THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE SUBOXONE (BUPRENORPHINE HYDROCHLORIDE AND NALOXONE) ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: *End Payor Actions*	**MDL No. 2445** **Master File No. 2:13-MD-2445-MSG**

MEMORANDUM OF LAW IN SUPPORT OF
END PAYOR PLAINTIFFS' MOTION FOR (1) AWARD OF ATTORNEYS' FEES, (2) REIMBURSEMENT OF LITIGATION EXPENSES, AND (3) PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES

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INTRODUCTION

Plaintiffs A.F. of L. – A.C.G. Building Trades Welfare Plan, Construction & General Laborers' Local 190 Welfare Fund, I.B.E.W. 292 Health Care Plan, Michigan Regional Council of Carpenters Employee Benefits Fund, Painters District Council No. 30 Health and Welfare Fund, Teamsters Health Services and Insurance Plan Local 404, and United Food & Commercial Workers Health and Welfare Fund of Northeastern Pennsylvania (collectively, "End-Payor Plaintiffs" or "Plaintiffs", and together with Defendant, "Parties"), respectfully move this Court[1] for an order awarding (1) attorneys' fees of $10,000,000 (1/3 of the $30,000,000 Settlement Fund), (2) reimbursement of costs and expenses of $2,519.904.62, and (3) a service award to each End Payor Plaintiff of $15,000 for their service in the litigation as class representatives.

End Payor Plaintiffs brought this class action individually and on behalf of the End Payor Class whose members purchased, paid, and/or reimbursed for Co-Formulated Buprenorphine/Naloxone (Suboxone and/or its AB-rated generic equivalents) in 48 States plus the District of Columbia and Puerto Rico. Declaration of Kenneth A. Wexler ("Wexler Decl.") ¶ 5. End Payor Plaintiffs alleged that Defendant engaged in a fraudulent scheme with respect to Suboxone in violation of state antitrust and consumer protection statutes, causing End Payor Plaintiffs and the End Payor Class to pay higher prices for Suboxone and its generic equivalents than they would have paid in a competitive market, unjustly enriching Defendant in the process. *Id.*

The litigation lasted more than ten years. *Id.* In that time, Co-lead Counsel: investigated and filed cases that were transferred to and consolidated in this Court by the Judicial Panel on

[1] Unless otherwise indicated, all capitalized terms have the same meaning as those set forth in the Parties' Class Action settlement Agreement. Dkt. No. 930-1 ("SA" or "Settlement Agreement").

Multidistrict Litigation; put together and filed amended consolidated complaints that were the subject of motion practice; partially defeated a motion to dismiss;[2] engaged in intense fact discovery marked by the production of documents by the End Payor Plaintiffs, the depositions of End Payor Plaintiff representatives, the review of voluminous documents produced by Defendant, consultation with experts, and a significant number of depositions; retained experts to testify on class certification and merits issues; deposed Defendant's experts covering the same subject matters; implemented a successful strategy resulting in certification of an issues class; defeated Defendant's *Daubert* motions; and defeated Defendant's motions for summary judgment. The Parties were preparing for trial when they reached the Settlement. Wexler Decl., *passim*.

As more fully described in Plaintiffs' Unopposed Motion for Preliminary Approval of End Payor Settlement and for Other Relief and related papers (Dkt. Nos. 928-930), which motion this Court granted on August 21, 2023 (Dkt. No. 935 (amended order preliminarily approving settlement, entered *nunc pro tunc*)), the Settlement, if approved, will conclude all claims of End Payors in this litigation against Defendant concerning the alleged suppression of generic competition for Suboxone during the period between December 22, 2011 and August 21, 2023. Wexler Dec. ¶ 17. The Settlement provides for Defendant to pay 30 million dollars into an escrow fund, to be distributed in accordance with an allocation plan negotiated and recommended by Allocation Counsel appointed by Co-Lead Counsel to ensure the protection of the differing interests. *Id.* The Settlement provides the End Payor Class with a substantial recovery when there easily could have been none. *Id.*

[2] The Defendants moved to dismiss the CAC for failure to state a claim and for lack of Article III standing. Dkt. No. 57. After extensive briefing and oral argument, the Court dismissed the claims arising under the laws of 37 States and otherwise denied the motion with respect to the other 13 States. The Court also dismissed the Reckitt entities, leaving Indivior as the sole Defendant. Dkt. No. 98. *See* Wexler Decl. ¶ 4.

Co-Lead and Liaison Counsel and their colleagues dedicated considerable amounts of time and resources to achieve this result. As of June 30, 2023, End Payor Plaintiffs' counsel had expended 26,172.55 hours with a to-be-audited lodestar value of $13,447,884.69, plus out-of-pocket expenses of $2,519,904.62. Wexler Dec. ¶ 24. Counsel spent this time and money on a contingency basis, all the time bearing the risk of never being compensated for their efforts or reimbursed for what they spent on behalf of the End Payor Class. *Id.* As it is, if the Court grants Co-Lead Counsel's motion, they will realize a negative multiplier on their lodestar. *Id.* at 23. Co-Lead Counsel submit that, when considered under these circumstances and the applicable legal standards, the present attorneys' fee and expense request of $10,000,000 and $2,519,904.62, respectively, is fair and reasonable and should be awarded.

ARGUMENT

I. The Requested Attorneys' Fees are Reasonable.

Rule 23(h) of the Federal Rules of Civil Procedure provides that in a class action settlement, "the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "The awarding of fees is within the discretion of the Court, so long as the Court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous." *Saini v. BMW of N. Am., LLC*, No. 12-6105 (CCC), 2015 WL 2448846, at *14 (D.N.J. May 12, 2015) (citing *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727 (3d Cir. 2001)).

A. Under the Common Fund Doctrine, the Requested Fees are Reasonable.

Courts have long held that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Bellum v. Law Offices of Frederic I. Weinberg & Assocs., P.C.*, No. 15-2460, 2016 WL 4766079, at *10 (E.D. Pa.

Sept. 13, 2016). The Third Circuit has noted that at the "heart of this [doctrine] is a concern for fairness and unjust enrichment; the law will not reward those who reap the substantial benefits of litigation without participating in its costs." *Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 145 (3d Cir. 1998). In contrast to a lodestar method of calculating attorney's fees, the percentage-of-recovery approach is more appropriate when there is a common fund. *See In re Cigna-American Specialty Health Administration Fee Litig.*, No. 2:16-cv-03967-NIQA, 2019 WL 4082946, at *11 (E.D. Pa. Aug. 29, 2019) (citing *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (finding that the percentage method is "generally favored" in common fund cases because "it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure."); *Harshbarger v. Penn Mut. Life Ins. Co.*, 2017 WL 6525783, at *2 (E.D. Pa. Dec. 20, 2017) ("The reasonableness of attorneys' fee awards in common fund cases ... is generally evaluated using a [percentage of recovery] approach followed by a lodestar cross-check.")).

The Third Circuit has identified ten factors for courts to consider when evaluating the reasonableness of a fee request under the percentage-of-recovery method:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by End Payor Plaintiffs' counsel; (7) the awards in similar cases; (8) the value of benefits attributable to the efforts of Co-Lead Counsel to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (10) any innovative terms of settlement.

In re Cigna-American, 2019 WL4082946 at *12 (citing *Gunter v. Ridgewood Energy Corp*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283,

338-40 (3d Cir. 1998)). *See also Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1833, 2020 WL 1922902, at *15-16 (E.D. Pa. Apr. 21, 2020); *In re Domestic Drywall Antitrust Litig.*, No. 13-MD-2437, 2018 WL 3439454, at *3 (E.D. Pa. July 17, 2018). "The fee award reasonableness factors need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest." *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 166 (3d Cir. 2006) (internal quotation omitted). Consideration of these factors demonstrates that Co-Lead Counsel's request for 1/3 of the Settlement Fund is reasonable and should be approved.

1. The Size of the Fund Created and Number of Persons Benefited

The result achieved is one of the primary factors to be considered in assessing the propriety of an attorneys' fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000) ("the single clearest factor reflecting the quality of [Co-Lead] [C]ounsels' services to the class are the results obtained"). Consideration of the circumstances surrounding End Payors and their claims in the case suggest that the $30 million Settlement they achieved is an excellent result for the End Payor Class.

At the time it was entered, the order on Defendant's motion to dismiss gutted a substantial portion of the End Payor Class's claims, leaving them to the vagaries of the appeals process after the entry of a final judgment. Wexler Decl. ¶5. Co-Lead Counsel nonetheless engaged in a full-blown discovery process, engaged experts, and prepared to move for class certification before a court that had recently denied certification of a pharmaceutical end payor antitrust class action,[3] which this was. Wexler Decl. at ¶¶6-8, 22, 25. Co-Lead Counsel devised and executed a strategy

[3] *Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1833, 2015 WL 3623005 (E.D. Pa. June 10, 2015). In *Vista*, the Court held that, on the record before it, the proposed end payor class was not ascertainable under the prevailing Third Circuit standard. *Id.* at *9. It also found that individual issues predominated over common issues. *Id.* at *21.

of moving for an issues-only class to avoid the pitfalls of the prior case, and they succeeded. *Id.* at ¶ 8. Co-Lead Counsel thereafter defeated *Daubert* motions Defendant brought against their experts, and they defeated Defendant's motion for summary judgment. *Id.* at ¶ 11. They were preparing to go to trial on the issue of antitrust violation as part of the direct purchaser trial on the whole of liability when Defendant filed a new motion to dismiss or decertify the class. *Id.* at ¶¶ 12-13.

Had Defendant succeeded in its motion, End Payor Plaintiffs would have been on appeal. Wexler Decl. ¶ 20. Otherwise, they would be going to trial, where one of the great unknowns is what would happen afterward. On the one hand, an adverse verdict would likely have ended the case or resulted in an appeal. On the other hand, verdict in favor of the End Payor Class would simply have led to more litigation. *Id.* The trial would have been limited to an antitrust violation and members of the End Payor class could then use a favorable verdict as *res judicata*. *Id.* However, each class member would have to file his or her or its own suit to do so. *Id.* They would have to try their individual cases on the undecided issues of impact and damages. *Id.* In these circumstances, it is unclear which members of the End Payor Class would have the financial wherewithal or willingness to commit the time to filing a separate suit. *Id.* It is also unclear how different juries would decide the different cases of different End Payor Class members. *Id.*

Given these risks and uncertainties, a $30 million settlement is an outstanding result. It is a certain and substantial fund that is available for distribution to the End Payor Class.

2. The Presence or Absence of Substantial Objections by Members of the Class to the Settlement Terms and/or Fees Requested by Counsel

Co-Lead Counsel cannot speak to this factor at present. Notice issued on August 28, 2023. Such notice describes the terms of the Settlement, tells class members their rights, and advises the End Payor Class of Co-Lead Counsel's intent to seek a fee of 1/3 of the Settlement Fund, the

reimbursement of litigation expenses, and service awards for the class representatives. Clearly, insufficient time has passed for the End Payor Class to react to the Settlement or fee request. We intend to address these issues in our supplemental filing on October 14, 2023. Dkt. No. 935, paragraph 26. The reaction of the End Payor Class will then be discussed in the context of *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) and *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998), which list the factors the Court should consider when determining whether to grant final approval to the Settlement.

3. The Skill and Efficiency of the Attorneys Involved.

The skill and efficiency of the attorneys involved also supports the fee request. Co-Lead and Liaison Counsel are experienced in litigating complex class actions and antitrust cases. Wexler Decl. ¶ 3. *See also* Dkt. No. 930 (firm profiles submitted in support of End Payor Plaintiffs' motion for preliminary approval of the Settlement Agreement). Through their efforts, these lawyers were able to defeat a significant portion of Defendant's motion to dismiss, prevail in numerous discovery disputes, obtain certification of the 11-State Class, defeat *Daubert* motions addressed to their experts, defeat summary judgment, and, through negotiations, successfully obtain a favorable recovery for the End Payor Class. Wexler Decl., *passim*. "The result achieved is the clearest reflection of petitioners' skill and expertise." *In re Linerboard Antitrust Litig.*, MDL 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004).

The quality of opposing counsel is also relevant in assessing the quality of Co-Lead Counsel's work. *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 420 (E.D. Pa. 2010). In this Action, Defendant was represented by Jones Day and Hogan Lovells, two nationally prominent law firms who zealously represented the interests of their client. The ability of Co-Lead counsel to obtain a favorable Settlement for the End Payor Class "in the face of formidable legal

opposition further evidences the quality of their work." *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003).

4. The Complexity and Duration of the Litigation; the Risk of Nonpayment; and the Amount of Time Devoted to the Case by End Payor Plaintiffs' Counsel.

These factors also weigh heavily in favor of awarding the requested fees and expenses. This is a complicated antitrust case involving a multifaceted product hop scheme alleged by the End Payor Plaintiffs to have involved a sham Citizens Petition, manipulation of a REMs process, product disparagement, pretextual price increases of the Suboxone tablet, and other conduct designed to maintain Defendant's monopoly pricing power over the Suboxone product to the detriment of the End Payor Class. *See generally* End Payor Plaintiffs' Second Consolidated Amended Class Action Complaint, Dkt. No. 149. "[C]omplex and/or novel issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by Co-Lead Counsel" are the "factors which increase the complexity of class litigation." *Cendant*, 243 F.3d at 741. Moreover, "antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome." *Linerboard*, 2004 WL 1221350, at *10. This case was no exception.

Further, the case has been pending for more than *ten years*. In all that time, Co-Lead and Liaison counsel have been acting on a contingency basis, spending more than 26,000 hours in time and more than $2.5 million in out-of-pocket expenses on the case. Wexler Decl. at ¶ 24.

Courts in the Third Circuit have consistently recognized that the attorneys' contingent fee risk is an important factor in determining a fee award. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) (finding "investment of time, personnel and resources" supported awarding requested fee). *See also In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104 (E.D. Pa. 2013) ("as a contingent fee case, counsel faced a risk of nonpayment in the event of an unsuccessful trial.

Throughout this lengthy litigation, [Co-Lead] [C]ounsel have not received any payment. This factor supports approval of the requested fee."); *In re Merck & Co., Inc. Vytorin ERISA Litig.*, No. 08-cv-285 (DMC), 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010) (finding "[t]he risk of little to no recovery weighs in favor of an award of attorneys' fees" where counsel accepted the action on a contingent-fee basis); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-01797-MSG, 2015 WL 12843830, at * 3 (E.D. Pa. Oct. 15, 2015) ("Class Counsel faced significant risks in taking their claims against the Cephalon Defendants to trial, including the risk that a jury might not find in their favor on any of a number of issues and that any jury verdict could result in a lengthy post-trial motion and appellate process.").

From the outset, End Payor Plaintiffs' counsel understood that they were embarking on a complex, expensive and potentially lengthy litigation, which could require (and has required) the investment of thousands of hours of attorney time, with no guarantee of ever being compensated for the investment of such time and resources. Wexler Decl. ¶ 21. In undertaking this risk, End Payor Plaintiffs' counsel were obligated to, and did, ensure that sufficient resources were dedicated to prosecuting this matter. *Id.* There have been many class actions in which Plaintiffs' counsel took on the risk of pursuing claims on a contingent basis, expended millions of dollars in time and expenses, and received nothing for their efforts. Thus, the contingency risk here was very significant and fully supports the requested fee. *See In re Cigna-American*, 2019 WL 4082946 at *13 (factors favoring fee award of 33.33 % of fund included fact that class counsel had litigated the case for more than six years and shouldered the risk that the litigation would yield little to no recovery); *In re Merck & Co., Inc. Vytorin ERISA Litig.*, Civil Action No. 08–CV–285 (DMC), 2010 WL 547613, at *10 (D.N.J. Feb, 9, 2010) ("inherently complex suit" that was "ongoing for more than two years" warranted 33 1/3% fee award).

5. Awards in Similar Cases

A request for one-third of a settlement fund is well within the range of reasonable fees in the Third Circuit. *See e.g., Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 06-cv-1833, 2020 WL 1922902, *30 (E.D. Pa. Apr. 21, 2020) (citing cases and noting that in the Third Circuit, reasonable fee awards in percentage-of-the recovery cases generally range from nineteen to forty-five percent of the common fund"). Accordingly, courts in this District have approved such awards in analogous delayed generic entry antitrust cases. *See e.g., Vista*, 2020 WL 1922902 at*30 (approving End Payor class settlement in delayed generic entry antitrust litigation and concluding requested fee of a third of the recovery "remains consistent with the awarded fee in other, similar cases"); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-01797-MSG, 2015 WL 12843830, at *6 (E.D. Pa. Oct. 15, 2015) (court acknowledging that courts in numerous Hatch-Waxman cases alleging delayed generic entry "have routinely granted a fee award of 33 1/3 %."); *In re Flonase*, 291 F.R.D. at 104 ("A one-third fee award is standard in complex antitrust cases of this kind."); *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431, ECF 485 (E.D. Pa. Nov. 7, 2012) (awarding fee of 33⅓% of settlement fund). Given the magnitude of this case, the efforts of Co-Lead Counsel, the risks born, and the positive outcome, a requested fee of a third of the recovery is consistent with fees awarded in similar cases. *See also In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2012 WL 5467530, at *7 (E.D. Pa. Nov. 9, 2012) (district court approved a thirty percent fee award from a $25,000,000.00 settlement).

This factor – awards in similar cases – warrants approval of Co-Lead Counsel's fee request.

6. Benefits Attributable to Others Including Government Agencies

This factor contemplates whether End Payor Plaintiffs' counsel benefited from "the efforts of other groups, such as government agencies conducting investigations." *AT&T*, 455 F.3d at 165. Here, the federal government filed civil and criminal cases against Defendant and the Reckitt

entities some five years after End Payor Plaintiffs filed suit. Wexler Decl. ¶ 9. The State Attorneys General filed their case in 2016 and then proceeded in lockstep with the direct purchaser and End Payor class cases. Wexler Decl. ¶ 7.

Not only did "government agencies" file after End Payor Plaintiffs, but their civil and criminal settlements put the financial viability of Indivior–and thus the ability of the End Payor Class to recover anything–in question. Despite facing the prospect of litigating against an insolvent defendant, End Payor Plaintiffs pressed on, responding to and defeating Defendant's *Daubert* and summary judgment motions (Dkt. Nos. 686, 813) and then preparing for trial. In essence, then, the government cases against Defendant simply point up the tenacity with which Co-Lead Counsel litigated this case. The factor of government involvement thus is a factor favoring the award of Co-Lead Counsel's requested fee.

7. The Percentage Fee that Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Agreement

The fee requested is on a par with and sometimes less than commonly negotiated fees in the private marketplace. *See Glaberson v. Comcast Corp.*, No. CV 03-6604, 2015 WL 5582251, at *14 (E.D. Pa. Sept. 22, 2015) (noting that a 30% fee is routinely privately negotiated in contingent fee cases); *In re Ikon Office Sol., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[I]n private contingency fee cases . . . [End Payor] [P]laintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery").

8. Innovative Terms of Settlements

While there is nothing innovative about a settlement that requires the payment of cash into a Settlement Fund, the Allocation Plan reflects a sensitivity to the varying interests among settlement class members, whether because they have relatively stronger claims or because the percentage of damages suffered as a group of consumers differs from Third Party Payors. Interim

Co-Lead Counsel recognized the potential for conflict in the allocation process and thus appointed Allocation Counsel to negotiate on behalf of the competing interests. They also retained their economic expert for the express purpose of advising Allocation Counsel of relative damages as between TPPs and consumers. This factor weighs in favor of Interim Co-Lead Counsel's fee request.[4]

B. A Cross-Check of Class Counsel's Lodestar Confirms the Reasonableness of the Requested Fee.

Courts in the Third Circuit at times examine the lodestar calculation as a cross-check on the percentage fee award. *See, e.g., Linerboard*, 2004 WL 1221350, at *4. The cross-check is not designed to be a "full-blown lodestar inquiry," but rather an estimation of the value of counsel's investment in the case. *Third Circuit Task Force Report, Selection of Class Counsel*, 208 F.R.D. 340, 422-23 (2002) (noting that "[t]he lodestar remains difficult and burdensome to apply"); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005) *as amended* (Feb. 25, 2005) ("[T]he lodestar cross-check does not trump the primary reliance on the percentage of common fund method."). The Third Circuit recommends the use of the lodestar cross-check "as a means of assessing whether the percentage-of-recovery award is too high or too low," not as a substitute for the percentage-of-the-fund method. *In re Diet Drugs*, 582 F.3d 524, 545 n.42 (3d Cir. 2009) (citing *Rite Aid*, 396 F.3d at 306-07).

Under the lodestar method, the district court "determines an attorney's lodestar by multiplying the number of hours he or she reasonably worked on a client's case by a reasonable

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

hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." *Gunter*, 223 F.3d at 195 n.1. In undertaking this approach, the Court "is not required to engage in this analysis with mathematical precision or 'bean-counting"' and "may rely on summaries submitted by the attorneys" without "scrutiniz[ing] every billing record." *Henderson v. Volvo Cars of N. Am., LLC*, No. CIV.A. 09-4146 CCC, 2013 WL 1192479, at *15 (D.N.J. Mar. 22, 2013) (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005)).

Here, End Payor Plaintiffs' counsel have devoted over 26,000 hours to the prosecution of the Settlement Class's claims against Defendants, resulting in a total lodestar of $13,447,884.69. Wexler Decl. at ¶ 24. While the Third Circuit has recognized that multipliers of one to four are often awarded, the requested fee award here results in a *negative* multiplier of .75. *McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 657 (E.D. Pa. 2015). This "is well under the generally acceptable range and provides strong support for approving the fee request." *Id.*

II. End Payor Plaintiffs' counsel should be Reimbursed for their Out-Of-Pocket Expenses

In addition to their request for attorneys' fees, Co-Lead Counsel requests reimbursement of certain of their out-of-pocket expenses in the amount of $2,519,904.62. *See* Wexler Decl. ¶ 24. "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *See Mayer v. Driver Sols., Inc.*, No. 10-CV-1939 JCJ, 2012 WL 3578856, at *5 (E.D. Pa. Aug. 17, 2012) (quoting *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001)).

The expenses requested for reimbursement are of the type "routinely billed by attorneys to paying clients in similar cases" and should therefore be reimbursed from the settlement proceeds. *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08–1432 (DMC)(JAD), 2012 WL

1964451, at *8 (D.N.J. May, 31, 2012). Accordingly, at this time, Co-Lead Counsel respectfully request reimbursement of their expenses in the amount of $2,519,904.62.

III. The Court should Approve Service Awards to the Class Representatives

Co-Lead Counsel request that the Court also award $15,000 to each of the End Payor Class representatives for their efforts to date, including dedicating themselves to pursue the Action for not just themselves, but for the benefit of the End Payor Class as a whole. Wexler Decl. ¶ 25. Each of the Class Representatives has been committed to pursuing the End Payor Class's claims since they became involved in the litigation. *Id.* They provided information necessary for filing the initial and subsequent complaints, provided their data to the economists retained by Co-Lead Counsel, cooperated in responding to discovery, supplied witnesses for depositions, and committed to appearing at trial. *Id.* End Payor Plaintiffs risked their reputations by participating in this case. *Id.* at ¶ 26. The awards requested here are well deserved. *Id.*

In the Third Circuit, service awards may be paid to class representatives to reward efforts that benefit the class.[5] Indeed, numerous courts have approved awards to named class plaintiffs for the benefits they have conferred on the class, and the amount requested here is consistent with typical awards. *See, e.g.*, *Vista*, 2020 WL 1922902, at *34 (approving service awards of $15,000 and $50,000); *Linerboard*, 2004 WL 1221350, at *19 (approving award of $25,000 for each class representative); *In re Residential Doors Antitrust Litig.*, MDL 1039, 1998 WL 151804, at *9 (E.D. Pa. Apr. 2, 1998) (approving $10,000 award to each representative). The requested awards to the End Payor Plaintiff class representatives are reasonable and justified based on their involvement in the action and should be granted.

[5] See *Bradburn Parent Teacher Store, Inc. v. 3M (Minn. Mining and Mfg. Co.)*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) ("It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class.").

CONCLUSION

For the foregoing reasons, End Payor Plaintiffs' counsel respectfully request that the Court award attorneys' fees and reimburse expenses in the amount of $10,000,000 and $2,519,904.62, respectively, and grant service awards to the Class Representatives in the amount of $15,000 each.[6]

Dated: September 5, 2023

Respectfully submitted,

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[6] Proposed orders will be submitted with Plaintiffs' Counsel's response to any objections on or before October 14, 2023, after the deadline for objecting and requesting exclusion from the Settlement Class has passed.

EXHIBIT A

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE SUBOXONE (BUPRENORPHINE HYDROCHLORIDE AND NALOXONE) ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: *End Pavor Actions*	**MDL No. 2445** **Master File No. 2:13-MD-2445-MSG**

DECLARATION OF KENNETH A. WEXLER IN SUPPORT OF END PAYOR PLAINTIFFS' MOTION FOR (1) AWARD OF ATTORNEYS' FEES, (2) REIMBURSEMENT OF LITIGATION EXPENSES, AND (3) PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES

I, Kenneth A. Wexler, hereby declare under penalty of perjury and pursuant to 28 U.S.C.§ 1746, as follows:

1. I am one of four Court appointed Co-Lead Counsel[1] in this matter for the End Payor Plaintiffs ("End Payors" or "Plaintiffs"). I have personal knowledge of the matters described below, and if called to testify, would be competent to do so.

2. I am managing partner in the law firm Wexler Boley & Elgersma LLP. I have served as Lead or Co-Lead Counsel in numerous nationwide class actions and have substantial experience litigating complex civil litigation. I respectfully submit this Declaration in support of

[1] The Court appointed us Interim Co-Lead Counsel on June 6, 2013. Dkt. No. 44. When the Court certified the 11-State Class, it removed "Interim" from our title. Dkt. No. 588. We are seeking the designation as Co-Lead Counsel again with respect to the larger settlement class. The use of the term in this declaration and brief in support of our fee petition is strictly for convenience.

Plaintiffs' Motion for (1) Award of Attorneys' Fees, (2) Reimbursement of Litigation Expenses, and (3) Payment of Service Awards for Class Representatives.

3. The End Payor cases came to this Court on June 6, 2013, pursuant to an order of the Judicial Panel for Multidistrict Litigation. Dkt. No. 1. On August 7, 2013, the Court designated me, Steve Shadowen of Hilliard Shadowen LLP, Michael M. Buchman of Motley Rice LLC, and Marvin A. Miller of Miller Law LLC as Interim Co-Lead Counsel for the End-Payor Class and designated Jeffrey L. Kodroff of Specter Roseman & Kodroff, P.C. as Liaison Counsel for the End Payor Plaintiffs. Dkt. No. 44. The firm and attorney profiles describing our respective professional backgrounds and qualifications to serve as Co-Lead Counsel are attached as Exhibit B to the declaration I submitted in support of End Payor Plaintiffs' motion for preliminary approval of the Settlement Agreement. Dkt. No. 930.

4. Co-Lead and Liaison Counsel have been closely involved in every aspect of the litigation since its inception. We conducted an extensive investigation of the underlying facts and applicable law before filing our respective complaints. Once the End Payor complaints were transferred to and consolidated in this Court, we tried to run the litigation as efficiently and successfully as possible.

5. On August 15, 2013, End Payor Plaintiffs filed a Consolidated Amended Class Action Complaint ("CAC"). Dkt. No. 48. The CAC alleged antitrust, consumer protection, and unjust enrichment claims under the laws of 48 States, plus Puerto Rico and the District of Columbia, and it named multiple Defendants, including Reckitt Benckiser, Inc. and several of its affiliates ("Reckitt entities"). *Id.* End Payor Plaintiffs alleged that Defendant engageds in a fraudulent scheme with respect to Suboxone in violation of state antitrust and consumer protection statutes, causing End Payor Plaintiffs and the End Payor Class to pay higher prices for Suboxone

and its generic equivalents than they would have paid in a competitive market, unjustly enriching Defendants in the process. The Defendants moved to dismiss the CAC for failure to state a claim and for lack of Article III standing. Dkt. No. 57. After extensive briefing and oral argument, the Court dismissed the claims arising under the laws of 37 States and otherwise denied the motion with respect to the other 13 States. The Court also dismissed the Reckitt entities, leaving Indivior as the sole Defendant. Dkt. No. 98.

6. Thereafter, the parties engaged in a wide array of party and third-party discovery, including interrogatories, voluminous document productions, depositions, and motion practice relating to perceived defects in the various discovery responses. Along with the direct purchasers, who had brought separate a case but were coordinated in this Court for pre-trial proceedings, End Payor Plaintiffs helped craft and sought to enter orders relating to authenticity and admissibility of documents, ESI, protective orders, and scheduling orders. We retained and consulted with multiple experts. On March 17, 2015, the Court entered a scheduling order regarding motions for class certification, expert reports, briefing on class certification, a fact discovery cut-off, motions for summary judgment, and *Daubert* motions. Dkt. No. 143.

7. On March 6, 2015, End Payor Plaintiffs filed a Second Amended Consolidated Class Action Complaint ("SAC"). Dkt. No. 152. Defendant answered on May 15, 2015. Dkt. No. 161. The State Attorneys General filed their case in 2016 and then proceeded in lockstep with the direct purchaser and End Payor class cases.

8. On September 18, 2018, End Payor Plaintiffs filed their motion for class certification of an 11-state issues-only class pursuant to Rule 23(c)(4). Dkt. No. 472. Co-Lead Counsel filed such a motion in large part because the Court had recently refused to certify a Rule 23(b)(3) damages class in the context of another pharmaceutical antitrust case, *Vista Healthplan,*

Inc. v. Cephalon, Inc., 2015 WL 3623005 (E.D. Pa. Jun. 10, 2015). The Court there found that the class of end payors was not ascertainable under Third Circuit law and that individual issues predominated. We felt we could develop a better record and believed that the case was distinguishable. However, based on our experience and expertise, Interim Co-Counsel believed certifying an issues-only class avoided the deficiencies the Court found existed in *Vista* and, therefore, they asked the Court to certify a class on six issues relating to proof of an antitrust violation. *Id.* On September 27, 2019, after extensive briefing and argument, the Court certified the issues class End Payor Plaintiffs had requested (the "11-State Class"). Dkt. No. 588. Thereafter, Co-Lead Counsel implemented the notice plan approved by the Court. Dkt. No. 784.

9. While the End Payor Plaintiffs' motion for class certification was pending, roughly five years after the End Payor Plaintiffs filed suit, the Reckitt entities, Indivior and related entities (collectively, "Indivior"), and various Indivior executives became ensnared in criminal and civil litigation brought by the United States government in connection with Indivior's fraudulent marketing of Suboxone. The Reckitt entities settled on July 11, 2019, paying $1.4 billion for Indivior's marketing scheme. The settlement included the Reckitt entities' forfeiture over time of proceeds totaling $647 million received from Indivior, civil settlements with the federal government and the states totaling $700 million, and an administrative resolution with the Federal Trade Commission ("FTC") for $50 million.

10. About one year later, Indivior settled its civil and criminal liability. One of its entities pled guilty to a one-count felony information and Indivior agreed to pay $600 million. In addition, Indivior paid $10 million dollars to the FTC. All told, the Reckitt entities and Indivior settlements totaled more than $2 billion.

11. We did not know the financial impact of the settlements on Indivior but presumed it was negative. End Payor Plaintiffs pressed on, however, responding to summary judgment and *Daubert* motions that Indivior filed in an effort to defeat the case without a trial. Dkt. No. 671. The Court denied the *Daubert* and summary judgment motions on February 19, 2021, and August 22, 2022, respectively. Dkt. Nos. 686, 813.

12. Following the August 22, 2022, decision denying summary judgment, the Court held a status conference to address the remainder of the schedule. Dkt. No. 848. At that conference the parties and the Court discussed issues that remained in dispute and Defendant stated its intent to file a motion to dismiss the End Payor Plaintiffs' claims on the grounds of the Supreme Court's relatively recent decision on Article III standing in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). The Court gave Indivior permission to do so, and set a pre-trial schedule leading to a September 18, 2023, trial date.[2] Dkt. No. 852.

13. Thereafter, the Parties consented to mediation with the Court serving as mediator. Before the first session, Indivior moved to dismiss the End Payor case for lack of Article III standing. Unexpectedly, Defendant made an alternative motion to decertify the 11-State Class on the theory that End Payor Plaintiffs could not go to trial on issues that did not include injury. Dkt. No. 871. End Payor Plaintiffs timely responded to this motion on May 29, 2023. Dkt. No. 883.

14. The parties mediated while the motion was pending. The fact that Co-Lead and Liaison Counsel had vigorously represented the interests of End Payors from the start of this case enabled us to negotiate from a position of strength and as advocates for the entirety of the End Payor Class. In addition, our achieving certification of the 11-State Class provided leverage we would not have had if class certification had been denied.

[2] The Court later reset trial for October 30, 2023. See Dkt. No. 912.

15. Co-Lead and Liaison Counsel first met with the Court in its role as mediator on January 25, 2023. Dkt. No. 851. Thereafter, I and Liaison Counsel were tasked with the principal responsibility of negotiating while other Co-Lead Counsel and members of our firms prepared for trial. If negotiations had failed, we were determined to be ready for trial on September 18, 2023, which was the Court-ordered trial date at the time.

16. There ensued six months of adversarial and sometimes contentious negotiations facilitated by the Court and resulting in the proposed $30 million cash Settlement. The Settlement provides for Defendant to pay the $30 million dollars into an escrow fund, to be distributed in accordance with an allocation plan negotiated and recommended by Allocation Counsel appointed by Co-Lead Counsel to ensure the protection of the differing interests. The Settlement provides the End Payor Class with a substantial recovery when there easily could have been none.

17. The Settlement, if approved, will conclude all claims of End Payors in this litigation against Defendant concerning the alleged suppression of generic competition for Suboxone during the period between December 22, 2011 and August 21, 2023, including all rights of appeal from the Court's dismissal order of December 3, 2014. Dkt. 97.

18. Defendant made no commitments to Co-Lead Counsel other than what is set forth in the Settlement Agreement and the *In Camera* Supplement to Settlement Agreement. We never discussed attorneys' fees during settlement negotiations; nor have we ever.

19. Based on extensive experience representing plaintiffs in similar class actions, I and my fellow Co-Lead and Liaison Counsel recognize that continued prosecution of this action would be risky, costly, and time consuming, with no guarantee of recovery for *any* member of the End Payor Class. We therefore believe that it is in the best interest of End Payor Plaintiffs and the End Payor Class to resolve the case now and ensure the existence and distribution of a substantial

settlement fund, as opposed to potentially no fund at all or funds limited to just certain End Payor Class members. We believe that the Settlement Agreement is fair, reasonable, and adequate and is in the best interests of the End Payor Class

20. I and my fellow Co-Lead and Liaison Counsel reach these conclusions considering all known facts and circumstances, including the significant risks and uncertainties that are presented by the case in its current posture. These risks and uncertainties included the pending motion to dismiss the End Payor Plaintiffs' claims for purported lack of Article III standing and the alternative motion decertify the 11-State Class. An adverse ruling would all but sink the ability of the End Payor class to recover anything. End Payor Plaintiffs would have been on appeal. And even if the motion was denied and the case proceeded to trial, the 11-State Class faced the potential for an adverse jury verdict and–in the event of a successful outcome–there were substantial unknowns related to post-trial proceedings for members of the 11-State Class. The trial would have been limited to an antitrust violation and members of the End Payor class could then use a favorable verdict as *res judicata*. However, each class member would have to file his or her or its own suit to do so. They would have to try their individual cases on the undecided issues of impact and damages. In these circumstances, it is unclear which members of the End Payor Class would have the financial wherewithal or willingness to commit the time to filing a separate suit. It is also unclear how different juries would decide the different cases of different End Payor Class members. On top of everything else, we recognize from experience the many difficulties inherent with the appeals process, especially with certain class certification issues that arise in this, the Third Circuit. All these risks are eliminated by the Settlement, which provides a benefit to the End Payor Class that is tangible, substantial, and certain.

21. From the outset, End Payor Plaintiffs' counsel understood that they were embarking on a complex, expensive, and potentially lengthy litigation, which could require (and has required) the investment of thousands of hours of attorney time, with no guarantee of ever being compensated for the investment of such time and resources. In undertaking this risk, End Payor Plaintiffs' counsel were obligated to, and did, ensure that sufficient resources were dedicated to prosecuting this matter. While engaged in litigation, Co-Lead Counsel conducted a considerable amount of work, trying to balance efficiency and effectiveness throughout. We tried to minimize fees and expenses to the extent we could, but the vigorous defense waged by Defendant's counsel repeatedly caused us to brief, re-brief, argue, and re-argue the same issue, such as class-wide injury and trial of an issues class.

22. Our efforts at efficiency included:

- Supervising all pretrial proceedings;
- Assigning work to counsel to take advantage of specific expertise;
- Avoiding overlap in the delegation of assignments to counsel;
- Limiting, where possible, appearances of Co-Lead Counsel at hearings, pretrial conferences, depositions, and meetings with Defendant;
- Negotiating and entering into multiple stipulations with defense counsel to streamline pretrial proceedings and trial;
- Conducting and coordinating interviews of fact witnesses and preparing the End Payor Plaintiffs for their depositions, as well as defending them;
- Implementing procedures to ensure that all court deadlines were met;
- Collecting and monitoring on a monthly basis the time and expense reports submitted by counsel for the End Payor Class;

; .

- Employing and consulting with experts and vendors based on the needs of the case; and
- Coordinating with counsel for the direct purchasers and the States to minimize duplication of effort and expense.

23. Management of the case required regular and ongoing communications with counsel for the End Payor Plaintiffs. Such communications occurred by phone and via electronic mail, video conference, and (on occasion) in-person meetings.

24. As of June 30, 2023, the End Payor Plaintiffs' law firms had incurred 26,172.55 hours with a lodestar value of 13,447,884.69, and out-of-pocket expenses of $2,519,904.62. *See* attached Exhibit A, which reflects in summary the time and expenses incurred by End Payor Plaintiffs' counsel to achieve the benefits of the Settlement for the End Payor Class. Counsel spent this time and money on a contingency basis, all the time bearing the risk of never being compensated for their efforts or reimbursed for what they spent on behalf of the End Payor Class. Based on these numbers, which will be audited before final approval, if the Court grants Co-Lead Counsel's motion, they will realize a negative multiplier on their lodestar.

25. The efforts of each of the End Payor Plaintiffs also assisted greatly in the prosecution of this case and dedicated themselves to pursue the Action for not just themselves, but for the benefit of the End Payor Class as a whole. Each of the Class Representatives has been committed to pursuing the End Payor Class's claims since they became involved in the litigation. They communicated with counsel throughout the litigation, reviewed and approved the filing of the complaints and key motions, provided voluminous paper and electronic responses to numerous requests for documents and data, provided information for the experts, answered interrogatories, had an employee sit for deposition by Defendant's counsel, agreed to be scheduled as witnesses at trial, and conferred with their counsel and approved the Settlement Agreement as terms were negotiated and completed.

26. The End Payor Plaintiffs stepped forward, risking their reputations, and subjecting themselves to public scrutiny on behalf of the End Payor Class. For their varying efforts, we

respectfully request that the Court approve a service award in the amount of $ 15,000 for each named End Payor Plaintiff and believe such awards are well deserved.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 5, 2023, in Chicago, Illinois.

/s/ Kenneth A. Wexler

Kenneth A. Wexler

EXHIBIT A

In re Suboxone Antitrust Litigation

From Inception through June 30, 2023

FIRM	HOURS	LODESTAR	EXPENSES
Cohen Milstein Sellers & Toll	2,366.55	$824,332.00	$9,978.36
Hach Rose Schirripa & Cheverie	573	$246,917.50	$13,416.50
Heins Mills & Olson	238	$103,070.00	$14,803.01
Hellmuth & Johnson	0	$0.00	$0.00
Hilliard & Shadowen	4,302.95	$2,114,431.00	$293,789.17
Milberg, LLP	804.3	$298,621.25	$9,975.99
Miller Law	4,773.70	$2,365,272.00	$296,258.91
Motley Rice	2,598.25	$1,587,914.25	$298,848.77
Pomerantz Law	834	$362,032.00	$105.65
Scott & Scott	1,046.50	$577,384.29	$16,415.29
Miller Shah	2,317.40	$1,130,355.90	$11,285.90
Spector Roseman Kodroff & Willis	2,267.00	$1,325,278.25	$309,422.88
Wexler Wallace	3,719.50	$2,257,149.00	$296,665.75
Wilentz Goldman*	254.4	$197,911.00	$10,179.53
Zimmerman Reed	33.5	$8,280.75	$7,569.53
Glancy Prongay & Murray LLP**	43.5	48,935.50	$0.00
PLUS Obligation to AB Data for prior notice & related services			$931,255.51
			$1,588,649.11
TOTALS	**26,172.55**	**13,447,884.69**	**$2,519,904.62**

*Includes time in August for Allocation assignment

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