UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: End-Payor Plaintiff Actions	MDL No. 2472 Master File No. 1:13-md-2472-WES-PAS

END-PAYOR CLASS PLAINTIFFS' MOTION
FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF LITIGATION EXPENSES,
AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 3

A. End-Payor Class Counsel Investigate and File the First Complaint Challenging Anticompetitive Practices Relating to Loestrin 24 Fe 4

B. End-Payors Successfully Appeal the Dismissal of Their Sherman Act Claims. 5

C. The Parties Engage in Extensive Discovery. 7

D. The Third-Party Payor Class Is Certified. 9

E. Plaintiffs Defeat Defendants' Summary Judgment Motions. 12

F. End-Payors Work Closely on Expert Issues. 14

G. End-Payors Prepare Extensively for Trial. 15

H. End-Payors Settle on the Eve of Trial 16

III. END-PAYORS' ATTORNEYS' FEES REQUEST IS REASONABLE. 17

A. The Percentage of the Fund Method Supports End-Payors' Fee Request. 18

1. One-Third Fee Awards Are Typical in Comparable Generic Suppression Suits 20

2. Class Counsel Are Highly Skilled and Possess Extensive Expertise Litigating Pharmaceutical Class Actions. 24

3. This Case Presented Substantial Risks at Essentially Every Stage 25

4. This Case Was Extremely Complex. 27

5. Class Counsel Prosecuted End-Payors' Claims With Diligence and Efficiency. 28

6. The Recovery Obtained by Class Counsel Is Substantial. 30

7. Class Counsel's Requested Fee Furthers the Public Interest in Incentivizing Suits by End-Payors Challenging Anticompetitive Practices by Pharmaceutical Companies. 32

B. The Lodestar Method Further Supports End-Payors' Fee Request. 33

IV. THE REQUESTED EXPENSES ARE REASONABLE. 35

V. THE REQUESTED SERVICE AWARDS ARE REASONABLE. 35

VI. CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

CASES

Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.,
481 F.2d 1045 (2d Cir. 1973)....................32

In re Asacol Antitrust Litig.,
No. 15-cv-12730-DJC, 2016 WL 4083333 (D. Mass Jul. 20, 2016)....................7

In re Asacol Antitrust Litigation,
907 F.3d 42 (1st Cir. 2018).................... *passim*

Bezdek v. Vibram USA Inc.,
79 F. Supp. 3d 324 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015)....................18

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)....................17, 18

In re Cabletron Sys., Inc. Sec. Litig.,
239 F.R.D. 30 (D.N.H. 2006)....................18, 19

Carlson v. Target Enter., Inc.,
No. 18-40139, 2020 WL 1332839 (D. Mass. Mar. 23, 2020)....................36

In re Compact Disc Minimum Advertised Price Antitrust Litig.,
292 F. Supp. 2d 184 (D. Me. 2003)....................36

In re Elec. Carbon Prods. Antitrust Litig.,
447 F. Supp. 2d 389 (D.N.J. 2006)....................27

In re Fidelity/Micron Sec. Litig.,
167 F.3d 735 (1st Cir. 1999)....................35

FTC v. Actavis, Inc.,
570 U.S. 136 (2013)....................6, 25, 26, 28

Goldberger v. Integraed Resources, Inc.,
209 F.3d 43 (2d Cir. 2000)....................32

Gottlieb v. Wiles,
150 F.R.D. 174 (D. Colo. 1993), *rev'd on other grounds*, 43 F.3d 474 (10th Cir. 1994)....................19

Hale v. State Farm Mut. Auto. Ins. Co.,
No. 12-0660-DRH, 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018)....................19

Hawaii v. Standard Oil Co. of Cal.,
405 U.S. 251 (1972)....................18

Latorraca v. Centennial Techs. Inc.,
834 F. Supp. 2d 25 (D. Mass. 2011)....................35

Lauture v. A.C. Moore Arts & Crafts, Inc.,
No. 17-CV-10219, 2017 WL 5900058 (D. Mass. Nov. 28, 2017)....................19, 36

In re Loestrin 24 Fe Antitrust Litig.,
261 F. Supp. 3d 307 (D.R.I. 2017)....................26

In re Loestrin 24 Fe Antitrust Litig.,
814 F.3d 538 (1st Cir. 2016)....................6, 11, 26, 31

In re Loestrin 24 Fe Antitrust Litig.,
No. 1:13-MD-2472-WES-PAS, 2019 WL 7286764 (D.R.I. Dec. 17, 2019)....................13, 14

In re Lupron Mktg. & Sales Practices Litig.,
No. 01-cv-10861, 2005 WL 2006833 (D. Mass. Aug. 17, 2005).................... *passim*

Mazola v. May Dept. Stores Co.,
No. 97-cv-10872, 1999 WL 1261312 (D. Mass. Jan. 27, 1999)....................20

Medoff v. CVS Caremark Corp.,
No. 09-cv-554-JNL, 2016 WL 632238 (D.R.I. Feb. 17, 2016)....................25

Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.,
838 F.3d 421 (3d Cir. 2016)....................7

In re Neurontin Mktg. & Sales Practices Litig.,
58 F. Supp. 3d 167 (D. Mass. 2014)....................21

In re Nexium (Esomeprazole) Antitrust Litig.,
842 F.3d 34 (1st Cir. 2016)....................7, 26

In re Prograf Antitrust Litig.,
No. 1:11-md-02242 (D. Mass. Nov. 2, 2016), ECF No. 712....................20, 22, 31

In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.,
No. 3:10-CV-30163, 2014 WL 6968424 (D. Mass. Dec. 9, 2014)....................36

In re Puerto Rican Cabotage Antitrust Litig.,
815 F. Supp. 2d 448 (D.P.R. 2011).................... *passim*

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979)....................17

In re Relafen Antitrust Litig.,
231 F.R.D. 52 (D. Mass. 2005)....20, 29, 32, 35

In re Remeron End-Payor Antitrust Litig.,
No. 02-cv-2007, 2005 WL 2230314 (D.N.J. Sept. 13, 2005)....23

Skelton v. Gen. Motors Corp.,
860 F.2d 250 (7th Cir. 1988) 33, 34

Staley v. Gilead Sciences, Inc.,
2020 WL 1032320 (N.D. Cal. March 3, 2020)....33

Sutton v. Med. Serv. Ass'n of Pa.,
No. 92-cv-4787, 1994 WL 246166 (E.D. Pa. June 8, 1994)....27

Taubenfeld v. AON Corporation,
415 F.3d 597, 600 (7th Cir. 2005) 19, 20

In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.,
56 F.3d 295 (1st Cir. 1995)....17, 18, 33

In re Tyco Intern., Ltd. Multidistrict Litig.,
535 F. Supp. 2d 249 (D.N.H. 2007)....18, 33

In re Wholesale Grocery Prods. Antitrust Litig.,
957 F.3d 879 (8th Cir. 2020) 26

OTHER AUTHORITIES

Federal Rule of Civil Procedure 23 ....9, 12, 18, 29

Prescription Drugs, Kaiser Family Foundation (Mar. 1, 2019),
https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-february-2019-prescription-drugs/....32

I. INTRODUCTION

Following nearly seven years of hard-fought litigation, and on the last business day before the start of trial, End-Payor Class Plaintiffs obtained a proposed $62,500,000 all-cash settlement with the Warner Chilcott Defendants[1] ("Settlement Fund") to reimburse Third-Party Payor ("TPP") Class members for their purchases of branded and generic Loestrin 24 Fe and Minastrin 24 Fe at supra-competitive prices.[2]

This settlement represents a significant victory, achieving for the Class one of the largest recoveries in an End-Payor generic suppression case in over a decade. The result is remarkable given that there was considerable uncertainty throughout the case as to whether End-Payors would be able to obtain *any* recovery from the Warner Chilcott Defendants. Indeed, certain of the End-Payor Class's claims were dismissed and revived only after a successful appeal. Later, in spite of the threat that the First Circuit's decision in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018) posed to class certification, End-Payors obtained certification of a TPP Class that bore the substantial majority of End-Payor damages. In the face of these and other challenges, End-Payor Class Counsel relied on hard work and experience to investigate and file the first complaint challenging Defendants' conduct and to achieve favorable rulings at essentially every stage of the litigation, which benefited not only the End-Payor Class here, but also plaintiffs in other generic suppression suits.

In recognition of the results achieved, the extensive time and resources invested, and the

---

[1] The Warner Chilcott Settlement is with Warner Chilcott plc n/k/a Allergan WC Ireland Holdings Ltd.; Warner Chilcott Holdings Co. III, Ltd.; Warner Chilcott Corp.; Warner Chilcott Laboratories Ireland Limited; Warner Chilcott Limited; Allergan plc; Warner Chilcott Co., LLC f/k/a Warner Chilcott Co., Inc.; Warner Chilcott (US), LLC; Warner Chilcott Sales (US), LLC.; Watson Laboratories Inc.; and Watson Pharmaceuticals, Inc.

[2] The End-Payor Class previously settled with Lupin Limited and Lupin Pharmaceuticals, Inc. ("the Lupin Defendants") for $1,000,000 and valuable cooperation against the Warner Chilcott and Watson Defendants ("Lupin Settlement"). Class Counsel seek expenses, but not any attorneys' fees, in connection with the Lupin Settlement.

risk undertaken, Class Counsel respectfully request an attorneys' fee award of $20,833,333.33—one-third (33⅓%) of the Settlement Fund—to compensate Class Counsel for the work it performed for the Class's benefit. In addition, Class Counsel seek payment for their reasonable and necessary unreimbursed litigation expenses in the amount of $3,743,996.58, and up to $250,000 to complete the settlement distribution process. Finally, Class Counsel request that the Court award $10,000 to each of the TPP Class Representatives and $5,000 to each of the Consumer Class Representatives in recognition of, and as compensation for, the valuable services each provided to the Class throughout this litigation.

As discussed in greater detail below and in the supporting declarations of Class Counsel and Professor Charles M. Silver of the University of Texas Law School, Class Counsel's one-third fee request is justified under both the percentage-of-the-fund and lodestar approaches.[3] Due to the complexity of and substantial investment in time and resources required by indirect purchaser generic suppression cases, one-third fee awards have become the norm in such suits over the last fifteen years. To Class Counsel's knowledge, the only significant departures from this norm have been in cases that settled more than decade ago, at earlier stages of the litigation lifecycle, and usually on less favorable terms. The lodestar method provides further support for the requested fees. Based on historical billing rates, Class Counsel's fee request represents only 1.05 times the reported lodestar of $19,917,547.10. Another court in this circuit characterized a similar multiplier as "low" and "certainly within the reasonable range."[4]

The other factors that trial courts in this circuit typically consider in awarding fees in

[3] *See* Decl. of Prof. Charles Silver in Support of End-Payor Class Pls.' Mot. for an Award of Attorneys' Fees, Reimbursement of Litig. Expenses, & Service Awards to the Class Representations ("Silver Decl."), attached as Ex. L.

[4] *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 465 (D.P.R. 2011).

common fund cases favor a higher-than-typical attorneys' fee award. Class Counsel brought this case at great risk on an exclusively contingent basis. This case was complex, even for an antitrust suit. It involved multiple theories of liability that required extensive expertise in competition, patent, and pharmaceutical regulatory law. Although recovery was far from assured, Class Counsel vigorously litigated this case from inception through the eve of trial, investing considerable resources and more than 35,249.28 hours of attorney and professional staff time and $3,743,996.58 million in unreimbursed expenses to prepare this case for trial. Despite the unique challenges presented, Class Counsel obtained one of the largest comparable recoveries for the Class in recent history and furthered the important public interest of deterring anticompetitive conduct by pharmaceutical companies.

II. BACKGROUND

On February 14, 2014, the Court appointed Cohen Milstein Sellers & Toll PLLC, Hilliard & Shadowen LLC, Miller Law LLC, and Motley Rice LLC as Interim Co-Lead Counsel and Motley Rice LLC as Liaison Counsel.[5] Since then, Co-Lead Counsel have directed the overall conduct of the litigation and worked with Liaison Counsel, the Executive Committee, and other End-Payor counsel to prosecute the litigation through the eve of trial. A detailed description of the work performed by each firm seeking fees and reimbursement of expenses is set forth in Co-Lead Counsel's Joint Declaration and the individual declarations of Class Counsel submitted in support of this motion.[6] Below is a summary of the work performed by Class Counsel during the

[5] Case Management Order ("CMO") No. 2, ECF No. 85 at ¶¶ 6-7 (Feb. 14, 2014). The Court also appointed as members of the Executive Committee: Carl Beckwith, Esq., PC; Shepherd Finkelman Miller & Shah LLC; Doyle Lowther LLP; the Dugan Law Firm, LLC; Pomerantz Grossman Hufford Dahlstrom & Gross LLP; Law Offices Bernard M. Gross, PC; Spector Roseman Kodroff & Willis, P.C.; Schnader Harrison; Hach Rose Schirripa & Cheverie, LLP; Branstetter, Stranch & Jennings, PLLC; and Trenk, DiPasquale, Della Fera & Sodono, P.C. *Id.* at ¶ 9.

[6] *See* Joint Decl. of Steve D. Shadowen, Sharon K. Robertson, Michael M. Buchman, & Marvin A. Miller in Support of End-Payor Class Pls.' Mot. for an Award of Attorneys' Fees, Reimbursement of Litig. Expenses, & Service Awards to the Class Representations ("Joint Decl."); *see also* Exs. A-J (End-Payor Class Counsel individual firm

litigation.

A. End-Payor Class Counsel Investigate and File the First Complaint Challenging Anticompetitive Practices Relating to Loestrin 24 Fe.

End-Payor Class Counsel pioneered the investigation and filing of litigation challenging Defendants' anticompetitive practices relating to Loestrin 24 Fe. The first such complaint was filed on April 5, 2013 by Co-Lead Hilliard & Shadowen, and was quickly followed by complaints by other Co-Leads.[7] That complaint was the product of extensive independent investigation, spearheaded by counsel for the End-Payor Plaintiffs.[8] In contrast to many other antitrust suits, the complaints here were filed without the benefit of any prior government investigation, and the first end-payor suit was filed before any other plaintiff party or public disclosure of any related matter. On May 14, 2013, a similar case was subsequently filed by Direct Purchasers, and complaints from Retailer Plaintiffs followed.[9] All of these cases were consolidated before this Court.[10] Throughout the litigation, all three plaintiff groups collaborated, to decrease duplication of effort and increase efficiency.

End-Payors filed a Consolidated Amended Complaint on December 6, 2013.[11] Although the three Plaintiff groups pleaded similar claims, only the End-Payors alleged that the acceleration clause in the Watson settlement was an additional unlawful reverse payment, and only the End-

---

declarations).

[7] Compl., *United Food & Commercial Workers Local 1776 & Participating Employers Health & Welfare Fund v. Warner Chilcott (US), LLC*, No. 2:13-cv-01807-CMR (E.D. Pa. Apr. 5, 2013), ECF No. 1; Compl. *N.Y. Hotel Trades Council & Hotel Assoc. of N.Y. City, Inc. v. Warner Chilcott Pub. Ltd. Co.*, 1:13-cv-02474-WES-PAS (D.R.I. Apr. 15, 2013); ECF No. 1; Compl., *City of Providence v. Warner Chilcott Pub. Ltd. Co.*, No. 1:13-cv-00307-WES-PAS (D.R.I. May 2, 2013), ECF No. 1.

[8] Joint Decl. ¶¶ 7-8.

[9] *See* Compl., *Am. Sales Co., LLC v. Warner Chilcott Pub. Ltd. Co.*, No. 1:13-cv-00347-WES-PAS (D.R.I. May 14, 2013), ECF No. 1; Compl., *Walgreen Co. v. Warner Chilcott Pub. Ltd*. Co., No. 1:14-cv-00102-WES-PAS (D.R.I. Feb. 25, 2014), ECF No. 1.

[10] Transfer Order, ECF No. 1 (Oct. 3, 2013).

[11] ECF No. 40.

Payors and Retailers asserted claims against the Lupin Defendants. Unlike the Direct Purchasers and Retailers, in addition to claims under the federal Sherman Act, End-Payors also pleaded state law antitrust, consumer protection, and unjust enrichment claims.

B. End-Payors Successfully Appeal the Dismissal of Their Sherman Act Claims.

On February 7, 2014, the Defendants moved to dismiss the End-Payor and Direct Purchaser complaints.[12] In addition to presenting arguments that were common to the End-Payors' and Direct Purchasers' claims, the Warner Chilcott and Lupin Defendants filed a separate 52-page brief directed at the particular claims and allegations plead in End-Payors' complaint, including those relating to the Lupin reverse payment, acceleration clauses, and various state law causes of action.[13] End-Payors opposed Defendants' dismissal motion in a detailed, 82-page brief.[14]

On September 4, 2014, the Court ruled against Plaintiffs, holding that only cash payments can be actionable as unlawful reverse payments.[15] The Court entered a partial final judgment as to End-Payors' federal antitrust claims and stayed the remaining claims.[16] End-Payors timely appealed the dismissal, filing their own appellate brief, which addressed the appropriate definition of a reverse payment, as well as unique issues relating to the End-Payors class.[17] End-Payors were also responsible, on behalf of all Plaintiff groups, for organizing the amicus curiae effort, garnering support from the nation's leading antitrust academics, the leading consumer-advocacy

---

[12] Defs.' Mot. to Dismiss DPPs' Consol. Am. Class Action Compl., ECF No. 74; Defs.' Mot. to Dismiss IPPs' Consol. Am. Class Action Compl., ECF No. 76.

[13] Defs.' Mem. of Law in Supp. of Mot. to Dismiss IPPs' Consol. Am. Class Action Compl., ECF No. 76 (Feb. 7, 2014).

[14] EPPs' Mem. of Law in Opposition to Defs.' Mot. to Dismiss, ECF No. 92-1 (Mar. 24, 2014).

[15] Op. & Order Granting Mot. to Dismiss, ECF No. 116.

[16] Judgment, ECF No. 142 (Feb. 17, 2015).

[17] Notice of Appeal, ECF No. 143 (Feb. 23, 2015); *See* No. 15-1250 (1st Cir. June 9, 2015).

organizations, 29 States, and the Federal Trade Commission. End-Payors also presented part of the oral argument to the First Circuit.[18]

On February 24, 2016, the First Circuit reversed the dismissal of End-Payors' Sherman Act claims, agreeing with Plaintiffs that the Supreme Court's *Actavis* decision did not limit reverse payments to cash.[19] The First Circuit also remanded "the question of whether the EPPs and DPPs adequately alleged that the individual provisions of the settlement agreements warranted antitrust scrutiny as unlawful reverse payments."[20]

On remand, End-Payors, in collaboration with Direct Purchasers and Retailers, began the process of substantially amending their complaints.[21] Plaintiffs' amended complaints added product hop or "switch" claims, which End-Payor counsel discovered and drafted. End-Payor counsel were also involved in the development of Plaintiffs' *Walker Process* fraud and sham litigation claims that were added to the amended complaints. Other additions to End-Payors' complaint included allegations regarding the size and nature of the reverse payments Warner Chilcott provided to Watson and Lupin and the anticompetitive effects associated with Watson's acceleration clause.

The Warner Chilcott Defendants and Lupin Defendants moved to dismiss End-Payors' amended complaint, advancing in hundreds of pages of briefing arguments relating to market power, reverse payments, patent fraud, product hopping, and End-Payors' state law claims.[22] The

[18] Joint Decl. ¶ 13.

[19] *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538 (1st Cir. 2016).

[20] *Id.* at 552-53.

[21] End-Payor Pls.' Second Am. Consolidated Class Action Compl., ECF No. 165 (May 9, 2016); *see also* Joint Decl. ¶ 15.

[22] Lupin Defs.' Mot. to Dismiss, ECF No. 191 (June 13, 2016); Warner Chilcott & Watson Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 192 (June 13, 2016); Decl. of A. Hanstead, ECF No. 193 (June 13, 2016).

Lupin Defendants filed a separate brief challenging End-Payors' reverse payment allegations.[23] Each of the three Plaintiff groups filed responses to Defendants' motions to dismiss. End-Payors' 85-page brief addressed arguments relating to the definition of a suspect payment, burdens of proof relating to saved litigation costs and fair value of services, the Watson Agreement's no-authorized-generic and acceleration clauses, the Lupin Agreement's reverse payments, and various state law issues.[24] End-Payors subsequently drafted on behalf of all Plaintiffs notices of supplemental authority regarding several relevant rulings in other generic suppression suits.[25] On January 13, 2017, Plaintiffs jointly argued the motions to dismiss, with End-Payor Counsel handling market power and the product hop claims for all Plaintiffs.[26]

C. The Parties Engage in Extensive Discovery.

While Defendants' second rounds of dismissal motions were pending, Plaintiffs commenced discovery. End-Payors actively engaged in the discovery process across three fronts: (1) offensive discovery common to all three Plaintiff groups; (2) offensive discovery pertaining only to End-Payors (or, with respect to the Lupin-related claims, to End-Payors and Retailers); and (3) defensive discovery pertaining to End-Payors.

Document discovery in this case was extensive. Defendants and third parties produced over 410,000 documents spanning over 3.5 million pages, which End-Payor Counsel invested considerable effort in reviewing and analyzing.[27] To avoid duplication of effort, and to take

---

[23] Mem. of Law in Supp. of Lupin Defs,' Mot. to Dismiss, ECF No. 191-1 (June 13, 2016).

[24] ECF No. 205.

[25] ECF Nos. 209, 223, 238, 254 (collectively addressing *In re Asacol Antitrust Litig.*, No. 15-cv-12730-DJC, 2016 WL 4083333 (D. Mass Jul. 20, 2016), *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421 (3d Cir. 2016), and *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34 (1st Cir. 2016).

[26] EPPs' Mem. in Opp. to Defs.' Mots. To Dismiss, ECF No. 266 (July 15, 2016).

[27] Joint Decl. ¶ 33.

advantage of the subject-matter expertise of individual Plaintiffs' counsel, the Plaintiff groups collaborated to create joint teams based on subject matter. End-Payor Counsel chaired the product hop[28] and privilege teams and assigned individuals to actively participate in each of the other subject-matter groups. As leaders of the privilege team, End-Payors spearheaded privilege and related discovery challenges, including arguing the majority of privilege-related issues and motions in telephonic hearings before Magistrate Judge Sullivan.[29] These efforts resulted in the dislodging of thousands of withheld documents and redacted documents.

End-Payor Counsel also dedicated substantial efforts to ensure non-common aspects of the case were developed and litigated.[30] For example, End-Payors worked together with Retailers on the Lupin reverse-payment claims. End-Payors also developed the factual record to support their unique claim regarding Watson's acceleration clause.

In total, Plaintiffs took more than two dozen fact witness depositions.[31] End-Payors participated in virtually all of these depositions, including examining or assisting others in preparing for every witness that related to Plaintiffs' product hop liability theory, as well as other key witnesses including Watson CEO David Buchen and Watson Chief Legal Officer Paul Bisaro.[32]

Defendants also undertook significant third-party discovery, in an effort to defeat class certification and undermine Plaintiffs' relevant market arguments. Many of those efforts were directed at Pharmacy Benefit Managers and absent End-Payor Class members. End-Payors, in

---

[28] Joint Decl. ¶¶ 34-35.

[29] *Id.* ¶¶ 38-49.

[30] *Id.* ¶¶ 24, 36, 50-51.

[31] *Id.* ¶¶ 50-54.

[32] *Id.* ¶ 51.

collaboration with the other plaintiff groups, participated in virtually all of the third-party depositions.[33]

Defendants served over 100 requests for production of documents, and numerous interrogatories on the End-Payors.[34] End-Payors met and conferred with Defendants, briefed and argued motions to compel unique to the End-Payors, and worked with each of the named plaintiffs to collect and produce documents. Defendants also served Rule 30(b)(6) deposition notices on each named plaintiff. Co-Lead Counsel prepared for and defended 12 depositions of the named plaintiffs, in consultation with co-counsel.[35]

D. The Third-Party Payor Class Is Certified.

On July 30, 2018, End-Payors moved for class certification.[36] After End-Payors filed their opening brief, on October 15, 2018, the First Circuit issued an opinion in *In re Asacol Antitrust Litigation*.[37] In *Asacol*, the appeals court reversed the certification of an end-payor class in a delayed generic case on the ground that the plaintiffs there had not proved they had an administratively feasible method for identifying and excluding from the class uninjured persons. This substantially complicated End-Payors' effort to gain class certification. Shortly thereafter, the Warner Chilcott Defendants filed a 71-page opposition to End-Payors' class certification motion, relying extensively on *Asacol*.[38]

In response to the threat posed by *Asacol*, and with incredible rapidity, End-Payors

[33] *Id.* ¶ 53.

[34] *Id.* ¶¶ 24-28.

[35] *Id.* ¶¶ 54.

[36] Mem. of Law in Supp. of EPPs' Mot. for Class Cert. & Appointment of Class Counsel, ECF No. 528-1.

[37] 907 F.3d 42 (1st Cir. 2018).

[38] Defs.' Mem. of Law in Opp. to EPPs' Mot. for Class Cert & in Supp. of Defs.' Renewed Mot. to Dismiss & Mot. for J. on the Pleadings, ECF No. 574-2 (Oct. 19, 2018).

mounted an extensive and innovative effort to show they could satisfy the First Circuit's newly adopted standards. First, End-Payors proposed a novel class definition consisting of separate consumer and TPP subclasses, along with a series of exclusions designed to carve out from the class potentially uninjured persons and entities.[39] Second, in support of this strategy, in less than four months, End-Payors filed two additional briefs supporting class certification (comprising around 100 pages)[40]; retained three new pharmaceutical experts; worked with those experts to file four reports[41]; worked with their existing expert economist to file two additional expert reports supporting class certification[42]; successfully opposed Defendants' efforts to strike their reply brief and rebuttal expert reports[43]; prepared for and defended the depositions of all four experts retained by End-Payors; deposed three experts retained by Defendants within a week of receiving their reports; moved to exclude the opinions of Defendants' experts[44]; worked with third-party Pharmacy Benefit Managers to secure permission to file four declarations supporting the reports of Plaintiffs' experts[45]; and prepared for an extensive, two-day evidentiary hearing on class

[39] EPPs' Reply Mem. of Law in Further Supp. of their Mot. for Class Cert. & Appointment of Class Counsel, ECF No. 633-1 (Dec. 7, 2018); Decl. of M. Buchman in Further Supp. of EPPs' Mot. for Class Cert. & Appointment of Class Counsel, ECF No. 664 (Dec. 14, 2018).

[40] *Id*.

[41] Expert Report of Myron D. Winkleman (Nov. 30, 2018), ECF No. 633, Ex. 1; Decl. of Laura R. Craft (Nov. 30, 2018), ECF No. 633, Ex. 2; Decl. of Eric J. Miller (Nov. 30, 2018), Ex. 3; Sur-rebuttal Decl. of Laura R. Craft (Feb. 1, 2019), ECF Nos. 751, 762, Ex. C.

[42] Reply Report of Gary L. French, Ph.D. Regarding Impact & Damages to End-Payor Pls., ECF No. 632, Ex. 1 (Dec. 7, 2018); Sur-Reply Report of Gary L. French, Ph.D. Regarding Impact & Damages to End-Payor Pls., ECF Nos. 751, 762, Ex. A (Feb. 1, 2019).

[43] Response in Opp. to Defs.' Mot. to Strike, ECF No. 668 (Dec. 18, 2018).

[44] EPPs.' Mem. of Law. in Supp. of Mot. to Exclude Test. & Ops. of James W. Hughes, Ph.D., and in Opp. to Defs.' Mot. to Exclude Testimony & Opinions of Gary L. French, Ph.D., ECF No. 632-2 (Dec. 7, 2018).EPPs' Reply Mem. of Law in Support of Mot. to Exclude Test. & Ops. of James W. Hughes, Ph.D., ECF No. 691-1 (Dec. 28, 2018); EPPs' Supplement to Mot. to Exclude Test. & Ops. of James W. Hughes, Ph.D., ECF No. 732-1 (Feb. 1, 2019); EPPs' Mem. of Law in Supp. of Mot. to Exclude Ops. & Test. of Mr. Timothy E. Kosty & Dr. Bruce A. Strombom, ECF No. 739-1 (Feb. 1, 2019);

[45] Decl. of Steven Schaper, ECF No. 632, Ex. 10; Decl. of Non-Party Express Scripts, Inc., ECF No. 632, Ex. 11; Decl. of Robert Lahman, ECF No. 632, Ex. 12; Decl. of Non-Party Prime Therapeutics LLC, ECF No. 632, Ex. 13; Decl. of Non-Party Prime Therapeutics LLC, ECF No. 632, Ex. 14.

certification[46].

Aside from advancing *Asacol*-related arguments, Defendants also filed an extensive renewed motion to dismiss, across an extensive 132 pages of briefing, challenging the class representatives' Article III standing, the availability of various state law claims under *Illinois Brick*, the reliability of End-Payors' economic models, the proposed class's numerosity, the typicality of certain class representatives, and purported conflicts among the class representatives and members.[47] End-Payors responded to each of these arguments.

On October 17, 2019, this Court certified End-Payors' proposed TPP class (comprising approximately two-thirds of total End-Payor damages) and largely denied Defendants' motion to dismiss, though it concluded that *Asacol* precluded certification of a class including consumers.[48] Based on the extensive record compiled and submitted by End-Payors and their experts, the Court stated that it was "convinced that the data [necessary to identify and exclude uninjured TPPs] are available and accessible"; indeed, "from PBM and pharmacy data, the EPPs could compile a list of TPPs that purchased Loestrin 24, Minastrin, and their generic equivalents, that includes payment amounts, coverage, and plan characteristics."[49] The litigation strategy and factual record developed by End-Payors here are now being relied on by indirect classes in other end-payor, delayed generic suits.[50]

---

[46] Tr. of Evidentiary Hr'g, ECF No. 807 (Feb. 13, 2019); Tr. of Evidentiary Hr'g, ECF No. 808 (Feb. 14, 2019).

[47] Defs.' Mem. of Law in Opp. to EPPs' Mot. for Class Cert. & in Supp. of Defs.' Renewed Mot. to Dismiss & Mot. for J. on the Pleadings, ECF No. 574-2 (Oct. 19, 2018); Defs.' Reply in Supp. of Renewed Mot. to Dismiss & Mot. for J. on the Pleadings, ECF No. 665-1 (Dec. 14, 2018)..

[48] Order, ECF No. 1226 (Sept. 17, 2019); Mem. of Decision on Class Cert & Order Regarding Mots. to Exclude Certain Expert Ops. & Defs.' Renewed Mot. to Dismiss, ECF No. 1274 (Oct. 17, 2019).

[49] Mem. of Decision on Class Cert & Order Regarding Mots. to Exclude Certain Expert Ops. & Defs.' Renewed Mot. to Dismiss, ECF No. 1274 at 81-82 (Oct. 17, 2019).

[50] *See*, *e.g.*, Op. & Order on End-Payor Pls.' Mot. for Class Certification, *In re Restasis (Cyclosporine Ophalmic Emulsion) Antitrust Litig.*, 18-md-2819 (E.D.N.Y. May 4, 2020), ECF No. 501 at 9-10, 39, 43, 45 (repeatedly citing this Court's *Loestrin* class certification decision and relying heavily on reports submitted by Laura

While the parties prepared for trial, Defendants filed a petition with the First Circuit seeking interlocutory review under Federal Rule of Civil Procedure 23(f), which End-Payors opposed and the First Circuit denied.[51] End-Payors worked with A.B. Data—the notice administrator approved by the Court—to develop and implement a robust notice program that reached virtually all class members.[52]

E. Plaintiffs Defeat Defendants' Summary Judgment Motions.

Summary judgment motions proceeded in two phases: motions relating to market power were filed first, followed by motions relating to the remainder of the case. Both phases involved extraordinary effort and cooperation among the plaintiff groups. End-Payor Counsel were responsible for drafting Plaintiffs' summary judgment briefs (offensive and defensive) regarding market power.[53] End-Payor Counsel were also closely involved, along with counsel for Direct Purchasers and Retailers, in preparing for and drafting Plaintiffs' statements of facts and responses to Defendants' statements.[54] Throughout the process, End-Payors worked together with Direct Purchaser Plaintiffs and Retailers to marshal evidence, coordinate with Plaintiffs' experts, and depose Defendants' experts.

Craft); End-Payor Pls.' Reply Mem. of Law in Further Support of Their Mot. for Class Cert., *In re Opana ER Antitrust Litig.*, No. 14-cv-10150 (N.D. Ill. Nov. 20, 2019), ECF No. 473 at 2, 4, 9-10, 12, 15, 20; Mem. of Law in Support of End-Payor Pls.' Mot. for Class Cert. & Appointment of Class Representatives & Class Counsel, *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836 (E.D. Va. Nov. 18, 2019), ECF No. 730 at 3, 9-10, 12, 15-17, 20, 23, 25-27, 29; Reply Mem. of Law in Support of End-Payor Plaintiffs' Mot. for Class Certification, *In re Niaspan Antitrust Litig.*, No. 2:13-md-02460 (E.D. Pa. Mar. 25, 2019), ECF No. 628.

[51] Pet. Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure for Permission to Appeal from Order Granting Class Cert., ECF No. 1254 (Oct. 2, 2019).

[52] Joint Decl. ¶ 72.

[53] *Id*. ¶¶ 73-74.(citing Mem. of Law in Supp. of Pls.' Mot. for Summ. J., & in Opp'n to Defs.' Mot. for Summ. J. on Market Power, ECF No. 595 (Oct. 26, 2018); Pls.' Reply Mem. of Law in Supp. of Mot. for Summ. J. on Market Power, ECF No. 707-1 (Jan. 25, 2019)).

[54] ECF Nos. 600, 601.

On March 14, 2019, the Court held a hearing on the market power summary judgment motions, during which End-Payor Counsel led arguments on behalf of the three Plaintiff groups.[55] In collaboration with Direct Purchasers and Retailers, End-Payor Counsel drafted answers to several follow-up questions posed by the Court, coordinated with Plaintiffs' experts, compiled demonstratives, and prepared the filing.[56] On October 3, 2019, End-Payor Counsel again argued on Plaintiffs' behalf at an additional hearing on these questions. The Court denied summary judgment on market power on December 17, 2019.[57]

On May 10, 2019, Defendants filed a separate omnibus summary judgment motion with respect to Plaintiffs' patent, reverse payment, and product hop claims, accompanied by a 57-page statement of facts and hundreds of exhibits.[58] Defendants' motion also pressed various arguments specific to End-Payors, including damages, statute of limitations, and particular state statutes.

On June 12, 2019, Plaintiffs collectively filed a responsive brief and statement of facts, as well as a statement of additional facts and hundreds of exhibits.[59] End-Payor Counsel drafted sections relating to the product hop, acceleration clauses, End-Payor damages, and state law issues, and were primarily responsible for drafting and marshaling evidence for the corresponding fact statements. On September 11, 2019, the Court held a hearing on Defendants' motion for summary

---

[55] Tr. of Hr'g on Mot. for Summ. J. (Market Power), ECF No. 823 (Mar. 14, 2019).

[56] Pls.' Answers to Court's Questions for Further Market Power Briefing, ECF No. 1247 (Sept. 30, 2019).

[57] *In re Loestrin 24 Fe Antitrust Litig.*, No. 1:13-MD-2472-WES-PAS, 2019 WL 7286764, at *19 (D.R.I. Dec. 17, 2019).

[58] Mot. for Summ. J., ECF No. 842 (July 10, 2019); Decl. of K. Dyson, ECF No. 843 (July 10, 2019); Exhibits in Supp. of Defs.' Statement of Undisputed Facts in Supp. of Defs.' Mot. for Summ. J., ECF Nos. 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856 (July 10, 2019); Defs.' Statement of Undisputed Facts, ECF No. 857-1 (July 10, 2019); Defs.' Mem. of Law in Supp. of Mot. for Summ. J., ECF No. 858-1 (July 10, 2019).

[59] Pls.' Mem. of Law. in Opp. to Defs.' Mot. for Summ. J., ECF No. 972-1 (June 12, 2019); Pls.' Statements of Facts in Opp. to Defs.' Mot. for Summ. J., ECF No. 973-1 (June 12, 2019); Pls.' Additional Statement of Material Undisputed Facts, ECF No. 973-2 (June 12, 2019); Exs. in Supp. of Pls.' Opp. to Defs.' Mot. for Summ. J., ECF Nos. 974, 975, 976 (June 12, 2019).

judgment, with End-Payor Counsel arguing on behalf of all Plaintiffs with respect to the product hop claim.[60] On December 17, 2019, the Court denied Defendants' motion.[61]

F. End-Payors Work on Expert Issues.

End-Payors agreed with Direct Purchasers and Retailers to share the cost of experts covering issues common to all three plaintiff groups, retaining twelve common experts. End-Payor Counsel worked with these experts on issues relating to product hop, market power, reverse payments, and causation. End-Payor Counsel also separately retained four End-Payor-only experts for issues relating to damages and class certification and, with Retailers, retained an expert in connection with the Lupin reverse payment claims.

The parties filed numerous *Daubert* challenges. For efficiency's sake and to avoid duplication of work, Plaintiffs agreed to coordinate on motions pertaining to common issues, with End-Payor Counsel actively participating and securing favorable results for all Plaintiffs. For example, End-Payor Counsel drafted Plaintiffs' motion to exclude Drs. Meyer, Robbins, and Schilling's opinions pertaining to the product hop,[62] which the Court granted insofar as those experts sought to testify as to certain policy and legal matters.[63] End-Payor Counsel were also responsible for drafting Plaintiffs' successful motion to exclude Drs. Meyer and Robbins from testifying that the no-authorized generic provision procompetitively protected from "ruinous competition."[64] In addition, End-Payors successfully defended against *Daubert* motions filed by

---

[60] Joint Decl. ¶ 80.

[61] *In re Loestrin 24 Fe Antitrust Litig.*, 2019 WL 7286764.

[62] Joint Decl. ¶ 81.

[63] Mem. of Law in Supp. of Mot. to Exclude Ops. & Test. of Drs. Christine S. Meyer, Mark S. Robbins, & Melissa A. Schilling Regarding Lack of Anticompetitive Effect from Product Hop, ECF No. 940 (June 3, 2019); Op. & Order on Summ. J. and Order Regarding Mots. to Exclude Certain Expert Ops., ECF No. 1380 (Dec. 17, 2019).

[64] *In re Loestrin 24 Fe Antitrust Litig.*, 2019 WL 7286764, at *19.

Defendants.

G. End-Payors Prepare Extensively for Trial.

End-Payors led all groups on several major pre-trial submissions. End-Payors took the lead role in shepherding drafting, editing, and submitting Plaintiffs' omnibus motion *in limine*, which raised 41 separate trial issues, as well as coordinating Plaintiffs' replies in support of those motions.[65] End-Payors also managed and contributed substantially to Plaintiffs' collective oppositions to Defendants' 9 motions *in limine*.[66]

In addition, End-Payors were primarily responsible for the parties' 231-page Joint Pretrial Memorandum, including spearheading and synthesizing the work of all three Plaintiff groups.[67] As part of this effort, End-Payors Counsel led negotiations and coordination with counsel for the Defendants. Given the scope and length of the Pretrial Memorandum, as well as the short time frame under which the parties were operating, this was a considerable undertaking.

End-Payors were also closely involved in other major pretrial activities.[68] For example, End-Payor Counsel participated in drafting and editing the Plaintiffs' proposed jury instructions and verdict form—including by creating several instructions and verdict questions tailored to the product hop claim and End-Payors' state law claims. Plaintiffs' proposed jury instructions, filed on November 25, 2019, included 131 separate instructions.[69] In addition, End-Payors co-led the process for vetting potential jurors, which required working with a jury consultant to organize and

---

[65] Joint Decl. ¶¶ 84-87; *see also* Mem. in Supp. of Purchasers' Omnibus Mot. *in Limine*, ECF No. 1301; Reply Mem. in Supp. of Purchasers' Omnibus Mot. *in Limine*, ECF No. 1336-1.

[66] Pls.' Responses in Opp. to Defs.' Mots. *in Limine*, ECF Nos. 1303, 1304, 1305, 1306, 1307, 1308-1, 1309-1, 1310, 1311-1 (Nov. 12, 2019).

[67] Joint Decl. ¶¶ 88-89; *see also* Pretrial Mem., ECF No. 1364 (Dec. 8, 2019).

[68] Joint Decl. ¶¶ 90-96.

[69] Pls.' Proposed Jury Verdict, ECF No. 1350 (Nov. 25, 2019); Pls.' Proposed Jury Instructions, ECF No. 1351 (Nov. 25, 2019).

evaluate questionnaires submitted by hundreds of potential jurors.[70] During jury selection, held on December 16 and 18, counsel for the End-Payors questioned venire panel members and participated in the process of selecting each of the 10 jurors.

In anticipation of the fact that many witnesses would not be testifying live at trial, Plaintiffs designated 49 deposition transcripts, and Defendants designated 95 deposition transcripts. Additionally, Plaintiffs designated 1,609 exhibits for trial, while Defendants designated 7,192 exhibits. Subsequently, the parties exchanged counter-designations and objections. End-Payor Counsel were closely involved in this process, engaging in extensive negotiations with Defendants over the parties' deposition and exhibit designations and objections after the other Plaintiffs settled.[71]

By the time the parties settled on the eve of trial, End-Payors had expended hundreds of hours on their trial presentation, including drafting and refining their opening statement and examinations of various witnesses.[72] End-Payors also participated with the other Plaintiffs in a mock trial to help refine their strategy.[73]

H. End-Payors Settle on the Eve of Trial.

After months of settlement discussions, on the final business day before trial, End-Payors and the Warner Chilcott Defendants reached an agreement in principle and negotiated and executed a corresponding memorandum of understanding to settle End-Payors' claims for $62.5 million in cash.[74] After further negotiations, a formal settlement agreement was executed on

[70] *Cf.* Case Management Order No. 16, ECF No. 1277 at 2 (Oct. 23, 2019).

[71] Joint Decl. ¶ 93.

[72] Joint Decl. ¶¶ 94-96.

[73] *Id.*

[74] *Id.* ¶ 99.

January 30, 2020. That agreement was the product of lengthy, hard-fought, and arm's-length negotiations among experienced counsel, with assistance from two well-regarded mediators—Judge Layn Phillips and David Murphy of Phillips ADR. On March 6, 2020, End-Payors moved for preliminary approval of the Warner Chilcott Settlement,[75] which this Court granted on March 23, 2020.[76] On March 28, 2020, notice was sent to class members *via* First-Class mail, publication, email, and public media. The notice advised that Class Counsel would seek a fee of up to one-third of the fund created by the Warner Chilcott Settlement.[77]

III. END-PAYORS' ATTORNEYS' FEES REQUEST IS REASONABLE.

Federal Rule of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

Under the common fund doctrine, an attorney who succeeds in creating a fund for the benefit of the class is entitled to "a reasonable attorney's fee from the fund as a whole."[78] Fee awards to class action plaintiffs' attorneys are essential to ensure access to the courts—"[d]ue to the expense, time and difficulty of pursuing complex litigation, it would likely not be economical for an individual Class Member to pursue such litigation on their own."[79] Fee awards in antitrust class actions promote compliance with, and the effective enforcement of, the antitrust laws.[80]

[75] Joint Decl. ¶¶ 97-98; *see also* EPPs' Mem. in Supp. of Amended Mot. for Settlement, ECF No. 1421 (Mar. 6, 2020).

[76] Order, ECF No. 1427 (Mar. 23, 2020).

[77] *See* Notice of Class Action & Proposed End-Payor Settlements (Mar. 28, 2020), available at https://inreloestrin24feantitrustlitigation.com/Home/Notice.

[78] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (citations omitted); *see also In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995) ("The common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs.").

[79] *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d at 463.

[80] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (noting that private challenges to antitrust violations provide "a significant supplement to the limited resources available to the Department of Justice for enforcing the

The First Circuit recognizes two methods for awarding attorneys' fees in the class action context.[81] Under the "percentage of the fund" method, where the parties' settlement establishes a "common fund" of money for the benefit of class members, the court may "shape[] the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation."[82] In contrast, under the "lodestar" method, the court calculates the fee award by "determining the number of hours productively spent on the litigation and multiplying those hours by reasonable hourly rates."[83]

The First Circuit has not mandated either approach over the other—though it has observed that the percentage of the fund method "offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace."[84] District courts in this circuit have discretion to rely on either (or both) methods, and often use one to "cross-check" the other.[85] Here, End-Payor Class Counsel's fee request is supported by both the percentage of the fund and lodestar approaches.

A. The Percentage of the Fund Method Supports End-Payors' Fee Request.

Previously, this Court has recognized three approaches for determining the appropriate fee percentage under the percentage-of-the-fund method.[86] The most common of these is the multi-

---

antitrust laws and deterring violations"); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972) (noting that Congress created rights for private citizens to enforce the antitrust laws, and Rule 23 provides for class actions that may "enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture").

[81] *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 349 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015); *see also In re Thirteen Appeals*, 56 F.3d at 307..

[82] *In re Thirteen Appeals*, 56 F.3d at 305; *see also Boeing*, 444 U.S. at 478.

[83] *In re Thirteen Appeals*, 56 F.3d at 305.

[84] *Id*. at 308.

[85] *See, e.g.*, *Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d at 464; *In re Tyco Intern., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007).

[86] *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 38 (D.N.H. 2006).

factor or "holistic" approach, which has been endorsed by the Second, Third, Fourth, Fifth, Sixth and Eleventh Circuits and by many district courts in this Circuit.[87] Other courts rely more narrowly on the "benchmark approach" and the "mimic-the-market approach."

In theory, these three approaches may lead to divergent results. In practice, however, in estimating the market rate for the services performed by class counsel, courts applying the mimic-the-market approach typically rely on many of the same considerations used by courts applying the holistic approach. This is largely due to the paucity of real-world competitive auctions among prospective lead counsel in class action cases.[88] For example, in *Taubenfeld v. AON Corporation*, the Seventh Circuit noted that the "type of evidence needed to mimic the market," includes information on "data on fees awarded in other class actions in the jurisdiction," "evidence of the quality of legal services rendered," and the "degree of risk of nonpayment with the case."[89] As is described in below and in the appended Declaration of Prof. Charles Silver, in this case, both the holistic and mimic-the-market approaches support the requested one-third fee award.[90]

Although the First Circuit has not endorsed a specified set of factors to be used in evaluating a fee request's reasonableness, district courts in this Circuit generally consider the following factors: (1) the fee awards in similar cases; (2) the risk of nonpayment; (3) the

---

[87] *Id.*

[88] *Cf. Gottlieb v. Wiles*, 150 F.R.D. 174, 180 (D. Colo. 1993), *rev'd on other grounds*, 43 F.3d 474 (10th Cir. 1994) ("Not only is there no ready analogy in the contingency fee-paying market to a class action securities case, the court's ability to make even a principled guess at a hypothetical market transaction between the class and class counsel is severely limited.").

[89] 415 F.3d 597, 600 (7th Cir. 2005); *see also Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018) (explaining that its mimic-the-market analysis was "informed by a number of factors, including: (1) the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services; (2) the risk of non-payment at the outset of the case; (3) the caliber of Class Counsel's performance; and (5) information from other cases, including fees awarded in comparable cases").

[90] *See* Silver Decl. ¶¶ 16-73; *see also*, *e.g.*, *Lauture v. A.C. Moore Arts & Crafts, Inc.*, No. 17-CV-10219, 2017 WL 5900058, at *1 (D. Mass. Nov. 28, 2017) ("A fee award of one-third is appropriate because it mimics the market.").

complexity and duration of the litigation; (4) the skill and efficiency of the attorneys involved; (5) the amount of time devoted to the case by plaintiffs' counsel; (6) public policy considerations; and (7) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel.[91]

When many of these factors are present, courts will often award a larger percentage of the fund (under the percentage-of-the-fund method) and/or a higher multiplier (under the lodestar method).[92] Here, all of these factors favor End-Payor Class Counsel's fee request.

1. One-Third Fee Awards Are Typical in Comparable Generic Suppression Suits.

End-Payors' one-third attorneys' fee request is firmly supported by fee awards in similar cases.[93] "[I]n this circuit, percentage fee awards range from 20% to 35% of the fund."[94] Among comparable end-payor generic suppression class actions—including in three such cases from this circuit[95]—one-third (33 1/3%) fee awards are far and away the most common.

End-payor generic suppression cases share certain characteristics, so the attorneys' fees awarded in such suits provide the most appropriate comparators for this case. First, these suits are among the most complex of any filed in federal court, requiring subject matter expertise in

---

[91] *See, e.g.*, *Puerto Rican Cabotage*, 815 F. Supp. 2d at 457-58 *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-cv-10861, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005) (same); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005).

[92] *Id*.

[93] *Taubenfeld*, 415 F.3d at 600 (holding that, under the mimic-the-market approach, "attorneys' fees from analogous class action settlements are indicative of a rational relationship between the record in this similar case and the fees awarded by the district court"); see also Silver Decl. ¶¶ 69-73.

[94] *Mazola v. May Dept. Stores Co.*, No. 97-cv-10872, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999).

[95] *See* Order Awarding Attorneys' Fees, Expenses & Approving Service Awards to the Class Representatives, *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig*., No. 1:16-cv-10238, (D. Mass. July 18, 2018), ECF No. 24; Order & Final J. Approving Settlement, Awarding Attorneys' Fees & Expenses, Awarding Representative Pls.' Incentive Awards, Approving Plan of Allocation, & Ordering Dismissal with Prejudice, *In re Prograf Antitrust Litig*., No. 1:11-md-02242 (D. Mass. Nov. 2, 2016), ECF No. 712; Final Order & J. Granting Final Approval to Proposed Class Action Settlement, *In re Relafen Antitrust Litig.*, No. 1:01-cv-12239 (D. Mass. Oct. 13, 2005), ECF No. 459.

antitrust, patent, and regulatory law, as well as a basic understanding of the science and economics of pharmaceuticals. Second, generic suppression cases are extraordinarily expensive to litigate because they necessarily involve voluminous documentary discovery, complicated privilege issues, numerous depositions, and the retention of multiple experts able to opine on each of the subject areas at issue. Third, as courts have ratcheted up class certification standards, particularly in indirect purchaser suits, even otherwise meritorious cases impose considerable risks. Fourth, such suits typically require many years to litigate, resulting in counsel bearing for lengthy periods massive out-of-pocket expenses and forgoing payment of their fees. Fifth, generic suppression defendants often hire the country's most sophisticated firms and mount particularly aggressive defenses, requiring large investments of attorney hours by class counsel.

As reflected in the below table, Class Counsel are aware of attorneys' fee awards in eighteen end-payor generic suppression class actions over the past decade-and-a-half. Of these, fees of 33% or greater were awarded in twelve cases—including in *all* of the nine most recent; fees between 30% and 33% were awarded in two cases; and fees between 25% and 30% were awarded in three cases.[96] Moreover, reflecting the quality of the results obtained by Class Counsel, the $62.5 million recovery is among the largest settlements in recent end-payor cases (for which the median is $28.85 million and mean is around $37 million), but does not cross into "megafund" territory.[97]

---

[96] The separate third-party payor and consumer class settlements in the *Ovcon* litigation are not reflected in these categories, because they did not require a cash payment to class members. The settling defendants agreed to donate products at market value ($6 million for consumers and $3 million for third-party payors), pay attorneys' fees and costs ($2 million to consumers and $1.1 million to third-party payors), and pay settlement notice and administration expense ($300,000 to consumers and $100,000 to third-party payors). The portion of the fees and expense fund awarded to class counsel as fees ($1,880,293.13 for consumers and $874,650) was equivalent to 21.2% of the total combined $13 million market value of the settlement, inclusive of all fees and costs awarded. *See* Mem. Op., *Vista Healthplan, Inc v. Warner Chilcott Holdings Company III, Ltd. ("Ovcon")*, No. 05-cv-2327 (D.D.C. Nov. 16, 2007), ECF No. 105; *Cohen v. Warner Chilcott Pub. Ltd. Co.*, 1:06-cv-00401 (D.D.C. Nov. 16, 2007), ECF No. 101; Mem. Op., *Ovcon*, (D.D.C. Nov. 16, 2007), ECF No. 104.

[97] *Accord In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014) ("In so-

Attorneys' Fee Awards in End-Payor Generic Suppression Class Actions (2005-2020)

Settlement Year	Case	Settlement Amount	Fee Awarded	Fee %
2020	*Vista Healthplan, Inc v. Cephalon, Inc. ("Provigil")*, No. 2:06-cv-1833 (E.D. Pa.)	$65,877,600	$21,959,200	33.3%
2018	*In re Aggrenox Antitrust Litig.*, No. 3:14-md-2516 (D. Conn.)	$50,229,193	$16,743,064	33.3%
2018	*In re Lidoderm Antitrust Litig.*, No. 3:14-md-02521 (N.D. Cal.)	$104,750,000	$34,916,000	33.3%
2018	*In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 1:14-md-02503 (D. Mass.)	$43,000,000	$14,333,333	33.3%
2016	*In re Prograf Antitrust Litig.*, No. 1:11-md-02242 (D. Mass.)	$13,250,000	$4,416,667	33.3%
2015	*In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 1:12-md-2343 (E.D. Tenn.)	$9,000,000	$3,000,000	33.3%
2013	*In re Wellbutrin SR Antitrust Litig.*, No. 2:04-cv-05898 (E.D. Pa.)	$21,500,000	$7,095,000	33.3%
2013	*In re DDAVP Indirect Purchaser Antitrust Litig.*, No. 7:05-cv-2237 (S.D.N.Y.)	$4,750,000	$1,567,500	33.3%
2013	*In re Flonase Antitrust Litig.*, No. 08-3301 (E.D. Pa.)	$35,000,000	$11,655,000	33.3%
2012	*In re Metoprolol Succinate ("Tropol XL") End-Payor Antitrust Litig.*, No. 06-cv-71 (D. Del.)	$11,000,000	$3,500,000	31.8%
2013	*In re Wellbutrin XL Antitrust Litig.*, 2:08-cv-2433 (E.D. Pa.)	$11,750,000	$3,916,275	33.3%
2009	*In re Tricor Indirect Purchaser Antitrust Litig.*, No. 1:05-cv-00360 (D. Del.)	$65,700,000	$21,900,000	33.3%

called 'megafund' cases, defined as those which yield settlement funds of over $100 million, some courts have adopted a practice of lowering the fee award percentage as the size of the settlement increases to avoid giving attorneys a windfall at the plaintiffs' expense.").

2007	*Vista Healthplan, Inc. v. Warner Chilcott Holdings Company III, Ltd. ("Ovcon")*, No. 1:05-cv-2327 (D.D.C.)	$9 million in products at market value and $3.2 million in fees and costs	$2,754,943.13	*21.2%
2005	*In re Terazosin Hydrochloride Antitrust Litig.*, No. 1:99-md-1317 (S.D. Fla.)	$28,700,000	$8,610,000	30%
2005	*In re Relafen Antitrust Litig.*, No. 1:01-cv-12239 (D. Mass.)	$67,000,000	$22,311,000	33.3%
2005	*In re Remeron End-Payor Antirust Litig.*, No. 2:02-cv-2007 (D.N.J.)	$27,555,000	$7,800,000	28.3%[98]
2005	*Nichols v. Smithline Beecham Corp. ("Paxil")*, No. 2:00-cv-6222 (E.D. Pa.)	$65,000,000	$19,000,000	29.2%
2005	*Ryan-House v. GlaxoSmithKline PLC ("Augmentin")*, No. 2:02-cv-442 (E.D. Va.)	$29,000,000	$7,250,000.00	25%

In similar suits in which courts awarded fees below 30% of the common fund, the procedural posture and settlement quality (or both) differed in material respects from this case. The *Remeron* and *Augmentin* end-payor suits both settled for a fraction of what End-Payors obtained here, and those settlements were concluded at earlier stages of the litigation—before counsel were required to devote the time and resources that Class Counsel did here. In *Remeron*, for instance, at the time the case settled, the court had not yet issued its decision on class certification; nor had the parties briefed summary judgment or begun to prepare for trial.[99] And in

[98] In *Remeron*, the end-payor class and state attorneys' general negotiated a combined $36 million settlement fund consisting of a $33 million payment to class members and government purchasers, $2 million earmarked for class notice and settlement administration costs, and $1 million to the attorney generals' offices for their fees and expenses. *See In re Remeron End-Payor Antitrust Litig.*, No. 02-cv-2007, 2005 WL 2230314, at *5-6 (D.N.J. Sept. 13, 2005). Under the terms of the settlement, class members were to receive 83.5% of the $33 million fund ($27,555,000). *Id.* Accordingly, class counsel's $7.8 million fee award represents 28.3% of the portion of the settlement that was allocated to the class.

[99] *See Remeron*, 2005 WL 2230314, at *2-4.

Paxil, the end-payors' class certification motion was pending at the time of settlement, and the parties had not yet filed summary judgment motions.[100]

Here, Class Counsel's unreimbursed efforts over the course of seven years culminated in one of the largest settlements for the End-Payor Class in recent history and required considerable expenditure of skill, risk, time, and resources. Whether those efforts would result in any recovery was unknown up until the last business day before trial in this matter was set to begin. Under the circumstances, End-Payors' fee request is not only in-line with fee awards in similar cases, but also eminently reasonable.

2. Class Counsel Are Highly Skilled and Possess Extensive Expertise Litigating Pharmaceutical Class Actions.

Class Counsel are among the most experienced class action and antitrust firms in the country. The Co-Lead firms have served, and continue to serve, in lead and executive committee roles in many of the nation's largest and most significant pharmaceutical antitrust cases.[101]

Despite facing considerable obstacles, Class Counsel were able to employ their skill and experience here to obtain an excellent recovery for the Class. This suit was particularly complex, as it involved multiple liability theories (i.e., patent fraud, sham litigation, several reverse payments, and product hop) and required a deep understanding of patent, antitrust, and

---

[100] *See* Mem., *In re Paxil Antitrust Litig.*, No. 2:00-cv-06222 (E.D. Pa. April 22, 2005), ECF No. 212 at 11-17 (describing the litigation history).

[101] *See*, *e.g.*, *In re Lipitor Antitrust Litig.*, No. 3:12-cv-02389 (D.N.J.); *Mayor & City Council of Baltimore v. Actelion Pharm. Ltd. ("Tracleer")*, No. 1:18-cv-03560 (D. Md.); *In re Niaspan Antitrust Litig.*, No. 2:13-md-02460 (E.D. Pa.); *Staley v. Gilead Sciences*, No. 3:19-cv-02573 (N.D. Cal.); *In re Zetia Antitrust Litig.*, No. 2:18-md-2836 (E.D. Va.); *In re Actos End Payor Antitrust Litig.*, No. 1:13-cv-09244 (S.D.N.Y.); *In re Lidoderm Antitrust Litig.*, No. 3:14-md-02521 (N.D. Cal); *In re Aggrenox Antitrust Litig.*, No. 3:14-md-02516 (D. Conn.); *In re Suboxone Antirust Litig.*, No. 2:13-md-02445 (E.D. Pa.); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 1:14-md-02503 (D. Mass.); *In re Nexium Antitrust Litig.*, No. 1:12-md-02409 (D. Mass.); *In re Cardizem CD Antitrust Litig.*, No. 2:99-md-01278 (E.D. Mich.); *In re Lorazepam & Clorazepate Antitrust Litig.*, No. 1:99-mc-00276-TFH (D.D.C.); *Ryan-House v. GlaxoSmithKline PLC*, No. 2:02-cv-00442 (E.D. Va.); *In re Warfarin Sodium Antitrust Litig.*, No. 1:98-md-01232 (D. Del.); *In re Relafen Antitrust Litig.*, No. 1:01-cv-12239 (D. Mass.); *In re K-Dur Antitrust Litig.*, No. 01-cv-1652 (D.N.J.).

pharmaceutical regulatory law, as well as the facts particular to this case. It was defended by deep-pocketed pharmaceutical companies that retained counsel who employed a scorched earth litigation strategy. Accordingly, the quality of representation provided by Class Counsel supports the fee request.

3. This Case Presented Substantial Risks at Essentially Every Stage.

"Many cases recognize that the risk [of non-payment] assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award."[102] This case, which was litigated on a fully contingent basis, presented a substantial risk of non-payment. For the seven years this case wended its way to trial, End-Payor Counsel devoted thousands of hours of attorney time and millions of dollars in expenses, for which there was no guarantee counsel would ever be compensated. End-Payors' considerable investments were necessitated by the inherent complexity of delayed generic suits, as well as the vigorous defense advanced by Defendants.

Moreover, in contrast to many other successful private civil antitrust suits, there were no guilty pleas or parallel government proceedings on which End-Payors could rely. Instead, End-Payors pioneered this case, investigating the facts and developing the legal claims from scratch, filing the first complaint that provided the foundation for all subsequent complaints filed by Direct Purchaser Plaintiffs and Retailers. "Where, as here, lead counsel undertook this action on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel."[103]

Moreover, when the original End-Payor case was filed in 2013, the legal landscape for delayed-generic competition suits was uncertain. The Supreme Court had not decided *FTC v.*

[102] *Lupron Mktg. & Sales Practices Litig.*, 2005 WL 2006833, at *4 (internal quotation marks omitted).

[103] *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 WL 632238, at *9 (D.R.I. Feb. 17, 2016).

Actavis, Inc.,[104] which provided some clarity on the legal standards for evaluating the legality of reverse-payment agreements under the antitrust laws. Even afterward, End-Payors' complaint was dismissed on the ground that the non-cash reverse payments at issue here did not fall within *Actavis*'s ambit. End-Payors were able to proceed with their reverse-payments claims only after obtaining a favorable decision on appeal to the First Circuit.[105] Additionally, End-Payors' complaint successfully pleaded novel "product hop" (or "switch") claims, which this Court recognized as "a relatively new theory under the Sherman Act" on which First Circuit courts had not yet ruled and for which there were no universally accepted legal standards.[106]

The risks borne by End-Payor Counsel, in seeking to litigate on behalf of a class of indirect purchasers, were unique among the three Plaintiff groups. For instance, in the midst of briefing class certification, the First Circuit issued its decision in *Asacol*, which erected significant hurdles to End-Payors' prosecution of the case on a class-wide basis. Despite these additional uncertainties, in order to obtain compensation for class members, End-Payor Counsel took the considerable risks of retaining, at their own expense, three new experts and investing hundreds of hours of attorney time, for which they might never have been compensated.

Trying this case would have presented considerable additional risks, as reflected in the mixed results of other recent antitrust trials.[107] In order to establish liability, End-Payors bore the burden of proving each of the following elements: (i) substantial market power over branded Loestrin 24, (ii) the existence of a reverse payment agreement or hard product switch, (iii)

---

[104] 570 U.S. 136 (2013).

[105] *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538 (1st Cir. 2016).

[106] *In re Loestrin 24 Fe Antitrust Litig.*, 261 F. Supp. 3d 307, 351 (D.R.I. 2017).

[107] *See*, *e.g.*, *In re Nexium Antitrust Litig.*, 842 F.3d 34 (1st Cir. 2016) (affirming verdict and entry of judgment for defendants following a six-week jury trial in another generic suppression suit); *In re Wholesale Grocery Prods. Antitrust Litig.*, 957 F.3d 879 (8th Cir. 2020) (affirming verdict and entry of judgment for defendants).

anticompetitive consequences of the reverse payment agreement or hard product switch that outweighed any legally recognized, procompetitive benefits; and (iv) delayed or impaired generic competition cause by the antitrust violation.[108] If even a single lay juror declined to find for End-Payors on any one of the required elements, End-Payors would have recovered nothing.

In addition, even if End-Payors were to succeed in establishing liability, the Class would have been required to prove damages before an entirely new panel of jurors.[109] Defendants made clear that they intended to vigorously assert several damages defenses that were unique to End-Payors, including challenging the pass-on of damages and ability to marshal data sufficient to satisfy *Asacol*'s requirements.[110] Nor would a favorable verdict have resolved the litigation. Defendants almost certainly would have appealed any verdict in favor of End-Payors, further jeopardizing and delaying any recovery by the Class.

4. This Case Was Extremely Complex.

"The complexity of federal antitrust law is well known."[111] "[A]ntitrust class actions are notoriously complex, protracted, and bitterly fought."[112] This case was no exception. On top of antitrust law and economics, the case required mastery in patent and drug law, and competency in

---

[108] Though contested by End-Payors, Defendants also asserted that End-Payors were required to prove numerous state-specific elements through a lengthy and byzantine set of verdict questions. At the point End-Payors disclosed their settlement in principle, the Court had not yet issued a final verdict slip.

[109] *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 401 (D.N.J. 2006); *Lupron*, 2005 WL 2006833, at *4 ("History is replete with cases in which plaintiffs prevailed at trial on issues of liability, but recovered little or nothing by way of damages."); *Sutton v. Med. Serv. Ass'n of Pa.*, No. 92-cv-4787, 1994 WL 246166, at *7 (E.D. Pa. June 8, 1994) ("[E]ven assuming that plaintiffs ultimately would have prevailed on liability, they faced the risk that they could not establish damages . . . ."). Moreover, in contrast to federal Sherman Act claims, which provides for automatic trebling once damages are established, certain of the state laws under which End-Payors sued either required establishing additional elements (*e.g.*, willfulness) in order to obtain a damages enhancement or did not provide for such enhancements at all.

[110] Defs.' Mots. *in Limine*, ECF Nos. 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287 (Dec. 24, 2019).

[111] *Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d at 459 (internal citations omitted).

[112] *Id.*

the science and manufacturing processes behind pharmaceutical products. And the number and complexity of the legal claims was unusual even among generic suppression suits. Additionally, as discussed at greater length above, Class Counsel litigated several novel issues, including the application of *Actavis* to non-cash payments, the legality of product hopping, the competitive effect of the acceleration clause, and the quantum of evidence required under *Asacol* in order to obtain certification of a class. The aggressive "kitchen sink" strategy pursued by the Defendants added to this complexity.

5. Class Counsel Prosecuted End-Payors' Claims With Diligence and Efficiency.

The extensive time and effort expended by End-Payor Class Counsel in prosecuting this action favors Counsel's requested one-third fee award.[113] In total, Class Counsel devoted 35,249.28 hours to pursuing, and ultimately obtaining, a recovery on behalf of the Class.

The Court's February 14, 2014 order appointed leadership for the End-Payors and vested Co-Lead Counsel with authority for the overall conduct of the case.[114] In accordance with this directive, the four Co-Lead Counsel handled the vast majority of work in this matter, including preparing and responding to written discovery, taking depositions, working with experts, briefing, court appearances, and preparing for trial. Co-Lead Counsel also divided tasks among themselves to further avoid duplication.

Aside from Co-Lead Counsel, five firms participated in prosecuting End-Payor claims in this matter. Non-lead firms were tasked with carrying out certain discrete tasks, including document review and working with the named plaintiffs. Co-Lead counsel closely monitored these

---

[113] *Id.* at 461 (where counsel "spent significant, but not excessive, time prosecuting the instant action. . . . this factor points in favor of Lead Counsel's fee request").

[114] CMO No. 2, ECF No. 85 at ¶¶ 6-7 (Feb. 14, 2014).

efforts.

The amount of time invested by Class Counsel was necessary and appropriate in light of the length of the litigation, the complexity of the claims and defenses, and the prowess of the Defendants' attorneys. End-Payor Counsel actively litigated this case for seven years. During that period, among other tasks, Counsel engaged in extensive discovery—including the review of millions of pages of documents produced by Defendants and third parties and the deposition and defense of several dozen witnesses; briefing (and generally defeating) three rounds of motions to dismiss and for judgment on the pleadings; a successful appeal to the First Circuit; successfully obtaining certification of a class and defending against a Rule 23(f) petition; briefing two rounds of summary judgment motions; filing and defending against numerous *Daubert* challenges at both the class certification and merits stages (many of which resulted in favorable rulings); and preparing the case for trial.[115]

In performing these tasks for the benefit of the End-Payor Class, Co-Lead Counsel made every effort to be efficient, in terms of both time spent and ensuring these tasks were handled by counsel and staff with appropriate skill and experience. Consistent with this Court's Case Management Orders, Co-Lead Counsel implemented time and expense billing guidelines for End-Payor Class Counsel.[116] Included among these guidelines were requirements that travel time be billed at 50% of the time spent, and that only common benefit time be included.

In addition, each firm was required to submit monthly time and expense reports for review by Co-Lead counsel and A.B. Data, so that Co-Lead Counsel could monitor tasks and expenses. Class Counsel's billing records and expenses were reviewed by Magistrate Judge Sullivan on a

[115] *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 80 (D. Mass. 2005).

[116] CMO No. 2, ECF No. 85 at ¶¶ 11-17 (Feb. 14, 2014).

quarterly basis through the third quarter of 2019 and were adjusted, as appropriate, based on her instructions. Any billing records or expenses that were not timely included in these quarterly reports were excluded from Class Counsel's fee and expense requests. Moreover, in order to ensure that Counsel would seek compensation for only common benefit time, each firm was notified that billing spent in connection with the Judicial Panel on Multidistrict Litigation proceeding, leadership negotiations, certain administrative tasks, and this attorneys' fee and expense request would be disallowed.

In order to avoid duplication of effort, End-Payor Class Counsel worked together with counsel for the other Plaintiff groups to create "issue" teams—including patents, product hop, payments/agreement, causation, and privilege—each of which was staffed with attorneys with subject-matter expertise who focused on the pertinent legal questions and factual record. Counsel for the End-Payors led both the product hop and privilege teams for all Plaintiff groups. When appropriate, counsel for the various Plaintiff groups jointly retained experts, ensuring that the Plaintiffs spoke with a single voice on common issues and reducing the costs incurred by each group. In addition, End-Payors coordinated with the other Plaintiffs in scheduling and taking depositions.

6. The Recovery Obtained by Class Counsel Is Substantial.

End-Payors obtained a substantial recovery of $62,500,000 for the benefit of the Third-Party Payors. The Warner Chilcott Settlement is all cash, is not based on the claims received, and does not permit any reversion of funds to Defendants. The Settlement achieved by End-Payors represents an excellent recovery for End-Payor Class members, particularly in light of the substantial risks and obstacles posed in the action.

As reflected in the chart below, End-Payors' $62.5 million Warner Chilcott settlement is

among the largest in recent generic suppression end-payor cases, and more than twice as large as the typical such end-payor settlement. A comparison of direct purchaser and end-payor generic suppression settlements in recent years further attests to the Warner Chilcott Settlement's quality. The typical end-payor recovery is around one-third of the recovery in related direct purchaser suits. Here, however, the End-Payors' recovery is *more than half* that of the Direct Purchasers.[117]

Direct Purchaser vs. Indirect Purchaser Settlements in Generic Suppression Class Actions (2005-2020)

	End-Payor Class Settlement	Direct Purchaser Class Settlement	EPP/DPP %
Loestrin **(D.R.I.)**	**$62,500,000**	**$120,000,000**	**52.1%**
Pre-*Loestrin* Average	**$28.9 million (median) $37.0 million (mean)**		**38.0%**[118]
Provigil (D. Pa.)	$65,877,600	$512,000,000	12.9%
Aggrenox (D. Conn.)	$50,229,193	$146,000,000	34.4%
Lidoderm (N.D. Cal.)	$104,750,000	$166,000,000	63.1%
Solodyn (D. Mass.)	$43,000,000	$72,500,000	59.3%
Prograf (D. Mass.)	$13,250,000	$98,000,000	13.5%
Skelaxin (E.D. Tenn.)	$9,000,000	$73,000,000	12.3%
Wellbutrin SR (E.D. Pa.)	$21,500,000	$49,000,000	43.9%
DDAVP (S.D.N.Y.)	$4,750,000	$20,250,000	23.5%
Flonase (E.D. Pa.)	$35,000,000	$150,000,000	23.3%
Toprol XL (D. Del.)	$11,000,000	$20,000,000	55.0%
Wellbutrin XL (E.D. Pa.)	$11,750,000	$37,500,000	31.3%
Tricor (D. Del.)	$65,700,000	$250,000,000	26.3%

[117] These numbers likely understate the quality of the End-Payors' recovery here because they do not account for generic suppression suits in which a direct purchaser class achieved a settlement, while the corresponding end-payors failed to get a class certified—thus obtaining *no* recovery. *See, e.g.*, *Asacol,* 907 F.3d 42 (vacating class certification).

[118] In order to avoid being skewed by unusually large or small settlements, this calculation is based on the mean of the percentages reflected in the "EPP/DPP %" column.

Ovcon (D.D.C.)	$13,000,000	$22,000,000	59.1%
Terazosin (S.D. Fla.)	$28,700,000	$74,000,000	38.8%
Relafen (D. Mass.)	$67,000,000	$175,000,000	38.3%
Remeron (D.N.J.)	$27,555,000	$75,000,000	36.7%
Paxil (E.D. Pa.)	$65,000,000	$100,000,000	65.0%
Augmentin (E.D. Va.)	$29,000,000	$62,500,000	46.4%

7. Class Counsel's Requested Fee Furthers the Public Interest in Incentivizing Suits by End-Payors Challenging Anticompetitive Practices by Pharmaceutical Companies.

End-Payor Counsel's attorneys' fees request is consistent with public policy objectives. Courts have recognized that attorneys' fee awards should reflect the important goal of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest."[119] Antitrust class actions advance the public interest both by deterring predatory behavior and compensating those who have been wronged.[120] "In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation."[121]

The public interest in attracting experienced and sophisticated litigators is particularly salient in suits challenging anticompetitive practices in the health care industry. The rising cost of health care is among the most pressing issues facing our country, with nearly 80% of Americans stating that drug prices are out of control.[122] Defendant pharmaceutical companies have vast

---

[119] *Goldberger v. Integraed Resources, Inc.*, 209 F.3d 43, 51 (2d Cir. 2000).

[120] *Lupron Mktg. & Sales Practices Litig.*, 2005 WL 2006833, at *6 ("The public interest is also served by the defendants' disgorgement of the proceeds of predatory marketplace behavior.").

[121] *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973).

[122] Ashley Kirzinger et al., *KFF Health Tracking Poll – February 2019: Prescription Drugs*, Kaiser Family Foundation (Mar. 1, 2019), https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-february-2019-prescription-drugs/.

resources and retain top-tier defense firms that typically pursue aggressive litigation strategies. Reasonable attorneys' fees are necessary to ensure that such suits attract equally adept class counsel who are incentivized to invest the time and resources necessary to obtain recoveries for the class. And these investments bring cumulative benefits to class members and the public, as favorable rulings push the law forward for future cases.[123]

B. The Lodestar Method Further Supports End-Payors' Fee Request.

Class Counsel's lodestar confirms the reasonableness of their fee request. When lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys."[124] The total reported lodestar in this case through April 30, 2020 is $19,917,547.10. This amount is calculated based on 35,249.28 hours of attorney and professional support time, billed at historical rates.[125]

Class Counsel worked to ensure that the reported lodestar is based only on the time spent for the common benefit of the End-Payor Class. As described above, each Class Counsel firm submitted monthly time reports for review by Co-Lead Counsel and A.B. Data and quarterly time reports (through the end of 2019) to Magistrate Judge Sullivan. Excluded from Class Counsel's reported lodestar is time billed in connection with the JPML proceeding, leadership negotiations,

[123] The acceleration-clause issue provides just one example of how Class Counsel's efforts here benefitted class members not only in this case but in other cases as well. In other pending litigation, end-payors assert that defendants used acceleration clauses, among other conduct, to monopolize the HIV class of drugs, causing tens of thousands of deaths and other serious injuries and billions of dollars in pecuniary damage. That district court's denial of the motion to dismiss the complaint relies substantially on this Court's decision on the acceleration-clause issue. *See Staley v. Gilead Sciences, Inc.*, 2020 WL 1032320, at *24 (N.D. Cal. March 3, 2020).

[124] *Tyco Intern., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d at 270 (quoting *In re Thirteen Appeals*, 56 F.3d at 307).

[125] Billed at current rates, Class Counsels' total lodestar is $21,706,696.62, which results in a "negative" multiplier of 0.96. *See, e.g.*, *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 255 n.5 (7th Cir. 1988) ("Delay in payment may be compensated in either of two ways: (1) by using the attorneys' current rates (as the district court did here); or (2) by using historical rates plus a prime rate enhancement. The courts in this circuit generally use current rates.").

and the fee and expense request. In support of their fee request, Class Counsel have also submitted declarations from each firm providing additional detail on the work performed, as well as support for their hourly rates.[126]

Moreover, Class Counsel's billed rates are reasonable and, as reflected in their individual declarations, have been approved by numerous courts.[127] Indeed, when compared to the rates charged by the firms that commonly represent defendants in cases such as these, Class Counsel's billed rates are modest—particularly given that, unlike most defense counsel, Class Counsel's work was billed on a contingent basis with payment deferred for years.[128] For instance, White & Case LLP, the firm representing the Warner Chilcott Defendants here, recently billed $1,545 to $1,095 per hour for partners, $995/hour for counsel, and $950 to $550 per hour for associates in another matter.[129] By comparison, with only one exception, *no* End-Payor Class Counsel billed more than $1,000 per hour (with partners billing $995 to $375 per hour, counsel billing $875 to $460 per hour, and associates billing $700 to $225 per hour).[130]

The one-third fee request represents only a very small enhancement over Class Counsel's reported lodestar, and appropriately reflects the fact that counsel performed all work on a contingent basis, forgoing payment for several years. Indeed, courts have recognized that this enhancement (a 1.05 "multiplier") is at the "low" end of multipliers in comparable suits.[131]

---

[126] *See* Exs. A-J (End-Payor Class Counsel individual firm declarations).

[127] *Id.*

[128] *See* Silver Decl. ¶¶ 77-84 (analyzing the billing rates of sophisticated defense and bankruptcy firms).

[129] First & Final Fee App. of White & Case LLP for Compensation for Services Rendered & Reimbursement of Expenses as Counsel to the Debtors for the Period of June 24, 2019 Through & Including July 23, 2019, *In re Joerns Woundco Holdings, Inc.*, No. 19-11401 (D. Del. Oct. 4, 2019), ECF No. 229.

[130] Exs. A-J. The lone attorney billing over $1,000/hour was involved in only a limited capacity and billed only 38.25 hours to the case. *See* Decl. of Michael M. Buchman in Support of End-Payor Class Pls.' Mot. for an Award of Attorneys' Fees, Reimbursement of Litig. Expenses, & Service Awards to the Class Representations, Ex. D.

[131] *See, e.g.*, *Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d at 465 (describing a 1.08 multiplier as

IV. THE REQUESTED EXPENSES ARE REASONABLE.

End-Payors seek reimbursement of $3,743,996.58 in litigation expenses that were reasonably incurred in prosecuting this action. The First Circuit has recognized that "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."[132]

The substantial majority of expenses (89%) were paid out of a common litigation fund, to which many End-Payor Counsel firms contributed. This fund was used to pay a variety of expenses that benefited the class, including the costs of testifying and consulting experts, the document review platform, trial support, translations, and mediation services. Litigation fund expenses amounted to $3,341,802.66. In addition to those expenses that were paid out of the litigation fund, individual firms separately incurred a total of $402,193.92 in expenses. A more detailed breakdown of expenses is reflected in the attached Joint Declaration of Co-Lead Counsel.[133] Lastly, the Court-appointed notice and claims administrator, A.B. Data, has advised Class Counsel that it estimates it will cost no more than $250,000 to complete the settlement distribution process.[134]

V. THE REQUESTED SERVICE AWARDS ARE REASONABLE.

End-Payors request service awards of $10,000 to each of the nine TPP Class

---

"low" and "certainly within the reasonable range"); *see also Relafen Antitrust Litig.*, 231 F.R.D. at 81-82 (holding that a 2.02 multiplier was appropriate and citing authority that the vast majority of fee awards in cases with $50-200 million common funds had multipliers of between 1.0 and 4.0).

[132] *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999); *see also Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25, 28 (D. Mass. 2011) ("In addition to attorneys' fees, lawyers who recover a common fund for a class are entitled to reimbursement of out-of- pocket expenses incurred during litigation.").

[133] Joint Decl. ¶¶ 111-18.

[134] *Id.* ¶ 218.

Representatives in connection with the Warner Chilcott Settlement and of $5,000 to both of the Consumer Named Plaintiffs in connection with the Lupin Settlement.

Courts routinely approve service awards "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation."[135] "[W]here, as here, the named plaintiffs participated actively in the litigation," such awards "serve an important function in promoting class action settlements."[136] "Because a named plaintiff is an essential ingredient of any class action, a [service] award can be appropriate to encourage or induce an individual to participate in the suit."[137]

The requested awards are consistent with those approved for class representatives in other end-payor delayed generic suits,[138] as well as those approved in other class suits in this circuit.[139] Moreover, because they represent only 0.016% of the total value of the Settlements in the aggregate, End-Payors' proposed service awards would have a negligible impact on other Class members' recoveries.

The substance of the Class Representatives' work on this litigation further supports the End-Payors' requested awards.[140] The Class Representatives all actively participated in the

[135] *Carlson v. Target Enter., Inc.*, No. 18-40139, 2020 WL 1332839, at *3 (D. Mass. Mar. 23, 2020) (citations omitted).

[136] *Lupron Mktg. & Sales Practices Litig.*, No2005 WL 2006833, at *7 (citations omitted).

[137] *Id.* (quoting *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189 (D. Me. 2003)).

[138] *Aggrenox*, No. 3:14-md-02516-SRU (D. Conn. July 19, 2018), ECF No. 821, at 10 (awarding $10,000 service awards); *Solodyn*, No. 1:14-md-02503-DJC (D. Mass. July 18, 2018), ECF No. 1176, at 4 (same); *Lidoderm*, No. 3:14-md-02521-WHO (N.D. Cal. Sept. 20, 2018), ECF No. 1055, at 7.

[139] *See, e.g.*, *Lauture*, 2017 WL 5900058, at *1 (D. Mass. Nov. 28, 2017) (reflecting service awards of $15,000 to each class representative; *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163, 2014 WL 6968424, at *7 (D. Mass. Dec. 9, 2014) (reflecting service awards of $10,000 to each of 10 class representatives).

[140] *See Carlson*, 2020 WL 1332839, at *3 (considering "(1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation").

litigation, stayed abreast of the progress of the case, collected and produced documents and responded to interrogatories, and prepared for and gave depositions. Additionally, because this case settled on the eve of trial, many of the Class Representatives expended considerable time and effort preparing to testify. The Class Representatives performed these services over many years despite the risk that there would be no recovery for the Class and, even if there were, the Class Representatives would not be guaranteed any compensation above that of class members who did not actively participate in the litigation.

VI. CONCLUSION

For these reasons, End-Payors respectfully request: (i) attorneys' fees in the amount of $20,833,333.33; (ii) expenses reimbursed in the amount of $3,743,996.58 and approval to expend up to $250,000 to complete the settlement distribution process; and (iii) service awards of $10,000 to each TPP Class Representative and $5,000 to each Consumer Class Representative.

Dated: June 8, 2020

Respectfully submitted,

<u>/s/ Sharon K. Robertson</u>

Sharon K. Robertson
Donna M. Evans
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005
Tel: (212) 838-7797
Fax: (212) 838-7745
srobertson@cohenmilstein.com
devans@cohenmilstein.com

Robert A. Braun
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, Suite 500
Washington, DC 20002
Tel: (212) 408-4600
rbraun@cohenmilstein.com

Steve D. Shadowen
Matthew C. Weiner
HILLIARD & SHADOWEN LLP
1135 W. 6th Street, Suite 125
Austin, TX 78703
Tel: (855) 344-3298
steve@hilliardshadowenlaw.com
matt@hilliardshadowenlaw.com

Marvin A. Miller
Lori Fanning
MILLER LAW LLC
115 South LaSalle Street, Suite 2910
Chicago, IL 60603
Tel: (312) 332-3400
mmiller@millerlawllc.com
lfanning@millerlawllc.com

Michael M. Buchman
Michelle Clerkin
MOTLEY RICE LLC
777 Third Avenue, 27th Floor
New York, NY 10017
Tel: (212) 577-0050
Fax: (212) 577-0054
mbuchman@motleyrice.com
mclerkin@motleyrice.com

Co-Lead Counsel for the End-Payor Class

Robert J. McConnell
MOTLEY RICE LLC
321 South Main Street, Second Floor
Providence, R.I. 02903
Tel: (401) 457-7700
bmcconnell@motleyrice.com

Liaison Counsel for the End-Payor Class

CERTIFICATE OF SERVICE

I, Sharon K. Robertson, hereby certify that I caused a copy of the foregoing to be filed electronically via the Court's CM/ECF system. Those attorneys who are registered CM/ECF users may access these filings, and notice of these filings will be sent to those parties by operation of the CM/ECF system.

Dated: June 8, 2020

/s/Sharon K. Robertson
Sharon K. Robertson