

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

In re: Prograf Antitrust Litigation	MDL No. 2242
This Document Relates To: All Direct Purchaser Class Actions	Civil Action No. 11-md-2242-RWZ

**DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER GRANTING
FINAL APPROVAL OF SETTLEMENT**

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	I
I. INTRODUCTION	1
A. Background	1
B. Notice to the Class	3
C. Plan of Distribution	3
II. ARGUMENT	4
A. Settlements of Class Actions are Encouraged.	4
B. The Proposed Settlement is Fair, Reasonable and Adequate.	4
1. Legal Standard	4
2. The Settlement is Presumptively Fair.	5
3. The <i>Grinnell</i> Factors Support Final Approval	6
a. The Complexity, Expense and Likely Duration of Litigation.	6
b. The Reaction of the Class to the Settlement.	7
c. Stage of Proceedings and Amount of Discovery Completed.	8
d. Risks of Establishing Liability and Damages.	9
e. The Risks of Maintaining the Class Action Through Trial.	10
f. Ability of the Defendant to Withstand a Greater Judgment.	10
g. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery, and the Range of Reasonableness of the Settlement Fund to a Possible Recovery in Light of All the Attendant Risks of Litigation.	11
C. The Settlement Notice Satisfies Due Process.	12
D. The Court Should Approve the Plan of Allocation.	13
III. CONCLUSION	13

TABLE OF AUTHORITIES

FEDERAL CASES

<i>ABC Rug & Carpet Cleaning Serv. v. ABC Rug Cleaners, Inc.</i> , 2010 U.S. Dist. LEXIS 145990 (D. Mass.)	13
<i>Bussie v. Allmerica Fin. Corp.</i> , 50 F. Supp. 2d 59 (D. Mass. 1999)	12
<i>In re Celexa & Lexapro Mktg. & Sales Practices Litig.</i> , 2014 U.S. Dist. LEXIS 125041 (D. Mass.)	5, 11
<i>In re Cendant Corp. Litig.</i> , 264 F.3d 201 (3d Cir. 2001)	10
<i>City of Providence v. Aeropostale, Inc.</i> , 2014 U.S. Dist. LEXIS 64517 (S.D.N.Y.)	8
<i>City of Providence</i> , 2014 U.S. Dist. LEXIS 64517 (S.D.N.Y.)	8
<i>In re Compact Disc Minimum Advertised Price Antitrust Litig.</i> , 216 F.R.D. 197 (D. Me. 2003)	7, 11, 12
<i>Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974)	5, 11
<i>In re Fleet/Norstar Sec. Litig.</i> , 935 F. Supp. 99 (D.R.I. 1996)	4
<i>Freedom Wireless, Inc. v. Bos. Communs. Group, Inc.</i> , 2006 U.S. Dist. LEXIS 95871 (D. Mass.)	4
<i>Gulbankian v. MW Mfrs., Inc.</i> , 2014 U.S. Dist. LEXIS 177668 (D. Mass.)	passim
<i>Hill v. State St. Corp.</i> , 2014 U.S. Dist. LEXIS 179702 (D. Mass.)	11
<i>Hochstadt v. Bos. Sci. Corp.</i> , 708 F. Supp. 2d 95 (D. Mass. 2010)	13
<i>Kristian v. Comcast Corp.</i> , 446 F.3d 25 (1st Cir. 2006)	6
<i>In re Linerboard Antitrust Litig.</i> , 2004 WL 1221350 (E.D. Pa.)	12
<i>In re Lupron Mktg. & Sales Practices Litig.</i> , 2005 U.S. Dist. LEXIS 17456 (D. Mass.)	9

<i>In re Lupron Mktg. & Sales Practices Litig.</i> , 228 F.R.D. 75 (D. Mass. 2005)	5, 7, 11, 12
<i>New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.</i> , 602 F. Supp. 2d 277 (D. Mass. 2009)	passim
<i>In re Pharm. Indus. Average Wholesale Price Litig.</i> , 588 F.3d 24 (1st Cir. 2009)	1, 4, 5, 6
<i>In re Relafen Antitrust Litig.</i> , 231 F.R.D. 52 (D. Mass. 2005)	7, 9, 10, 11, 12
<i>In re Remeron Direct Purchaser Antitrust Litig.</i> , 2005 U.S. Dist. LEXIS 27013 (D.N.J.)	8, 10, 13
<i>Rolland v. Cellucci</i> , 191 F.R.D. 3 (D. Mass. 2000)	4, 11, 12
<i>Shapiro v. JP Morgan Chase & Co.</i> , 2014 U.S. Dist. LEXIS 37872 (S.D.N.Y.)	6, 10
<i>Sylvester v. Cigna Corp.</i> , 369 F. Supp. 2d 34 (D. Me. 2005)	11
<i>Texas v. Organon USA Inc. (In re Remeron End-Payor Antitrust Litig.)</i> , 2005 U.S. Dist. LEXIS 27011 (D.N.J.)	12
<i>In re Tyco Int’l</i> , 535 F. Supp. 2d 249 (D.N.H. 2007)	12
<i>In re Warfarin Sodium Antitrust Litig.</i> , 391 F.3d 516 (3d Cir. 2004)	7
<i>In re Warfarin Sodium Antitrust Litig.</i> , 212 F.R.D. 231 (D. Del. 2002)	10
FEDERAL RULES	
Fed. R. Civ. P. 23(e)	1, 4, 12, 14

I. INTRODUCTION

A. Background

Direct Purchaser Plaintiffs¹ and the certified class of direct purchasers (the “Class,” collectively, the “Plaintiffs”) respectfully request that the Court grant final approval of the proposed \$98 million cash settlement (“Settlement”) in this case. As detailed below, and in the Joint Affidavit of Bruce E. Gerstein and Thomas M. Sobol (the “Gerstein/Sobol Aff.”) submitted herewith, the Settlement is an outstanding recovery for the Class and should be approved by this Court as “fair, reasonable, and adequate.”²

The Settlement’s fairness is reflected by a lack of objections. In fact, the core of the Class – which consists of 25 national and regional pharmaceutical resellers – have affirmatively supported the Settlement. The fairness of the Settlement is further reflected by (a) its procedural posture; it settled on the eve of trial, after Astellas Pharma US, Inc.’s (“Astellas”) motion to dismiss, extensive discovery disputes, Astellas’s motion for summary judgment and interlocutory appeal application, and the Court’s class certification grant; and its occurrence after (b) consultation with liability and damages experts; (d) favorable Daubert rulings on liability and damages; (e) extensive trial preparations including witness and expert preparation, drafting of exhibit lists and objections, designation of deposition testimony, and the filing motions in limine; and (f) substantive mediation by Eric Green, who provided both sides with his unbiased assistance and expertise.³ In addition, besides the typical battles that are to be expected in high-stakes litigation, this action included additional difficult conflicts, such as protracted disputes

¹ Burlington Drug Company, Inc. (“Burlington”), King Drug Company of Florence, Inc. (“King”), Louisiana Wholesale Drug Co., Inc. (“LWD”), Stephen L. LaFrance Pharmacy, Inc. d/b/a SAJ Distributors and Stephen L. LaFrance Holdings, Inc., and Uniondale Chemists, Inc.

² See FED. R. CIV. P. 23(e)(2); *In re Pharm. Industry Avg. Wholesale Price (“AWP”) Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009).

³ See Gerstein/Sobol Aff. at ¶¶ 3-9.

regarding Defendant's privilege assertions, and the designation of non-reporting witnesses as experts.⁴

Furthermore, this action was exceptionally complex, leaving its outcome in doubt if it did not settle. This case dealt with whether Astellas's petition could have convinced the FDA to change its position in light of the science, mathematics, and history of bioequivalence and generic drug testing and approval. It also dealt with, among other things, (1) FDA policy and the comparative policies of other entities regarding bioequivalence; (2) the science and medicine of immunosuppression; (3) the market for immunosuppressants; (4) the body of clinical data regarding the effectiveness of generic forms of immunosuppressants; (5) the timing of potential generic launch; and (6) the economic impact of the alleged delay. All of these tasks required consultation with experts and all were subject to significant dispute.

The fairness of the Settlement is manifest considering Astellas's defenses in each of these areas that it would have asserted at trial and on appeal. Moreover, 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 recovery, or, for that matter, any recovery at all. Instead, the Settlement will provide for:

- A national, direct purchaser class-wide settlement;
- Payment by Astellas totaling \$98 million in cash (less attorneys' fees, costs, and class representative awards) to members of the Class who timely file claim forms; and
- Individual notice to each class member by first class mail.

⁴ See Gerstein/Sobol Aff. at ¶¶ 22, 46.

A proposed Order was previously submitted as exhibit D to the Declaration of Bruce E. Gerstein in Support of Class Plaintiffs' Motion for Preliminary Approval of Proposed Settlement. (Doc. No. 652-2, Ex. D).

B. Notice to the Class

The Court previously approved the form and method of notice. Thus, on or about February 19, 2015, Rust Consulting, Inc. ("Rust"), the Court-appointed Settlement Administrator, sent individual notice to each of the 25 Class members by first class mail. Summary notice was also published in *The Pink Sheet*. Rust also established a website, www.prografdirectsettlement.com, containing the Notice, claim form, Settlement Agreement, and the Court's Preliminary Approval Order, and instructing members of the Class about how to obtain additional information. The notice advised Class members of the Settlement and their associated legal rights, including the rights to submit a claim, attend and to be heard at the final fairness hearing, or object to any term of the Settlement. The notice also informed members how they could obtain additional details about the Settlement. No Notices were returned as undeliverable, and no objections or opt-out notices were received. Plaintiffs therefore request that the Court find that Plaintiffs' Settlement Notice⁵ satisfied due process.

C. Plan of Distribution

Plaintiffs propose distributing the net settlement fund (i.e., net of attorneys' fees, expenses and class representative awards) to Class members *pro rata* based on each Class member's aggregate share of the total class purchases of Prograf during the Class Period. Each Class member's distribution amount will be calculated with the assistance of Plaintiffs' economist using transactional sales data produced by Astellas. Each class member will be

⁵ The declaration of Rebecca A. Blake of Rust Consulting, Inc. detailing the notice program is appended hereto as Ex.1.

provided with a pre-populated claim form setting forth the class member's purchase volume. Any Class member may provide the Settlement Administrator with data or information concerning its Prograf purchases to supplement or correct purchase information drawn from the transactional sales. Plaintiffs request that the Court approve this Plan of Allocation.⁶

II. ARGUMENT

A. Settlements of Class Actions are Encouraged.

It is well-settled that courts encourage settlement of lawsuits.⁷ Such encouragement is especially strong with respect to complex class actions such as this one.⁸

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

1. Legal Standard

A class action settlement warrants final approval if it is "fair, reasonable and adequate."⁹

The First Circuit stated that:

[A] district court can approve a class action settlement only if it is fair, adequate and reasonable, or (in shorthand) reasonable. If the parties negotiated at arm's-length and conducted sufficient discovery, the district court must presume the settlement is reasonable. The district court enjoys considerable range in approving or disapproving a class settlement, given the generality of the standard and the need to balance a settlement's benefits and costs.¹⁰

⁶ The declaration of Jeffrey J. Leitzinger, Ph.D. detailing the plan of allocation (distribution to class members on a *pro-rata* basis) is appended as Ex. 2.

⁷ *Freedom Wireless, Inc. v. Boston Communs. Group, Inc.*, 2006 U.S. Dist. LEXIS 95871 at *6 (D. Mass. Oct. 12, 2006) (in affirming a settlement, stating, "public policy encourage[s] the settlement of private disputes..."); *Rolland v. Cellucci*, 191 F.R.D. 3, 8 (D. Mass. 2000) (applying a "strong presumption in favor of the Settlement Agreement").

⁸ *See AWP Litig.*, 588 F.3d at 36. ("The district court's approval reflected another important concern: facilitating a settlement in a hard-fought, complex class action"); *In re Fleet/Norstar Sec. Litig.*, 935 F. Supp. 99, 105 (D.R.I. 1996) ("The district court's discretion is circumscribed by the long-recognized policy of encouraging settlements.").

⁹ FED. R. CIV. P. 23(e)(2).

¹⁰ *AWP Litig.*, 588 F.3d at 32-33 (citations omitted).

However, “[t]he First Circuit has not established a fixed test for evaluating the fairness of a settlement.”¹¹ As this Court explained in *Gulbankian v. MW Mfrs., Inc.*, “[t]here is no single litmus test for a settlement’s approval; it is instead examined as a gestalt to determine its reasonableness in light of the uncertainty of litigation.”¹² Courts in this district have used an exhaustive list of factors articulated by the Second Circuit, known as the “*Grinnell*” factors:¹³

(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.¹⁴

2. The Settlement is Presumptively Fair.

Where a settlement is “the product of arms-length negotiation following extensive discovery, its fairness is presumed.”¹⁵ The Settlement was negotiated at arm’s-length over months by counsel experienced in similar class antitrust cases, and mediated by Eric Green.¹⁶ Furthermore, the parties settled less than two weeks before the start of trial, after discovery was

¹¹ *Gulbankian v. MW Mfrs., Inc.*, 2014 U.S. Dist. LEXIS 177668 at *6-*7 (D. Mass. Dec. 29, 2014) (citing *New England Carpenters Benefits Fund v. First DataBank, Inc.*, 602 F.Supp.2d 277, 280 (D. Mass. 2009)).

¹² *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *6.

¹³ *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). See *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 93-94 (D. Mass. 2005) (noting that *Grinnell* has supplied the “most commonly referenced factors”); *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *7; *First DataBank, Inc.*, 602 F.Supp.2d 277, 280 (D. Mass. 2009).

¹⁴ *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *7. Courts in this Circuit have also recognized that a shorter (though still fundamentally similar) list may be more appropriate given the facts and posture of a particular case. See *First DataBank*, 602 F.Supp.2d at 280-281 (discussing “pared down versions of the *Grinnell* list,” such as the six-factor list from *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003) and a “slimmer,” five-factor list from *In re Tyco Int’l, Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 259-60 (D.N.H. 2007)).

¹⁵ *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *7, citing *AWP*, 588 F.3d at 32-33; *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 2014 U.S. Dist. LEXIS 125041 at *5 (D. Mass. Sept. 8, 2014).

¹⁶ This Court has described Mr. Green as “an experienced and well-qualified mediator.” *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *6.

complete, and after the Court had ruled on motions for summary judgment, *Daubert* motions, and other significant pretrial issues. Thus, the parties were fully aware of the strengths and weaknesses of the case.¹⁷ Accordingly, the Settlement is presumptively fair.

3. The Grinnell Factors Support Final Approval

The *Grinnell* factors support final approval. “All of the *Grinnell* factors need not be satisfied. Instead, the Court should look at the totality of the factors in light of the circumstances.”¹⁸

a. The Complexity, Expense and Likely Duration of Litigation.

The first factor is “the complexity, expense, and likely duration of the litigation,”¹⁹ which “captures the probable costs, in both time and money, of continued litigation.”²⁰

“The prosecution of a complex antitrust lawsuit, either in court or in arbitration, requires the outlay of substantial financial resources.”²¹ This case is no exception. Further, it raised many complicated factual and legal issues to which Astellas presented defenses. Defendant asserted, for example, that the portion of the petition that was granted could have been the cause of the delay in generic approval; that clinicians thought the petition was objectively reasonable; that the FDA inviting comment regarding tacrolimus approval standards showed the reasonableness of the petition; that the petition’s evidence was scientifically sound; that post-petition events and events in other jurisdictions vindicated the petition’s arguments; that Plaintiffs’ regulatory expert, Dr. Kessler, could not support his opinion that the FDA only considers “clinically meaningful data”; and that in any event, Sandoz could not have launched its generic product until

¹⁷ See, e.g., *AWP*, 588 F.3d at 32-33.

¹⁸ *Shapiro v. JP Morgan Chase & Co.*, 2014 U.S. Dist. LEXIS 37872 at *24 (S.D.N.Y. Mar. 21, 2014).

¹⁹ *First DataBank*, 602 F.Supp.2d at 280 (quoting *Grinnell*, 495 F.2d at 463).

²⁰ *Shapiro*, 2014 U.S. Dist. LEXIS 37872 at *28.

²¹ *Kristian v. Comcast Corp.*, 446 F.3d 25, 52 (1st Cir. 2006).

just before it actually did.²² In an effort to overcome these challenges, Class Counsel took extensive fact discovery and worked closely with expert witnesses in the fields of antitrust economics, bioequivalence, statistics, and FDA policies and procedures.²³ Moreover, this action has been hard-fought for over four years.²⁴ The parties and third parties together filed dozens of briefs, participated in many hearings and conferences, and this Court wrote several major opinions before the case was ready for trial. It was only after extensive settlement discussions and mediation that the parties settled. Absent the Settlement, this case would have continued to a complex jury trial, a lengthy post-trial motion phase, and appeals, with no certainty of a favorable outcome.²⁵ By contrast, the Settlement provides the Class with immediate and definite relief without the delay, risk, and uncertainty of continued litigation.²⁶

b. The Reaction of the Class to the Settlement.

The second factor is “the reaction of the class to the settlement.”²⁷ “Reaction to a settlement is positive when the number of objectors is minimal compared with the number of claimants, provided notice effectively reached absent class members.”²⁸ There are no objections

²³ See Gerstein/Sobol Aff. at ¶¶ 27-30.

²⁴ See Gerstein/Sobol Aff. at ¶ 3.

²⁵ See, e.g., *In re Warfarin*, 391 F.3d 516, 536 (3d Cir. 2004) (“...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”); *In re Compact Disc*, 216 F.R.D. 197, 212 (D. Me. 2003) (“The plaintiffs thereafter have to prepare for and attend a lengthy trial, perhaps in several locations; motions for judgment as a matter of law at the close of those trials; post trial motion practice; and lengthy appeals.”)

²⁶ *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005) (Agreeing, in approving settlement, “[t]he complexity, expense and likely duration of the litigation . . . weighs heavily in favor of final approval of this Settlement.”) (Internal quotation marks omitted.).

²⁷ *First DataBank*, 602 F.Supp.2d at 280 (quoting *Grinnell*, 495 F.2d at 463).

²⁸ *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *8, citing *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 96 (D. Mass. 2005).

to the settlement to date,²⁹ which “may itself be taken as evidencing the fairness of a settlement.”³⁰

Several members of the Class, composed of 25 businesses, many with their own counsel, have written to the Court to express their *affirmative support* for the Settlement, including Class Representatives, five additional regional wholesalers, and the “Big 3” national wholesalers, who have the largest financial stake in the Settlement.³¹ These Class members, whose purchases together comprised over 95% of total purchases, recognize the legal hurdles and risks involved in this case and the excellent result obtained. Their judgment is especially meaningful because, based upon their experience as Class members in other like cases, most of which were prosecuted by the same Class Counsel, they have a particular ability to assess the Settlement’s reasonableness. In particular, the “Big 3,” have the largest financial stake in the Settlement, and therefore have the greatest incentive to critically assess it. Their affirmative support underscores the overall positive reaction of the class.

c. Stage of Proceedings and Amount of Discovery Completed.

The third *Grinnell* factor is “the stage of the proceedings and the amount of discovery completed.”³² This Court considers whether “the parties fully understand the legal and factual circumstances and are well situated to make informed decisions in the settlement context.”³³

²⁹ The deadline for submission of objections to be filed is April 27, 2015. Class Counsel will inform the Court if any are filed.

³⁰ *City of Providence v. Aeropostale, Inc.*, 2014 U.S. Dist. LEXIS 64517 at *15-*16 (S.D.N.Y. May 9, 2014) (quotation omitted). *See also, e.g., In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013 at *17 (D.N.J. Nov. 9, 2005) (“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.”)

³¹ *See* exhibits 2 through 11 to the Gerstein/Sobol Aff.

³² *First DataBank*, 602 F.Supp.2d at 280 (quoting *Grinnell*, 495 F.2d at 463).

³³ *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *9. *See also, City of Providence*, 2014 U.S. Dist. LEXIS 64517 at *17 (“[T]he question is whether the parties had adequate information about their claims, such that their counsel can intelligently evaluate the merits of plaintiff’s claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs’ causes of action for purposes of settlement.”) (Internal quotation omitted).

Application of this factor supports approval. The parties did not settle until just before trial. All fact and expert discovery had been completed. Over 2.4 million pages of documents had been reviewed. Plaintiffs had taken 16 fact depositions. The parties had engaged in extensive motion practice.³⁴ As a result, Class Counsel understood the strengths and weaknesses of the Class's claims and Astellas's defenses.³⁵

d. Risks of Establishing Liability and Damages.

The fourth and fifth *Grinnell* factors are the risks of establishing liability and damages.³⁶ “In evaluating [these factors], the court weighs the likelihood of success on the merits against the amount and form of relief offered in the settlement.”³⁷ These factors weigh in favor of approval.

There were no guarantees of a verdict for Plaintiffs that would endure post-trial motions and appeal. This case was exceptionally complex, dealing with issues of bioequivalence, immunosuppression, and FDA practice, all set against the difficult “objective baselessness” liability standard, making it impossible to predict its outcome. Moreover, damages were hotly contested, subject to competing expert interpretations and dependent on which expert assumptions the jury credited. Indeed, antitrust jurisprudence is “replete with cases in which plaintiffs prevailed at trial on issues of liability, but recovered little or nothing by way of damages.”³⁸ The jury could have agreed with Astellas's experts, that even if Plaintiffs established baselessness, Sandoz would not have launched the first generic tacrolimus until just before it actually did. Or, the jury might have agreed with Astellas's experts that generic

³⁴ See Gerstein/Sobol Aff. at ¶¶ 16-18; 32-52.

³⁵ *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *9 (approving settlement after “extensive and well-developed discovery” had taken place, “[m]ultiple motions to compel” were filed, “over a dozen depositions” taken, and “[o]ver 130,000 pages of ...produced.”); *Relafen*, 231 F.R.D. at 73 (“This is not a case where the bulk of the attorneys’ time was spent on negotiations. Class counsel has consistently and vigorously been preparing for trial, which, were this Court to reject the Settlement, would commence in the near future.”).

³⁶ *First DataBank*, 602 F.Supp.2d at 280-81 (quoting *Grinnell*, 495 F.2d at 463).

³⁷ *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *10.

³⁸ *In re Lupron Mktg. & Sales Practices Litig.*, 2005 U.S. Dist. LEXIS 17456 at *16 (D. Mass. Aug. 17, 2005).

competition would not have resulted in as large of a price decrease as Plaintiffs' expert argued. Damages in these scenarios would have very low, or *de minimis*.³⁹

A settlement is approvable where it "avoids substantial risks and costs for both sides, giving a certain positive outcome in the face of a costly and uncertain one."⁴⁰ The fourth and fifth *Grinnell* factors pertain here.

e. The Risks of Maintaining the Class Action Through Trial.

The sixth *Grinnell* factor, "the risk[] of maintaining a class action through trial,"⁴¹ "allows the Court to weigh the possibility that... a class...would be decertified prior to trial."⁴² As there was minimal risk of decertification, this factor is neutral.

f. Ability of the Defendant to Withstand a Greater Judgment.

The seventh *Grinnell* factor, "the ability of the defendants to withstand a greater judgment,"⁴³ inures towards approval. As in *In re Relafen Antitrust Litig.*, "[t]his 'defendant oriented' consideration, is largely neutral as this is, evidently, a 'defendant [] with classic deep pockets.'"⁴⁴ Plaintiffs do not contend that Astellas could not withstand a judgment larger than the Settlement, but that does not weigh heavily against approval.⁴⁵

³⁹ See, e.g., *In re Warfarin*, 212 F.R.D. at 256 ("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 *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001)).

⁴⁰ *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *10.

⁴¹ *First DataBank*, 602 F.Supp.2d at 281 (quoting *Grinnell*, 495 F.2d at 463).

⁴² *Shapiro*, 2014 U.S. Dist. LEXIS 37872 at *39 (internal quotation omitted).

⁴³ *First DataBank*, 602 F.Supp.2d at 281 (quoting *Grinnell*, 495 F.2d at 463).

⁴⁴ 231 F.R.D. at 73 (citing *Lupron*, 228 F.R.D. at 97).

⁴⁵ See, e.g., *Remeron*, 2005 U.S. Dist. LEXIS 27013 at *24 ("[M]any settlements have been approved where a settling defendant has had the ability to pay greater amounts.").

g. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery, and the Range of Reasonableness of the Settlement Fund to a Possible Recovery in Light of All the Attendant Risks of Litigation.

The eighth and ninth *Grinnell* factors are “the range of reasonableness of the settlement fund in light of the best possible recovery” and “the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.”⁴⁶ “[T]he issue for the court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case.”⁴⁷ In this regard, “the court consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable,”⁴⁸ while “guard[ing] against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.”⁴⁹ Thus, “[a] settlement need not reimburse 100% of the estimated damages to class members in order to be fair.”⁵⁰

Potential damages, minus any trebling or any punitive damages,⁵¹ “appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed

⁴⁶ *First DataBank*, 602 F.Supp.2d at 281 (quoting *Grinnell*, 495 F.2d at 463).

⁴⁷ *Hill v. State St. Corp.*, 2014 U.S. Dist. LEXIS 179702 at *26 (D. Mass. Nov. 26, 2014). As Judge Young explained in *In re Relafen*, “A fine-tuned equation by which to determine the reasonableness of the size of a settlement fund does not exist. In any case, there is a range of reasonableness with respect to a settlement. Moreover, a high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes.” 231 F.R.D. at 73 (citations omitted).

⁴⁸ *Id.*

⁴⁹ *In re Lupron*, 228 F.R.D. at 98.

⁵⁰ *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 2014 U.S. Dist. LEXIS 125041, at *21 (internal citations omitted). See also *Gulbankian*, 2014 U.S. Dist. LEXIS 177668 at *13 (citing *Celexa* 2014 U.S. Dist. LEXIS 125041 at *5) (in class action seeking damages to consumers from defective windows, settlement compensation was fair even though it did not cover “actual real world cost of replacing a defective window”); *Rolland*, 191 F.R.D. at 14-15 (“[i]n evaluating the substantive fairness of a class action settlement, the court cannot, and should not, use as a benchmark the highest award that could be made to the plaintiff after full and successful litigation of the claim.”) (citation omitted).

⁵¹ See *In re Compact Disc*, 216 F.R.D. at 210 (D.Me. 2003) (“courts generally do not consider either recovery of treble damages or recovery of attorney fees in assessing the settlement”). See also *Sylvester v. CIGNA Corp.*, 369

settlement.”⁵² This Settlement provides a recovery well within the range of reasonableness in light of the best possible recovery and the risks of litigation. The \$98 million dollar recovery here represents approximately 53% of the likeliest damages estimate Plaintiffs’ expert espoused, which is well within the range of acceptable settlement recoveries.⁵³

Juxtaposed against the risks of litigation discussed above, the eighth and ninth *Grinnell* factors strongly support 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 adequate notice be provided to the class.⁵⁴ “The notice must describe fairly, accurately and neutrally the claims and parties in the litigation, the terms of the proposed settlement, and the options available to individuals entitled to participate, including the right to exclude themselves from the class.”⁵⁵

By order dated January 30, 2015, the Court found that the proposed form of written notice for mailing to all known Class members and the summary notice for publication in the industry trade journal, *The Pink Sheet*, satisfied the requirements of Rule 23(e).⁵⁶ By February

F.Supp.2d 34 at 51, n. 51 (D.Me. 2005) (declining to consider Plaintiffs’ request for interest, punitive and treble damages in analyzing fairness and reasonableness of proposed settlement); *Grinnell*, 495 F.2d at 458-459.

⁵² *In re Relafen*, 231 F.R.D. at 74 (citation omitted); *In re Lupron*, 228 F.R.D. at 97 (citation omitted).

⁵³ *See, e.g., In re Relafen Antitrust Litig.*, 231 F.R.D. at 74 (“26% or 55% of the alleged damages as calculated, respectively, by the End Payors’ expert and the defense expert.”); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *4 (E.D. Pa., June 2, 2004) (collecting cases in which courts have approved settlements of 5.35% to 28% of estimated single damages in complex antitrust actions); *In re Remeron End-Payor Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27011 at *70 (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”).

⁵⁴ *See In re Tyco*, 535 F. Supp. 2d at 258; *Rolland*, 191 F.R.D. at 6.

⁵⁵ *In re Compact Disc*, 216 F.R.D. at 203. *See also Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 80 (D. Mass. 1999). Class members were given the opportunity to opt-out of the class when the Court first certified it. Pursuant to the Court’s Order dated August 6, 2013 (Doc. No. 288), a “Notice of Pendency of Class Action” in a form approved by the Court, was sent to putative class members. Opt-out elections were required to be postmarked by October 31, 2013. No parties/entities have elected to opt-out of the class. The proposed Settlement Agreement does not provide for a second opt-out period and Fed. R. Civ. P. 23(e) does not require one.

⁵⁶ Doc. No. 659.

19, 2015, the Claims Administrator disseminated notices in compliance with the Court's Order.⁵⁷

All class members were advised by certified mail of their rights under the Settlement, including the right to object to the Settlement itself, to the award of attorneys' fees and costs, or to the proposed incentive awards. Additionally, Class members were advised that they may appear at the May 20, 2015 fairness hearing. Accordingly, the Settlement Notice satisfied due process.

D. The Court Should Approve the Plan of Allocation

The proposed Plan of Allocation, which would allocate the settlement funds to Class members on a *pro rata* basis efficiently and fairly, is familiar in these Hatch-Waxman antitrust cases. "As with the settlement itself, 'the plan of allocation must be fair, reasonable and adequate.'"⁵⁸ Plans of Allocation that distribute recovery to class members on a *pro rata* basis meet this test, and are "inherently reasonable."⁵⁹ As set forth more fully in the Declaration of Jeffrey L. Leitzinger, Ph.D.,⁶⁰ the Plan of Allocation, distributes the Settlement Fund, net of Court-approved attorneys' fees, expenses, and incentive awards, *pro rata*, in proportion to overcharges incurred by each purchaser.

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

⁵⁷ See Ex. 1..

⁵⁸ *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 109 (D. Mass. 2010) (citing *In re Tyco*, 535 F. Supp. 2d at 262).

⁵⁹ *In re Remeron*, 2005 U.S. Dist. LEXIS 27013 at *30. See also *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 110 (D. Mass. 2010) (*pro rata* distribution); *Woolfson v. Caregroup, Inc.*, 2010 U.S. Dist. LEXIS 145990 (D. Mass. Sept. 13, 2010); (approving as fair, a plan of allocation distributing funds in a way that is "rationally related to the relative strengths and weaknesses of the respective claims asserted.").

⁶⁰ Appended hereto as Ex.2. The Leitzinger Declaration details the proposed Plan of Allocation.

pursuant to FED. R. CIV. P. 23(e), finds that the Settlement Notice satisfied due process, and approves the Plan of Allocation.

Dated: April 9, 2015

/s/ Bruce E. Gerstein

Bruce E. Gerstein
Dan Litvin
GARWIN GERSTEIN & FISHER LLP
88 Pine Street, 10th Floor
New York, NY 10005
Tel: (212) 398-0055
Fax: (212) 764-6620
bgerstein@garwingerstein.com
dlitvin@garwingerstein.com

Thomas M. Sobol
David S. Nalven
Kristen A. Johnson
Jessica MacAuley
HAGENS BERMAN SOBOL SHAPIRO LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Tel: (617) 482-3700
Fax: (617) 482-3003
tom@hbsslaw.com
davidn@hbsslaw.com
kristenp@hbsslaw.com
jessicam@hbsslaw.com

Co-lead Counsel for the Direct Purchaser Class

CERTIFICATE OF SERVICE

I, Bruce E. Gerstein, hereby certify that I caused a copy of the foregoing to be filed electronically via the Court's electronic filing system. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system, and notice of these filings will be sent to these parties by operation of the Court's electronic filing system.

Dated: April 9, 2015

/s/ Bruce E. Gerstein
Bruce E. Gerstein