove the existence, and extent, of damages. Indeed, antitrust history is replete with examples of plaintiffs receiving little or no damages despite having engaged in extensive litigation – even when they succeeded in establishing liability. *See, e.g., United States Football League v. National 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. American Tel. & Tel. Co.*, 708 F.2d 1081, 1166-67 (7th Cir. 1983) (antitrust judgment was remanded for new trial on damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vac'd*, 417 U.S. 156 (1974) (after two trips to the Second Circuit and one to the Supreme Court, plaintiff and the putative class recovered nothing in this antitrust class case).

Over the course of this case, the parties proffered competing expert reports regarding overcharge damages to which the Class would be entitled. Measuring damages depends, in large part, on (a) characterizing the "but for" world (*i.e.*, proving what would have happened with regard to the timing and pricing for the market entry of various generic competitors absent Defendants' wrongful conduct), and (b) quantifying the overcharges paid by the Class resulting from a properly characterized and proven "but for" world. It is by no means certain that Plaintiffs' proof of what would have occurred in the "but for" world and the opinions of Plaintiffs' economic expert, Dr. Gary French, would have prevailed through this process. *See, e.g.*, *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 256 (D. Del. 2002) ("Damages would likely be established at trial through 'a "battle of experts", with each side presenting its figures to the jury and with no guarantee whom the jury would believe'") (quoting *Cendant*, 264 F.3d at 239); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 539 (D.N.J. 1997) ("a jury's acceptance of expert testimony is far from certain, regardless of the expert's credentials"), *aff'd*, 148 F.3d 283 (3d Cir. 1999), *cert. denied*, 525 U.S. 1114 (1999). Indeed, Defendants, through their expert, Dr. Monica Noether (assuming her report and testimony survived Plaintiffs' *Daubert* challenge), contested Plaintiffs' methodology and measure of damages, rendering any outcome with respect to damages uncertain. *See* Joint Decl. at ¶¶ 37(b), 77. Moreover, in

light of Defendants' assertions regarding the lack of causation, there was a risk that a jury might not accept Plaintiffs' damages models and, ultimately, might limit, or even preclude, any damages award.

In short, even if Class Counsel successfully established liability of the Defendants (and held such a liability verdict on appeal), impediments remained that could have reduced or negated the Class's recoverable damages. Accordingly, examination of the fifth *Girsh* factor strongly supports approval of the Settlement.

f. The Sixth *Girsh* Factor – The Risks of Maintaining the Class Action Through Trial – Neither Favors Nor Disfavors Approval of the Settlement.

"Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *Warfarin*, 391 F.3d at 537 (internal quotation and citation omitted).

On January 25, 2011, this Court issued an order certifying the Class. *See* Doc. No. 41. Plaintiffs do not believe there was much risk of this case being decertified. Accordingly, this *Girsh* factor is essentially neutral in the consideration of whether to grant final approval of the Settlement.

g. The Seventh *Girsh* Factor – the Ability of the Defendant to Withstand a Greater Judgment – Neither Favors Nor Disfavors Approval of the Settlement.

"The seventh *Girsh* factor considers 'whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement.'" *Warfarin*, 391 F.3d at 537-38 (quoting *Cendant*, 264 F.3d at 240). Here, there is no reasonable concern regarding whether Defendants could withstand a greater judgment. Plaintiffs do not believe it is a risk that the Court should consider in its evaluation of whether to approve the Settlement, given the other factors discussed.

h. The Eighth and Ninth *Girsh* Factors – the Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of all the Attendant Risks of Litigation – Favor Approval of the Settlement.

The eighth and ninth "*Girsh* factors evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case. The factors test two sides of the same coin: reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin*, 391 F.3d at 538 (quoting *Prudential*, 148 F.3d at 322). "In order to assess the reasonableness of a proposed settlement seeking monetary relief, 'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.'" *Prudential*, 148 F.3d at 322 (quoting *General Motors*, 55 F.3d at 806). In

undergoing this analysis, the potential for an award of treble damages need not be taken into account. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 257-58 (D. Del. 2002) (citation omitted).

In the instant case, Plaintiffs' expert economist, Dr. Gary French, estimated that the Class's aggregate damages range anywhere from hundreds of millions of dollars to billions of dollars, depending on certain critical factors and assumptions. *See* Joint Decl. at ¶ 36(a). Dr. French's estimate of overcharge damages is based on (a) applying varying "but for" worlds that conceivably could be found by a jury to likely have occurred if not for the wrongful conduct (*i.e.* what would have occurred absent Defendants' unlawful conduct) and (b) his quantification of the overcharges paid by the Class. *See* Joint Decl. at ¶ 36(a). Dr. French's aggregate damages calculations varied depending on several factors, including (1) the timing of generic competitors' market entry; (2) how many generic competitors would have been able to enter the market in the "but for" world; and (3) whether the phenomenon known as "generic bypass" was accounted for or not. *See id*.

Using only the potential range of damages as a metric for determining the fairness of the Settlement is not reliable because it does not take into account the substantial discounts associated with the formidable litigation risks, including the risk that a jury could accept part of the claim and reject other parts or the prospects of the case on appeal. Dr. French's analysis assumes that Plaintiffs will prove, and

the jury will accept, the entirety of the claim based on a range of possible scenarios that would have happened in the "but for" world. *See* Joint Decl. at ¶¶ 36(a), 84. If Plaintiffs were unable to establish one or more elements of their claim, it could doom the case in its entirety.

Furthermore, Dr. French's damage calculations were dependent on the specific "but for" causation theories that Class Counsel might put forth at trial, which would yield numerous alternatives, including differences in timing of generic competitors' market entry and the number of generic competitors that would have entered the market.

In the context of the aforementioned risks, the Settlement represents a very substantial recovery. *See* Joint Decl. at pp. 2-5. This recovery is clearly acceptable when viewed in the context of similar high-risk antitrust class action cases. *See, e.g.*, *In re Cendant Corp. Litig.*, 109 F. Supp. 2d 235, 263 (D.N.J. 2000) (noting that typical recoveries in complex securities class actions range from 1.6%-14% of estimated damages); *In re Aetna Sec. Litig.*, No. MDL 1219, 2001 WL 20928, at *11 (E.D. Pa. Jan. 4, 2001) (approving settlement of approximately 10% of total damages of $830 million); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 03-4578, 2005 WL 1213926, at *9 (E.D. Pa. May 19, 2005) (recovery of 11.4% of estimated single damages "compares favorably with the settlements reached in other complex class action lawsuits"); *In re Remeron*

End-Payor Antitrust Litig., 02-2007 FSH, 2005 WL 2230314, at *24 (D.N.J. Sept. 13, 2005) ("an antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement is reasonable relative to other factors . . ."); *In re Greenwich Pharm. Sec. Litig.*, No. 92-3071, 1995 WL 251293, at *5 (E.D. Pa. April 26, 1995) (holding a $4.3 million settlement within the range of reasonableness where plaintiff's estimate of damages was $100 million); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approval of settlement that provided between 5.2% and 8.7% of best possible recovery).

Most telling is whether this Settlement would be consistent with a non-class settlement where the plaintiffs were motivated solely by self-interest. Here, we know that to be true because the Class, made up of sophisticated business entities that have a long experience with these types of cases, has affirmatively weighed in by communicating strong support for the Settlement.

Furthermore, the instant Settlement Fund is at the higher end of the range of settlements in the most analogous cases previously settled – other complex Hatch-Waxman antitrust class action cases brought by direct purchasers alleging impeded generic entry. These previously-settled cases were brought on behalf of classes of direct purchasers that overlap substantially with the Class here, and the settlements were quite significant (with two above $100 million and two over $200 million).

See, e.g., In re Tricor Direct Purchaser Antitrust Litig., No. 05-cv-340 (D. Del. April 23, 2009) ($250 million settlement); *In re Relafen Antitrust Litig.*, No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004) ($175 million settlement); *In re Buspirone Antitrust Litig.*, No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003) ($220 million settlement); *In re Cardizem CD Antitrust Litig.*, MDL No. 1278 (E.D. Mich. Nov. 26, 2002) ($110 million settlement). Such settlements are real world examples that this Court should consider as it evaluates the range of reasonableness of the Settlement.

Given the Settlement Fund's size relative to the fact that recovery for the Class was far from guaranteed, the Settlement in fact represents a good value for a strong case – albeit one where numerous critical legal issues have not been determined and therefore remain uncertain. The Settlement thus offers a reasonable means of addressing the Class's injuries in light of the risks of non-recovery. *See Aetna*, 2001 WL 20928 at *11 ("the evaluating court must recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution . . .").

Accordingly, evaluation of the eighth and ninth *Girsh* factors strongly supports approval of the Settlement.

3. Analyses of the *Prudential* Factors Favor Approval of the Settlement.

In addition to the *Girsh* factors, the Third Circuit has explained that it may be helpful to consider the following non-exclusive factors – often referred to as the "*Prudential* factors":

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential, 148 F.3d at 323.

While a "district court must make findings as to each of the nine *Girsh* factors in order to approve a settlement as fair, reasonable, and adequate, as required by Rule 23(e)," the factors that the Third Circuit "identified in *Prudential* are illustrative of additional inquires that in many instances will be useful for a thoroughgoing analysis of a settlement's terms." *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010). The Court need only address the *Prudential* factors that are relevant to the litigation in question. *See Prudential*, 148 F.3d at 323-24.

To the extent any of the additional factors apply to the evaluation of the Settlement, they too are supportive for the following reasons:

- Extensive discovery was completed prior to reaching this Settlement. *See* pp. 11, 14, 19, *supra*.
- All class members were afforded the opportunity to object to any and all aspects of the Settlement, but, to date, none has done so. Quite the contrary, the Settlement has received active support from Class members comprising approximately 93% of the Neurontin purchases at issue in this case. *See* pp. 16-18, *supra*.
- The Settlement makes no provision for the payment of attorneys' fees to Class Counsel. That is a matter for this Court to determine.
- As discussed in Section II(D) below, the procedure for processing individual claims is fair and reasonable.

Therefore, evaluation of the applicable *Prudential* factors favors approval of the Settlement.

C. The Settlement Notice Satisfies Due Process.

The due process demands of the Fifth Amendment and the Federal Rules of Civil Procedure require that adequate notice be provided to class members of a proposed settlement. *See Aetna*, 2001 WL 20928 at *5. Due process requirements are satisfied by the "combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class." *Prudential* 148 F.3d at 306.[9]

---

[9] Class members were given the chance to opt out of the Class following notice of this Court's January 25, 2011 order certifying the Class, and while the Court has discretion to give members of the previously-certified Class another chance to opt out, *see* FED. R. CIV. P. 23(e)(4), there is no requirement to do so.

Here, this Court, by order dated May 2, 2014, in addition to preliminarily approving the Settlement, found that the proposed form of written notice for mailing to all known Class members (the "Mail Notice") and the summary notice for publication in the industry trade journal, *The Pink Sheet* (the "Publication Notice" and, together with the Mail Notice, the "Settlement Notice"), as well as the proposed method of the Settlement Notice's dissemination, satisfied the requirements of Rule 23(e). *See* Doc. No. 727 at ¶ 6. On May 12, 2014, Plaintiffs complied with the Court's Order, as they disseminated the Settlement Notice to the Class. *See* Affidavit of Michael Rosenbaum Re: Mailing and Publication of Notice, attached as Exhibit 1 to the Joint Decl. (attaching copy of the Settlement Notice). Accordingly, the Settlement Notice satisfied due process concerns.

D. The Court Should Approve the Plan of Allocation.

The Court should approve the proposed Plan of Allocation, which like many

---

Under similar circumstances, courts in antitrust cases like this one have consistently foregone a second opt-out period. *See, e.g.*, *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 745 (E.D. Pa. 2013) (finally approving settlement and noting that because "class members were given the chance to opt out when [the court] originally certified the class . . .[the court] declined to allow class members an additional opportunity to opt out of the class after receiving notice of the settlement"). Because Class members have had the chance to invoke their due process rights and opt out of the certified Class, and the Settlement still allows them to object to the terms of the Settlement, there was no need for a second opt-out period. Furthermore, the fact that, to date, no Class member has objected to the Settlement demonstrates that a second opt-out period is not necessary.

similar plans in analogous cases, would allocate the settlement funds to those Class members who submit claims on a *pro rata* basis efficiently and fairly. "When assessing proposed plans of allocation, courts use the same standard for determining whether to approve the settlement itself. Therefore, the proposed plan needs to be fair, reasonable and adequate." *Flonase*, 951 F. Supp. 2d at 752 (citing *Cendant*, 264 F.3d at 248). "In determining whether a Plan of Allocation is fair, reasonable, and adequate, courts give great weight to the opinion of qualified counsel." *In re Schering-Plough Corp.*, No. 08-1432, 2012 WL 1964451, at *6 (D.N.J. May 31, 2012). Generally, a plan of allocation is reasonable if it reimburses class members based on the type and extent of their injuries. *See, e.g.*, *In re Lucent Tech., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 649 (D.N.J. 2004) ("A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable"); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 493 (E.D. Pa. 2003) (same). The proposed Plan of Allocation meets this standard. Moreover, it is conceptually similar to the Plan of Allocation that Plaintiffs previously employed, and that this Court previously approved, in *In re Remeron.*

As set forth more fully in the Plan of Allocation (the "Plan of Allocation") and in the accompanying Declaration of Gary French, Ph.D. Related to Proposed Allocation Plan and Net Settlement Fund Allocation (the "French Declaration" or

"French Decl.")[10] (attached to the Plan of Allocation as Exhibit "A"), filed contemporaneously herewith, the Class proposes to allocate the Settlement Fund, net of Court-approved attorneys' fees, expenses, and incentive awards ("Net Settlement Fund"), in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged anticompetitive conduct. Such a method of allocating the Net Settlement Fund is inherently reasonable. *See Remeron*, 2005 WL 3008808 at *11. It does so both efficiently and fairly by relying upon the transactional databases that have previously been produced in this litigation so as to make submission of claims by class members a simple matter of verifying the purchase data provided to each of them on individualized claim forms that will be mailed to them by the Court-approved claims administrator. *See* Plan of Allocation at ¶¶ 1.1-1.2, 2. Under the proposed plan, the claims administrator, working with Dr. French's and his economic consulting firm, will prepare and send these individualized claim forms to each member of the Class within forty-five (45) days of the Court issuing an Order finally approving the Settlement and the plan. *See* Plan of Allocation at ¶ 1.1-1.3.

---

[10] The French Declaration outlines Dr. French's experience with antitrust economics, economic damages and Hatch-Waxman direct purchaser class action cases, as well as the proposed Plan of Allocation. *See* French Decl. at ¶¶ 3-5, 8-9, 15-26.

The Plan of Allocation designed by Dr. French provides a fair and reasonable method of determining each Class member's proportionate share of the Net Settlement Fund in proportion to the share of overcharges each suffered as a result of the challenged anticompetitive conduct in this case. It does so based on each Class member's purchases of Neurontin and generic gabapentin during the time period at issue. *See* French Decl. at ¶¶ 15-26. Among other things, the Plan of Allocation describes: (1) the method of calculating each Class member's *pro rata* share of the Net Settlement Fund; (2) the contents and method of disseminating a Claim Form; (3) the manner in which claims will be initially reviewed and processed; (4) the method of notifying Class members of the amount that each Class member will receive from the Net Settlement Fund; and (5) the process for handling and resolving challenged claims, if any. *See* Plan of Allocation at ¶¶ 3-5, 8-9, 15-26. The Plan of Allocation also provides timetables for completing various tasks related to calculating and distributing each Class member's *pro rata* share of the Net Settlement Fund.

Similar plans of allocation have been approved and employed successfully in multiple previous Hatch-Waxman direct purchaser class cases, such as in *In Re Remeron.* The use of similar plans in similar cases supports the approval of the proposed Plan of Allocation here. *See, e.g., Nichols v. SmithKline Beecham Corp.*, 2005 WL 950616, at *18 (E.D. Pa. 2005) (noting with approval similarity of

allocation plan to plans used in similar cases). Moreover, the Plan of Allocation proposes that Dr. French be retained to assist in making allocation computations under the Plan. *See* Plan of Allocation at ¶¶ 3-4.

Accordingly, the proposed Plan of Allocation is fair and reasonable, and should be approved by the Court.

III. CONCLUSION.

For the reasons detailed above, Plaintiffs respectfully request that the Court enter the proposed Order and Final Judgment, which, *inter alia*, grants final approval to the Settlement pursuant to FED. R. CIV. P. 23(e), finds that the Settlement Notice satisfied due process, and approves the Plan of Allocation.

Dated: July 1, 2014

Respectfully submitted,

CLEMENTE MUELLER, P.A.
222 Ridgedale Avenue
Cedar Knolls, NJ 07927
Tel.: (973) 455-8008

By: /s/ Jonathan D. Clemente
Jonathan D. Clemente
Liaison Counsel

GARWIN GERSTEIN &
FISHER, L.L.P.
Bruce E. Gerstein
88 Pine Street, 10th Floor
New York, NY 10005
Tel.: (212) 398-0055
Fax: (212 764-6620

KAPLAN FOX &
KILSHEIMER, LLP
Robert N. Kaplan
Richard J. Kilsheimer
850 Third Avenue, 14th Floor
New York, NY 10022
Tel.: (212) 687-1980
Fax: (212) 687-7714

Co-lead Counsel for the Direct Purchaser Class Plaintiffs

ODOM & DES ROCHES, LLP
John Gregory Odom
Stuart E. Des Roches
Suite 2020, Poydras Center
650 Poydras Street
New Orleans, LA 70130
Tel.: (504) 522-0077
Fax: (504) 522-0078

SMITH SEGURA & RAPHAEL
LLP
David P. Smith
720 Murray Street
P.O. Box 1632
Alexandria, LA 71309
Tel.: (318) 445-4480
Fax: (318) 487-1741

SPERLING & SLATER, P.C.
Paul E. Slater
55 West Monroe Street
Suite 3200
Chicago, IL 60603
Tel.: (312) 641-3200
Fax: (312) 641-6490

BERGER & MONTAGUE, P.C.
Daniel Berger
Eric L. Cramer
Ellen T. Noteware
1622 Locust Street
Philadelphia, PA 19103
Tel.: (215) 875-3000
Fax: (215) 875-4604

VANEK, VICKERS & MASINI,
P.C.
Joseph M. Vanek
David P. Germaine
111 S. Wacker, Suite 4050
Chicago, IL 60606
Tel.: (312) 224-1500
Fax: (312) 224-1510

HEIM, PAYNE & CHORUSH
LLP
Russell A. Chorush
600 Travis, suite 6710
Houston, Texas 77002
Tel.: (713) 221-2000
Fax: (713) 221-2021

GRANT & EISENHOFER PA
Linda P. Nussbaum
485 Lexington Ave., 29th Fl.
New York, NY 10017
Tel.: (646) 722-8504
Fax: (646) 722-8501

KOHN, SWIFT & GRAF, P.C.
Joseph C. Kohn
One South Broad Street
Suite 2100
Philadelphia, PA 19107
Tel.: (215) 238-1700
Fax: (215) 238-1968

KOZYAK TROPIN &
THROCKMORTON, P.A.
Adam Moskowitz
2800 First Union Financial Center
200 South Biscayne Boulevard
Miami, FL 33131-2335
Tel.: (305) 377-0652
Fax: (305) 372-3508