

**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

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF
ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES
AND INCENTIVE AWARDS TO CLASS REPRESENTATIVES**

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Plaintiffs,¹ by Class Counsel, respectfully submit this Memorandum in Support of Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for the Class Representatives pursuant to Fed. R. Civ. P. 23(h) and 54(d).

I. INTRODUCTION

The Plaintiffs' claims against Astellas Pharma US, Inc. ("Astellas") have been settled for a cash settlement of \$98 million (the "Settlement"), plus interest (the "Settlement Fund"). This is an excellent result, achieved for the benefit of the Class through the skill, subject matter expertise, perseverance, and diligence of Class Counsel in the face of vigorously asserted defenses by skillful opposing counsel, and on the eve of trial. As compensation for their efforts, Class Counsel seek an award of attorneys' fees in the amount of \$32,666,666.66 -- one-third of the Settlement Fund -- and reimbursement of \$1,420,865.29 in litigation expenses. Plaintiffs also seek incentive awards for each of the class representatives of \$50,000 to \$100,000 for their respective contributions to the success of this effort.²

An extensive description of this complex litigation, including a description of Class Counsel's work prior to reaching the Settlement, and the numerous and substantial risks that Class Counsel faced (and would continue to face absent the Settlement) is set forth in Direct Purchaser Class Plaintiffs' Memorandum of Law in Support of Motion for Entry of an Order Granting Final Approval of Settlement (the "Settlement Motion") and the accompanying Affidavit of Class Counsel (the "Gerstein/Sobol Aff."), submitted concurrently herewith.

The following factors support this application:

¹ Plaintiffs are Stephen L. LaFrance Holdings, Inc., Stephen L. LaFrance Pharmacy, Inc., Louisiana Wholesale Drug Company, Burlington Drug Company, King Drug of Florence, Inc., and Uniondale Chemists, Inc.

² Named Plaintiffs actively protected the Class's interests by filing the suit on behalf of the Class and undertaking all the responsibilities involved in being a named plaintiff, including responding to document requests and interrogatories, monitoring the progress of the case, attending mediation sessions, and preparing for trial. The Class representatives were required to expend significant time and effort that was not compensated over the 4 years of this litigation.

1. The size of the \$98 million Settlement Fund is substantial and will provide a significant guaranteed recovery to the Class.

2. There are no objections to the request and several members of the class, comprised entirely of businesses experienced in pharmaceutical antitrust litigation, have provided positive endorsements of the request.

3. The litigation was vigorously and effectively prosecuted at all stages by Class Counsel, including through preparation for trial. Class Counsel's efforts in defeating Astellas's summary judgment motion are of particular note in light of the heightened burden of proof imposed by the *Noerr-Pennington* doctrine.

4. Class Counsel faced significant risks in pursuing this litigation. Class Counsel confronted determined opposition by Astellas and its well-staffed and highly competent legal team, who vigorously denied any wrongdoing and asserted numerous defenses. The risks faced by Class Counsel were particularly poignant on the eve of trial due to outstanding evidentiary issues, the inherent uncertainty of a jury verdict, and a possible motion for judgment as a matter of law at the close of Plaintiffs' case, which could have resulted in dismissal of Plaintiffs' claims either by this Court or on appeal. These risks were compounded because Class Counsel worked on a contingent fee basis, receiving no compensation during the litigation, and no assurance of recovering fees and costs.

5. The fee request is consistent with fee awards in 19 direct purchaser pharmaceutical antitrust actions in this District and elsewhere since 2003. It is also consistent with the case law from this District as well as other federal courts, which routinely make such awards. Moreover, a one-third fee readily approximates market conditions involving complex business litigation, where contingency fees of one-third are common.

6. Public policy is served through the compensation of counsel who prosecute private claims on a contingent basis who may not otherwise press forward with purely individual claims. Without a fee that takes into account the contingency risk, Class Counsel would be unable to bring actions that serve to protect the interests of the public.

These reasons are detailed more completely below and in the accompanying affidavit, and support Class Counsel's request that the Court approve this motion.

II. HISTORY OF THE LITIGATION

This Action, commenced on March 1, 2011, was brought on behalf of a class of direct purchasers of the brand name drug Prograf sold by Astellas. Plaintiffs alleged that Astellas violated Section 2 of the Sherman Act by delaying competition from less-expensive generic versions of Prograf by filing a petition with the FDA that it could not reasonably have expected to succeed on the merits; that was intended to delay generic competition; that did in fact delay generic competition; and which thereby allowed Astellas to unlawfully maintain its monopoly and charge supracompetitive prices for a period of time.

A. Discovery

Following an extensive pre-filing investigation and the preparation of a detailed complaint, Class Counsel conducted extensive discovery. *See* Gerstein/Sobol Aff. at ¶¶ 20-31. Class Counsel: (a) obtained documents through public sources and FOIA requests to the FDA; (b) served document requests and interrogatories on Astellas, and document requests on third-parties, including Astellas's generic competitors, transplant physician organizations, Astellas's outside public relations and marketing firms, and Astellas's law firm; (c) analyzed over 2.4 million pages of documents produced as a result; (d) assisted Class Representatives in responding to discovery; (e) identified the necessary deponents and took sixteen fact

depositions³; and (f) retained and worked closely with seven experts regarding the science of bioequivalence, economics, regulatory policy, and FDA practice. *Id.*⁴

B. Motion Practice

Class Counsel also engaged in significant motion practice. *See* Gerstein/Sobol Aff. at ¶¶ 32-52. For example, Class Counsel engaged in motion practice regarding privilege issues that resulted in the production of thousands of additional documents containing key liability evidence.

The parties also engaged in extensive *Daubert* briefing. Class Counsel successfully precluded Astellas's experts from testifying on generic bypass and end-payor claims. Class Counsel also successfully defended Plaintiffs' experts from attack on key liability, causation, and damages issues; (*Id.* at ¶¶ 49-50) and defeated Astellas's attempts to offer non-reporting experts under Fed. R. Civ. P. 26(a)(2)(C). *Id.* at ¶¶ 46-48. The parties also filed extensive *in limine* briefing that increased the risk on both sides. For example, the parties' disputed whether post-petition evidence was admissible. Plaintiffs also opposed Astellas's motions *in limine*, including a motion to preclude evidence regarding its injunction litigation against the FDA. *Id.* at ¶¶ 52. Class Counsel participated in oral argument on *Daubert* and *in limine* motions at the final pretrial conference on December 4, 2015. Class Counsel also engaged in briefing and argument resulting in denial of Astellas's motions to dismiss and for summary judgment. *Id.* at ¶¶ 16-19; 36-45.

C. Trial Preparation

After denial of Astellas's motion for summary judgment, Class Counsel began preparations for trial, scheduled to begin January 12, 2105 (*id.* at ¶ 52), expending substantial effort to refine and focus a complex case for succinct presentation to the jury. To narrow and

³ As well as attending several depositions in the end-payor case.

⁴ In all, 10 experts opined in this case and each provided at least one report: 7 on behalf of the direct purchaser plaintiffs and 3 on behalf of Astellas. The majority of the experts were deposed. *Id.* at ¶¶ 30-31.

define the issues to be tried before the Court and jury, Class Counsel: (a) reviewed the extensive document database to select documents critical to Plaintiffs' presentation; (b) reviewed hundreds of hours of deposition testimony in order to distill essential testimony to be presented to the jury; (c) worked with fact and expert witnesses to prepare for their examinations; (d) worked with Astellas in submitting a joint pretrial memorandum to the Court; (e) prepared proposed jury instructions and *voir dire*; and (f) retained and worked with graphic designers to prepare visual aids to effectively communicate with the jury. *Id.*

D. Mediation and Settlement

After full discovery and pre-trial practice, and on the eve of trial, Class Counsel was in a position to reach a Settlement for the Class. Negotiation of the Settlement unfolded over a period of months and intensified only as the trial approached. *Id.* at ¶¶ 53-56. Mediation was conducted under the auspices of Eric D. Green, a highly experienced mediator. That mediation included in-person presentations to inside and outside counsel for Astellas, written communications, and multiple one-on-one telephone sessions through Mr. Green, resulting in a \$98 million cash settlement proposal by Mr. Green that was accepted by the parties.

III. CLASS COUNSEL'S FEE REQUEST IS REASONABLE

A. The Percentage-of-the-Fund Method is the Appropriate Method for Calculating Attorneys' Fees in This Case

A lawyer who recovers a "common fund" on behalf of a class is entitled to reasonable attorneys' fees and expenses from the fund.⁵ The Supreme Court has consistently held in

⁵ See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 241 (1985) (a common fund allows "fair and just allowances for expenses and counsel fees").

common fund cases that it is appropriate for attorneys' fees to be determined on a percentage-of-the-fund ("POF") basis.⁶

While district courts in the First Circuit have the discretion to use either a POF or lodestar method in making an attorney fee award in a common fund case, the First Circuit has acknowledged the "distinct advantages that the [POF] method can bring to bear"⁷ in that it is less burdensome to administer, reduces the possibility of collateral disputes, enhances efficiency throughout the litigation, is less taxing on judicial resources, and better approximates the clearly stated preference for use of the POF method in determining fees.⁸ Hence, most courts use the POF method with a lodestar cross-check.⁹

B. Application of the Relevant Factors Supports the Requested Fee Here

A district court in the First Circuit has "extremely broad" latitude in determining a fee award under the POF method.¹⁰ Unlike other Circuits, the First Circuit does not require district courts to use a fixed list of factors.¹¹ Nonetheless, district courts have typically focused on a mix of the following considerations:

- (1) the extent of the benefit obtained;

⁶ See *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939).

⁷ A majority of the Circuit Courts of Appeal have approved the use of the POF method in common fund cases. See *In re Lupron*, 2005 U.S. Dist. LEXIS 17456 at *10-11 (D. Mass. Aug. 17, 2005) (noting that Courts of Appeals for the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits have adopted it).

⁸ *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305-07 (1st Cir. 1995) ("contrary to popular belief it is the lodestar method, not the [POF] method, that breaks from precedent."); *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, 2014 U.S. Dist. LEXIS 170100 at *22 (D. Mass. Dec. 9, 2014) ("The 'prevailing praxis' within the First Circuit is to use the percentage-of-the-fund ('POF') approach to calculate attorneys' fees in non-statutory fee cases).

⁹ *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 U.S. Dist. LEXIS 97364, *7 (D. Mass. Oct. 20, 2009) (Saris, J.) ("the weight of the case law [] approves of percentage of the fund as the methodology for determining attorneys' fees, with a lodestar calculation as a pragmatic cross-check."); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005) (Young, C.J.) (utilizing percentage-of-the-fund method with lodestar as a cross-check).

¹⁰ *In re Tyco Int'l Ltd. MDL Litig.*, 535 F.Supp.2d 249, 265 (D.N.H. 2007) (quoting *In re Thirteen Appeals*, 56 F.3d at 309).

¹¹ *Id.*

- (2) the reaction of the class members to the proposed settlement and proposed attorneys' fees;
- (3) the skill and efficiency of the attorneys involved;
- (4) the amount of time devoted to the case by counsel;
- (5) the complexity and duration of the litigation;
- (6) the risk that the litigation would be unsuccessful;
- (7) fee awards in similar cases;
- (8) the manner in which the fee request was negotiated between counsel and the lead plaintiff(s); and
- (9) public policy considerations, if any.¹²

1. The extent of the benefit obtained

The Class is comprised of 25 business entities. These Class Members will share in the \$98 million cash Settlement Fund, net of any attorneys' fees, expenses and incentive awards granted by the Court. Their recovery is both quantifiable and immediate. The recovery is substantial, both in absolute terms and in light of the obstacles and risks faced by Class Counsel in this case, including the risk of a recovery of zero.¹³ As detailed in the Gerstein/Sobol Aff. (¶¶57-62) and in Plaintiffs' Settlement Motion (at 12-15), these obstacles were numerous,

¹² See, e.g., *In re Evergreen Ultra Short Opportunities Fund Secs. Litig.*, 2012 U.S. Dist. LEXIS 174711, at *5-6 (D. Mass. Dec. 10, 2012) (listing factors); *In re TJX Co. Retail Security Breach Litig.*, 584 F.Supp.2d 395, 401 (D. Mass. 2008) (same); *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 265-266 (D.N.H. 2007) (same); *In re Lupron*, 2005 U.S. Dist. LEXIS 17456 at *12 (same).

¹³ See *in re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, 2014 U.S. Dist. LEXIS 170100 at *13 (settlement providing substantial payment considered a benefit to the class); *In re Relafen*, 2004 U.S. Dist. LEXIS 28801 at *19 (multi-million dollar cash settlement fund for direct purchases of prescription drug conferred a substantial benefit on the class); *In re Veeco Instruments Secs. Litig.*, 2007 U.S. Dist. LEXIS 85554, *22-23 (S.D.N.Y. Nov. 7, 2007) (\$5.5 million settlement conferred substantial benefit in securities class action in view of fact that defendants were represented by well-staffed team of lawyers who challenged plaintiffs at every stage of litigation up until eve of trial).

significant, time consuming and costly. In light of these risks and obstacles, the \$98 million Settlement is an excellent result.¹⁴

2. The reaction of the class to the proposed settlement and proposed attorneys' fees

On January 29, 2015, following preliminary approval, individual notice of the Settlement was mailed to Class Members, published in a healthcare trade journal, and posted on the websites of certain of Class Counsel and the Claim Administrator.¹⁵ The notice informed Class Members that Class Counsel would be seeking fees of up to one-third of the Settlement Fund, reimbursement of expenses, and incentive awards for each of the Class Representatives.

Class Counsel has received *no* objections to date,¹⁶ indicating the overwhelming support of the Class for the settlement and for the requested award of fees. The lack of objections, particularly in a class consisting of sophisticated entities, is a “rare phenomenon” that supports the requested fee.¹⁷ Here, however, the Class’s support of the Settlement and fee request is not limited to the absence of objections: 11 Class members, including the three largest purchasers, have affirmatively endorsed their support for the Settlement and the fee request. For example, one counsel for Cardinal Health wrote:

¹⁴ See, e.g., *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013 at *34 (D.N.J. Nov. 9, 2005) (awarding a one-third fee, finding that settlement amount was “significant when measured against the estimates as to the potential values of Plaintiffs’ claims made by the parties’ experts during the course of this litigation.”); *In re General Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 432 (E.D. Pa. 2001) (awarding a one-third fee, and finding that a \$48 million fund was “quite large” and exceeds “twice the amount that defendants’ expert claimed plaintiffs could recover under the best circumstances”).

¹⁵ See Rust Aff. at ¶ 7 (Ex. 1 to the Gerstein/Sobol Affidavit). The notice was posted on the websites of Garwin Gerstein & Fisher, LLP and Rust Consulting, LLC.

¹⁶ See Gerstein/Sobol Aff. at ¶ 67. The deadline for receipt of objections is April 27, 2015. In the event that an objection is received, Class Counsel will inform the Court.

¹⁷ See *In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3rd Cir. 2005); *In re Relafen*, 2004 U.S. Dist. LEXIS 28801 at * 20 (in approving fee request, noting that no member of the class, which was comprised of business entities, objected to the requested fee award); *Bennett v. Roark Capital Group, Inc.*, 2011 U.S. Dist. LEXIS 48094 (D. Me. May 4, 2011) (same); See also, *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, 2014 U.S. Dist. LEXIS 170100 at *14 (overruling 11 objections, finding that the majority support for the settlement “strongly favors final approval”).

Class Counsel have, through me, informed Cardinal Health of the general facts and circumstances of the case, the legal hurdles and other risks involved in the case, and the settlement. Based on the information provided by Class Counsel and Cardinal Health's own assessment of the facts and legal issues, Cardinal Health is satisfied the proposed settlement is fair and adequate. Based on the value of the settlement and the time and expense which Class Counsel invested on behalf of the class members in prosecuting and resolving this matter, Cardinal Health is also satisfied the proposed attorney fee award of the settlement amount is appropriate.¹⁸

3. The skill and efficiency of the attorneys involved

Class Counsel's experience and skill¹⁹ are evidenced by their effective prosecution and settlement of this action.²⁰ This skill also resulted in obtaining class certification; denial of Astellas's motions to dismiss and for summary judgment; effective prosecution and defense of *Daubert* motions and motions *in limine*; comprehensive trial preparation; and successful settlement negotiations.²¹

4. The amount of time devoted to the case by counsel

Class Counsel have expended over 34,200 hours and advanced over \$1.42 million in expenses on this case.²² As observed in *Varacallo v. Massachusetts Mut. Life Ins. Co.*, "[o]ver

¹⁸ See Gerstein/Sobol Aff. at Ex. 3. Several other class members have similarly supported the settlement. See *id.* at Exs. 2-11.

¹⁹ The background, experience, accomplishments and qualifications, including firm resumes of Class Counsel, were previously submitted to the Court in their Motion for Appointment (Dkt. No. 60). In describing the efforts of many of the same Class Counsel in another complex antitrust class action, Judge Edmunds in *In re Cardizem CD Antitrust Litig.*, No. 99-73259 (E.D. Mich. Nov. 26, 2002) stated that "this Court would be remiss if it failed to acknowledge the experience, hard work and skill demonstrated by Class Counsel in this matter. Their excellent performance on behalf of the Class in this hotly contested case justifies the award they seek." *Id.* at 21. See also *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, *37 (D.N.J. Nov. 9, 2005) (with respect to the same Class Counsel, noting that, "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience"); *In re Relafen*, 2004 U.S. Dist. LEXIS 28801 at *19 (with respect to the same Class Counsel, Chief Judge Young noted that "the [s]ettlement was obtained as a direct result of Class Counsel's skillful advocacy.")

²⁰ See, e.g., *In re Pharm. Ind. AWP Litig.*, 2008 U.S. Dist. LEXIS 111818, *82 (D. Mass. Dec. 15, 2008) (Saris, J.) (in awarding 30% fees from a \$28.6 million settlement, noting that class counsel "vigorously and effectively pursued the Class Members' claims...in this highly complex case [and] that the Settlement was obtained as a direct result of their advocacy."); *In re TJX*, 584 F.Supp.2d at 408 (fact that class counsel was comprised of attorneys from firms experienced in type of litigation at issue and demonstrated "more than satisfactory skill and effort in the course of their advocacy" weighed in favor of granting requested fee award).

²¹ See generally, Gerstein/Sobol Aff.

²² See Gerstein/Sobol Aff. at ¶¶ 2, 84, 87.

the course of years, it is reasonable that so much time would have been spent on these complex cases, particularly given the excellent counsel of Defendants and their contested nature.”²³ So too here. From pre-complaint investigation through discovery and trial preparation, Class Counsel expended time, energy and resources in litigating this case against highly-skilled adversaries. Moreover, Class Counsel have worked and will continue to work a significant number of hours in connection with administering the Settlement.²⁴ This all represents a significant commitment of time, personnel, and out-of-pocket expense outlays to this case.

5. The complexity and duration of the litigation

Antitrust class actions are invariably complex.²⁵ This case is no exception. To prove that Astellas’s petition was objectively baseless, Plaintiffs had to develop evidence that the petition had no reasonable chance of persuading the FDA to change its position on the standards for assessing bioequivalence. This required Class Counsel to learn the science, mathematics, and history of bioequivalence and generic drug testing and approval; develop a strong understanding of FDA policy and the comparative policies of other jurisdictions regarding bioequivalence; and gain in-depth knowledge about immunosuppressants, especially Prograf and its generic equivalents intended for sale in the U.S. versus versions approved in other countries, and about the clinical data regarding the effectiveness of generic forms of immunosuppressants. Additionally, Class Counsel had to filter through thousands of documents, take depositions, and work with experts to determine when a less-expensive generic version of Prograf could have

²³ 226 F.R.D. 207, 252 (D.N.J. 2005).

²⁴ See *Varacallo*, 226 F.R.D. at 252 (fee award will be sole compensation for counsel “despite the continuing responsibilities [counsel] will have in responding to Class Member inquiries, assisting the Claim Evaluator, consulting on individual cases, and any post-judgment proceedings and appeals”).

²⁵ *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) (“whether a company’s action constitutes an antitrust violation is usually a complicated question of fact. The law that then applies to those facts is equally complex”); *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000) (“An antitrust class action is arguably the most complex action to prosecute.”)

gained FDA approval and entered the market, “but for” Astellas’s filing of the citizen petition; the would-be pricing of such product; the market erosion on Prograf from such a launch; and the financial impact of the delay. All these issues were subject to Astellas’s opposition.

6. The risk that the litigation would be unsuccessful

A determination of a fair fee must include consideration of “the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high.”²⁶ As such, numerous courts have observed that the risk assumed by an attorney is “perhaps the foremost” factor in determining the appropriate fee award.²⁷

The risks of non-recovery were abundant throughout this case. Class Counsel undertook comprehensive, time-consuming pre-filing investigation regarding highly complex, technical scientific and regulatory issues, and undertook discovery, obtaining and reviewing millions of pages of documents in the lead-up to summary judgment. As the case proceeded, Class Counsel undertook substantial additional risk, expending tens of thousands of additional hours and over a million dollars in out-of-pocket expenses further investigating the Class’s claims, conducting depositions, retaining and working with experts (and rebutting the opinions of defense experts), briefing numerous discovery motions, and preparing for trial by crafting an extensive exhibit list,

²⁶ *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 842 F. Supp. 2d 346, 353 (D. Me. 2012) quoting *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013 at *39 (D.N.J. Nov. 9, 2005). *See also*, *Milliron v. T-Mobile USA, Inc.*, 2009 U.S. Dist. LEXIS 101201, *33 (D.N.J. Sept. 10, 2009) (noting that the risk of taking a case on contingency is “a real and important factor” because “success is never guaranteed and counsel face[s] serious risks since both trial and review are unpredictable.”)(Quotation omitted).

²⁷ *In re Lupron*, 2005 U.S. Dist. LEXIS 17456 at *15 (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000)); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 U.S. Dist. LEXIS 120953, *53 (S.D.N.Y. Dec. 23, 2009)(the risk associated with a case “bears heavily” upon the determination of an appropriate fee award).

designating witness testimony for use at trial, preparing experts and clients for testimony, and briefing *Daubert* motions and motions *in limine*.²⁸

All of this work would have been for naught absent settlement or prevailing before a jury on all elements, including the rigorous *PRE* “objective baselessness” standard, and maintaining that jury verdict on appeal. Plaintiffs faced the very real possibility of no recovery at all from the day this case was filed.

7. Fee awards in similar cases

The one-third fee amount is standard in direct purchaser pharmaceutical antitrust cases. The table below summarizes 19 cases over the last 13 years from circuits across the country, four of which were decided within the last year, in which a one-third fee was awarded:

Direct Purchaser Generic Pharmaceutical Antitrust Cases One-Third Attorneys’ Fees Awarded		
Date	Case Name	Settlement Amount
01-20-15	<i>In re Prandin Direct Purchaser Antitrust Litig.</i> , E.D. Mich. 10-cv-12141, Doc. No. 68	\$19M
9-16-14	<i>Mylan Pharmaceuticals, Inc. v. Warner Chilcott PLC</i> , E.D. Pa. 12-cv-3824, Doc. No. 665	\$15M
8-6-14	<i>In re Neurontin Antitrust Litigation</i> , D.N.J. 2:02-cv-01830, Doc. No. 114	\$190M
6-30-14	<i>In re Skelaxin</i> , E.D. Tenn. 12-MD-2343, Doc. No. 747	\$73M
11-07-12	<i>In re Wellbutrin XL Antitrust Litigation</i> , E.D. Pa. 08-2431, Doc. No. 485	\$37.5M
05-31-12	<i>Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc.</i> , D. Del. 07-142-SLR, Doc. No. 243	\$17.5M
01-12-12	<i>In re Metoprolol Succinate Antitrust Litig.</i> , D. Del. 06-52-MPT, Doc. No. 194	\$20M

²⁸ See, e.g., *In re Tyco*, 535 F.Supp.2d at 268 (had class lost at summary judgment trial class counsel would have lost the tens of millions of dollars expended as well as attorney time invested).

11-28-11	<i>In re DDAVP Direct Purchaser Antitrust Litig.</i> , S.D.N.Y. 05-2237, Doc. No. 113	\$20.25M
11-21-11	<i>In re Wellbutrin SR Antitrust Litig.</i> , E.D. Pa. 04-5525, Doc. No. 413	\$49M
08-11-11	<i>Meijer, Inc. v. Abbott Labs.</i> , N.D. Cal. 07-05985-CW, Doc. No. 514	\$52M
01-31-11	<i>In re Nifedipine Antitrust Litig.</i> , D.D.C. 03-mc-223-RJL, Doc. No. 333	\$35M
01-25-11	<i>In re Oxycontin Antitrust Litig.</i> , S.D.N.Y. 04-md-1603-SHS, Doc. No. 360	\$16M
04-23-09	<i>In re Tricor Direct Purchaser Litig.</i> , D. Del. 05-340-SLR, Doc. No. 543	\$250M
04-20-09	<i>Meijer, Inc. v. Barr Pharms., Inc.</i> , D.D.C. 05-2195, Doc. No. 210	\$22M
11-09-05	<i>In re Remeron Direct Purchaser Antitrust Litig.</i> , D.N.J. 03-0085, Doc. No. 185	\$75M
04-19-05	<i>In re Terazosin Hydrochloride Antitrust Litig.</i> , S.D. Fla. 99-MDL-1317, Doc. No. 1557	\$74M
09-28-04	<i>North Shore Hematology-Oncology Assoc., P.C. v. Bristol-Myers Squibb Co.</i> , D.D.C. 04-248-EGS, Doc. No.24	\$50M
04-09-04	<i>In re Relafen Antitrust Litig.</i> , D. Mass. 01-12239-WHY, Doc. No. 297	\$175M
04-11-03	<i>La. Wholesale Drug Co. v. Bristol-Myers Squibb Co.</i> , S.D.N.Y. 01-cv-7951, Doc. No. 22	\$220M

More generally, courts within and outside this District have consistently awarded fees of one-third of a settlement fund.²⁹ In a comprehensive review of 289 settlements, the court in *In re*

²⁹ See *In re Relafen Antitrust Litig.*, 231 F.R.D. at 77 (end-payor class)(noting that one-third was “not out of proportion with large class actions.”) (citing Eisenberg & Miller, *Attorney’s Fees in Class Action Settlements: An Empirical Study*, 1 Journal of Empirical Legal Studies (2004)(noting that “one-third is the benchmark for privately-negotiated contingent fees”); *In re Relafen Antitrust Litig.*, 2004 U.S. Dist. LEXIS 28801 at * 20-21(direct purchaser class) (“the requested 33 1/3% percent fee award is well within the applicable range of percentage fund awards.”) (citations omitted); *Mowbray v. Waste Management Holdings*, C.A. No. 98-11534-WGY (D. Mass. Aug. 2, 2001); *Wilensky v. Digital Equip. Corp.*, C.A. No. 94-10752-JLT (D. Mass. July 11, 2001); *Chalverus v. Pegasystems, Inc.*, C.A. No. 97-12570-WGY (D. Mass. Dec. 19, 2000); *In re Peritus Software Services Inc.*, C.A. No. 98-10578-WGY (D. Mass. Feb. 28, 2000).

Rite Aid Corp. Sec. Litig., determined an “average attorney’s fees percentage [of] 31.71%” with a median value that “turns out to be one-third.”³⁰

8. Public Policy Considerations

The class action vehicle enables a large group of people to band together and press claims that would otherwise be prohibitively expensive to litigate.³¹ When the class action vehicle results in the creation of a common fund for the benefit of the class, public policy is one of the major rationales for awarding attorneys’ fees to those prosecuting private antitrust claims.³²

Such public policy considerations weigh in favor of the requested fee here. As in *In re Tyco*,³³ where the court there found that public policy considerations favored granting the requested fees, this case was complex, hotly contested, and resource intensive. Without a fee award that takes into account the efforts and risks undertaken by Class Counsel in this case, the interests of those who may not otherwise prosecute such claims individually may go unprotected.³⁴ Accordingly, this factor supports the fee request here.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

A lodestar cross-check supports the reasonableness of the requested fee. Class Counsel worked over 34,200 hours on this case. The reported lodestar (i.e., reported time multiplied by reported current rates) is collectively over \$17.35 million. *See Gerstein/Sobol Aff.* at ¶ 84.³⁵ If,

³⁰ 146 F.Supp.2d 706, 735 (E.D. Pa. 2001).

³¹ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

³² *See In re Lupron*, 2005 U.S. Dist. LEXIS 17456 at *23 (in awarding attorneys’ fees, noting public interest in obtaining redress for prescription drug consumers and making defendants disgorge proceeds of predatory market behavior); *In re Tyco*, 535 F.Supp.2d at 270 (without a fee that reflected the risk and effort involved in litigation, attorneys might hesitate in future to be similarly aggressive and persistent in bringing claims).

³³ 535 F.Supp.2d at 270.

³⁴ *See, e.g., id.; Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3rd Cir. 2000) (noting the “stated goal in percentage fee-award cases of ensuring that competent counsel be willing to undertake risky, complex and novel litigation” and recognizing “the importance of financial incentives to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk non-payment.”)

³⁵ Class Counsel carefully allocated assignments in a manner that effectively prosecuted the case while avoiding duplication of effort. *See Gerstein/Sobol Aff.* at ¶ 2.

after co-lead counsel conduct a review and determine that, for example, a a conservative 20% lodestar reduction is appropriate, and assuming a one-third fee award, the “cross-check” multiplier would be about 2.35, well within the reasonable range in matters such as this one. An examination of recently approved multipliers in other complex pharmaceutical antitrust class cases reveals that the multiplier requested here is commensurate with and often lower than fees commonly awarded.³⁶

IV. CLASS COUNSEL’S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses that were “reasonable” and “necessary to bring the action to a climax.”³⁷ The categories of expenses for which Class Counsel seek reimbursement here are the type of expenses routinely and necessarily charged to hourly-fee paying clients, and therefore, should be reimbursed out of the common fund. Specifically, Class Counsel’s expenses of over \$1.42 million, reflect costs expended for purposes of prosecuting this litigation, including expert fees; costs associated with computerized research and the creation of an electronic document database; travel and lodging expenses; copying costs; the costs of court reporters and

³⁶ See, e.g., *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 U.S. Dist. LEXIS 5964 at *14 (E.D. Mich. Jan. 20, 2015); (A 3.01 lodestar “is reasonable in light of what has been routinely accepted as fair and reasonable in complex matters such as this one.”); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 U.S. Dist. LEXIS 91661 at *7 (E.D. Tenn. June 30, 2014) (Same, with reference to a 2.1-2.5 multiplier.); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 793at 751(E.D. Pa 2013) (“[A] a multiple of 2.99 is within the generally acceptable range.”); *In re Tricor Direct Purchaser Antitrust Litig.*, 2009 U.S. Dist. LEXIS 133251 at *17 (D. Del. Apr. 23, 2009) ([T]he [3.93] multiplier requested here is well within the acceptable range.”); *Nichols v. Smithkline Beecham Corp.*, 2005 U.S. Dist. LEXIS 7061, *78 (E.D. Pa. April 22, 2005) (noting that “[t]he fee awarded [in the Buspar litigation] resulted in a multiplier of 8.46.”); *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp.*, No. 03-4578, 2005 U.S. Dist. LEXIS 9705, *60 (E.D. Pa. May 19, 2005) (approving multiplier of 15.6 in the Paxil litigation); *Oncology & Radiation Ass., P.A. v. Bristol-Meyers Squibb Co. et al.*, No. 01-02313 (D.D.C. Sept. 3, 2004) (9.77 multiplier awarded in Taxol antitrust litigation); *In re Relafen*, 2004 U.S Dist. LEXIS 28801 at *19 (4.88 multiplier awarded); *North Shore Hematology-Oncology Ass., P.C. v. Bristol-Meyers Squibb Co.*, No. 04-248 (D.D.C. Nov. 30, 2004) (8.1 multiplier awarded in Platinol antitrust litigation). Where not available in published opinions, Class Counsel have calculated these multipliers based upon fee petition filings made in the above-cited cases. These supporting documents are available for review at the Court’s request.

³⁷ *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (“lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax.”).

deposition transcripts; mediator costs; and the costs of preparing for the trial. Reimbursement of similar expenses is routinely permitted.³⁸

A large component of these expenses consists of fees paid to experts who were instrumental in, among other things, helping Plaintiffs understand the scientific, medical, and regulatory framework necessary to establish liability and causation; calculate damages; refute Astellas's defenses; prepare for trial; and settle the case. These expenses were necessarily incurred in obtaining this result for the Class.³⁹

V. INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES ARE APPROPRIATE AND REASONABLE

Class Counsel request that the Court approve incentive awards of \$100,000 to each of Louisiana Wholesale Drug Co., Inc. and King Drug Company of Florence, Inc.; \$75,000 to each of Stephen L. LaFrance Pharmacy, Inc. d/b/a SAJ Distributors and Stephen L. LaFrance Holdings, Inc., and Burlington Drug Company, Inc.; and \$50,000 to Uniondale Chemists, Inc. No Class member has yet to object to the requested incentive awards.⁴⁰

In instituting this litigation, these Class Representatives have acted as private attorneys general seeking a remedy for what appeared to be a public wrong, in effect providing private

³⁸ See *In re Remeron*, 2005 U.S. Dist. LEXIS 27013 at *49 (citing *Oh v. AT&T Corp.*, 225 F.R.D. 142, 154 (D.N.J. 2004) (finding the following expenses to be reasonable: “(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund pro hac vice.”)). See also *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 U.S. Dist. LEXIS 5964 at *17 (approving “reasonable and necessary” expenses.); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 U.S. Dist. LEXIS 91661 at *11 (same); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d at 751 (same); *In re Tricor Direct Purchaser Antitrust Litig.*, 2009 U.S. Dist. LEXIS 133251 at *17 (same).

³⁹ The individual affidavits of Class Counsel list “contribution to the litigation fund” (or similar phrase) as an expense. This refers to contributions made by Class Counsel to a common litigation fund which was administered by Co-Lead Counsel and used solely and exclusively to pay some of the reasonable expenses described above. Certain other expenses, particularly travel expenses, were paid directly by Class Counsel individually.

⁴⁰ The different amounts reflect the different roles each played in the case, including but not limited to potential trial roles, mediation roles, and initiation of suit. All Named Plaintiffs also participated in discovery.

enforcement of the law.⁴¹ Private class action suits are a primary weapon in the enforcement of the laws for the protection of the public.⁴²

The Class Representatives diligently fulfilled this role and represented the interests of the Class by filing suit on behalf of the members of the Class and undertaking the responsibilities attendant to serving as representative plaintiffs, including responding to document requests and interrogatories, keeping themselves apprised of the progress of the case, travelling across the country to participate in mediation, and preparing for trial. *See* Gerstein/Sobol Aff. at ¶ 90; Exs. 9-11.

Numerous courts have found it appropriate to specially reward named plaintiffs for the benefits they conferred, and the amount requested here is in line with awards of such type.⁴³

VI. CONCLUSION

For the reasons set forth above and in the Gerstein/Sobol Aff., Class Counsel respectfully request that the Court approve the fee and expense application and enter an Order awarding Class Counsel fees in the amount of \$32,666,666 (i.e., one third of the \$98 million Settlement Fund) plus a proportionate share of the interest thereon through the date of the award, and reimbursement of expenses in the amount of \$1,421,865.29. Class Counsel also request that the named plaintiffs receive incentive awards as follows: \$100,000 to each of Louisiana Wholesale Drug Co., Inc. and King Drug Company of Florence, Inc.; \$75,000 to each of Stephen L.

⁴¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 635 (1985) (“A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public’s interest.”) (Internal citations and quotation marks omitted.); *Boos v. Abbott Lab.*, 925 F. Supp. 49, 50-51 (D. Mass. 1996) Under the rule of *Hanover Shoe*, direct purchasers act as private attorneys general in the antitrust context. Their ability to realize from litigation triple the full amount of antitrust overcharging, notwithstanding their own actual damages, provides them with a significant incentive to pursue antitrust violators and to deprive them of the fruits of their illegality.”)

⁴² *Id.*

⁴³ *See, In re Neurontin Antitrust Litigation*, 2:02-cv-01830-FSH (D. N.J. August 6, 2014) (Doc. No. 114) (awarding \$100,000 to each named plaintiff); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322 (E.D. Pa. 2007) (awarding \$75,000); *In re Revco Sec. Litig.*, 1992 U.S. Dist. LEXIS 7852, *21 (N.D. Ohio May 6, 1992) (\$200,000 incentive award to named plaintiff).

LaFrance Pharmacy, Inc. d/b/a SAJ Distributors and Stephen L. LaFrance Holdings, Inc., and Burlington Drug Company, Inc.; and \$50,000 to Uniondale Chemists, Inc.

Dated: April 9, 2015

Respectfully submitted,

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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