UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE VALEANT PHARMACEUTICALS INTERNATIONAL, INC. THIRD-PARTY PAYOR LITIGATION	Civil Action No. 3:16-cv-3087-MAS-LHG District Judge Michael A. Shipp Magistrate Judge Lois H. Goodman Special Master Dennis M. Cavanaugh, U.S.D.J. Ret.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENTS AND APPROVAL OF PLAN OF ALLOCATION

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Plaintiffs AirConditioning and Refrigeration Industry Health and Welfare Trust Fund ("ACR Trust"), Fire and Police Health Care Fund, San Antonio ("San Antonio"), Plumbers Local Union No. 1 Welfare Fund ("NY Plumbers"), New York Hotel Trades Council & Hotel Association of New York City, Inc. ("NYHTC"), and the Detectives Endowment Association of New York City ("DEA") (collectively, "Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully move this Court, pursuant to Federal Rule of Civil Procedure 23, for: (i) final approval of the proposed Settlements of the above-captioned action ("Action") on the terms set forth in the Stipulation and Agreement of Settlement with Valeant Pharmaceuticals International, Inc., dated August 4, 2021 (ECF No. 194-2) ("Valeant Stipulation") and the Stipulation and Agreement of Settlement with the Philidor Defendants dated August 4, 2021 (ECF No. 195-2) ("Philidor Defendants Stipulation"); (ii) approval of the proposed plan for allocating the net proceeds of the Settlements to the Settlement Class ("Plan of Allocation" or "Plan"); and (iii) certification of the Settlement Class for purposes of effectuating the Settlements.[1]

I. PRELIMINARY STATEMENT

After five years of hard-fought litigation, including two rounds of motion to dismiss briefing, substantial fact discovery, and arm's-length settlement negotiations facilitated by an experienced mediator, Plaintiffs and Lead Counsel have succeeded in securing a recovery of

[1] Unless otherwise defined, all capitalized terms have the meanings set forth in the Stipulations or in the Joint Declaration of James A. Harrod and James E. Cecchi in Support of (I) Plaintiffs' Motion for Final Approval of Settlements and Approval of Plan of Allocation; and (II) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses ("Joint Declaration" or "Joint Decl."). The Joint Declaration is an integral part of this submission and, for the sake of brevity herein, Plaintiffs respectfully refer the Court to the Joint Declaration for a detailed description of, *inter alia*: the claims asserted, the procedural history of the Action, the negotiations resulting in the Settlements, the risks of continued litigation, compliance with the Court-approved notice plan, and the Plan of Allocation. Citations to "¶ __" herein refer to paragraphs in the Joint Declaration and citations to "Ex. __" herein refer to exhibits to the Joint Declaration.

$23.125 million in cash for the Settlement Class. Subject to the Court's final approval, the Settlements—a $23 million settlement with Valeant and a $125,000 settlement with the largely impecunious Philidor Defendants—will resolve all claims asserted in the Action.[2] Lead Counsel and Plaintiffs believe the Settlements provide a very favorable result for the Settlement Class in light of the risks and costs of further litigation and readily satisfy the standards for final approval under Rule 23(e)(2).

Plaintiffs and Lead Counsel believe that the proposed Settlements represent a significant benefit to the Settlement Class, particularly in the light of the significant risks that further litigation might result in no recovery or a smaller recovery. Plaintiffs and Lead Counsel recognize that this Action would present a substantial number of risks in establishing Defendants' liability before a factfinder, including new confounding evidence that could rebut core aspects of Plaintiffs' liability and damages case. In light of these risks, Plaintiffs and Lead Counsel believe that the proposed Settlements are fair, reasonable, and adequate, and in the best interests of the Settlement Class.

As detailed in the Joint Declaration, the Settlements were reached only after extensive litigation beginning in 2016, which included the filing of two consolidated complaints, the second of which was filed after an eighteen-month stay during the pendency of a criminal trial against Defendant Andrew Davenport; motion practice regarding Defendant Davenport's motion to stay; motion practice regarding the Court's appointment of a Special Master; Plaintiffs' successful opposition to Defendants' second round of motions to dismiss, after the first round of motions to dismiss was mooted by the litigation stay; and extensive discovery, including review and analysis of more than 8.6 million pages of documents produced to Plaintiffs by Defendants and third parties,

[2] Final approval of the Valeant Settlement is a condition for the Philidor Defendants Settlement to become effective. *See* Philidor Defendants Stipulation (ECF No. 195-2), at ¶ 32(f).

successful opposition to the Philidor Defendants' motion to quash a document subpoena, and participation in 39 depositions that were coordinated with the Valeant securities actions and required multiple two-day depositions. ¶¶ 10, 19-82. Plaintiffs' Counsel also worked extensively with an expert on damages. ¶ 83. Accordingly, when Plaintiffs agreed to the Settlements, Plaintiffs and Plaintiffs' Counsel had a well-developed understanding of the strengths and weaknesses of the class's claims in the Action.

The Settlements are also the product of arm's-length negotiations between the Parties, including, in the case of Valeant Settlement, two mediation sessions before Jed D. Melnick of JAMS, which included the preparation and exchange of comprehensive detailed mediation statements. ¶¶ 84-88. The Settlements are not "claims-made" settlements and all Settlement proceeds, after the deduction of Court-approved fees and costs, will be distributed on a *pro rata* basis to Settlement Class Members who submit Claims accepted by the Court for payment.

On August 17, 2021, Judge Cavanaugh preliminarily approved the Settlements, finding it likely that the Court could approve the Settlements at final approval. ECF No. 196, ¶ 4; ECF No. 197, ¶ 4. The Settlements also have the full support of Plaintiffs, and the reaction of the Settlement Class to date has been positive. While the deadline for objections has not yet passed, following the dissemination of more than 41,000 Notices to potential Settlement Class Members, there have been no objections to the Settlements or the Plan of Allocation. ¶¶ 111, 118.

Plaintiffs and Lead Counsel respectfully submit that: (i) the Settlements meet the standards for final approval under Rule 23, and represent a fair, reasonable, and adequate result for the Settlement Class; and (ii) the Plan of Allocation is a fair and reasonable method for equitably distributing the Net Settlement Funds. Plaintiffs also request that the Court certify the Settlement Class for purposes of effectuating the Settlements.

II. THE SETTLEMENTS WARRANT FINAL APPROVAL

Rule 23(e)(2) requires judicial approval of any class action settlement. Whether to grant such approval lies within the discretion of the district court. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.R.D. 516, 535 (3d Cir. 2004).[3] In exercising its discretion over a proposed settlement, a court should review the settlement in light of the strong judicial policy favoring settlement. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (recognizing "strong presumption in favor of voluntary settlement agreements"). The Third Circuit has noted that the policy favoring settlement "is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Id.* at 595; *see also McDonough v. Horizon Blue Cross Blue Shield of New Jersey*, 641 F. App'x. 146, 150 (3d Cir. 2015) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged.").

Under Rule 23(e)(2), the Court should approve a proposed class action settlement if it finds it to be "fair, reasonable, and adequate." Fed. R. Civ. P 23(e)(2); *see also In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016) ("*NFL Players*"). In making this determination, Rule 23(e)(2) provides that a court should consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;

[3] Unless otherwise noted, all internal quotation marks, citations, and other punctuation are omitted, and all emphasis is added.

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment;

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In addition, courts in the Third Circuit have long considered the following nine factors enumerated in *Girsh v. Jepson* in deciding whether to approve a proposed class action settlement:

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

521 F.2d 153, 157 (3d Cir. 1975); *see also Whiteley v. Zynerba Pharma, Inc.*, 2021 WL 4206696, at *2 (E.D. Pa. Sept. 16, 2021); *NFL Players*, 2016 WL 1552205, at *17.[4] The Third Circuit has further advised courts to consider, where applicable, the additional factors set forth in *Krell v. Prudential Ins. Co. of Am. (In re Prudential)*, 148 F.3d 283 (3d Cir. 1998). *See Zynerba Pharma*, 2021 WL 4206696, at *3; *In re ViroPharma Inc. Sec. Litig.*, 2016 WL 312108, at *9 (E.D. Pa. Jan. 25, 2016).[5]

[4] "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re Valeant Pharms. Int'l, Inc. Sec. Litig.*, 2020 WL 3166456, at *7 (D.N.J. June 15, 2020).

[5] The Advisory Committee Notes to the 2018 amendments to Rule 23 explain that the four Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23 Adv. Comm. Notes

Consideration of these factors strongly supports a finding that the Settlements are fair, reasonable, and adequate, and warrant final approval.

A. Plaintiffs and Lead Counsel Have Adequately Represented the Settlement Class

In determining whether to approve a class action settlement, the Court should first consider whether Plaintiffs and Lead Counsel "have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). *See Vinh Du v. Blackford*, 2018 WL 6604484, at *4 (D. Del. Dec. 18, 2018) ("The Third Circuit applies a two-prong test to assess the adequacy of the proposed class representatives. First, the court must inquire into the qualifications of counsel to represent the class, and second, it must assess whether there are conflicts of interest between named parties and the class they seek to represent."). This factor clearly favors the Settlements.

Plaintiffs and Lead Counsel have adequately represented the Settlement Class in both their prosecution of the Action and in negotiating and securing the Settlements. Plaintiffs' claims, all of which are based on a common course of alleged wrongdoing by Defendants, are typical of those of other Settlement Class Members and Plaintiffs have no interests antagonistic to the Settlement Class. *See Vinh Du*, 2018 WL 6604484, at *4 ("Plaintiff's interests are coextensive with, and not antagonistic to, the interests of the class since they all raise the same claims and seek the same relief.").[6] Plaintiffs diligently supervised and participated in the litigation on behalf of the Settlement Class. As detailed in their supporting declarations, Plaintiffs' efforts included, *inter alia*, communicating regularly with Lead Counsel, reviewing pleadings and briefs, gathering and

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to 2018 Amendments, Subdivision (e)(2). Accordingly, Plaintiffs discuss below the fairness, reasonableness, and adequacy of the Settlements principally in relation to the four Rule 23(e)(2) factors, but also discuss the application of the factors identified in *Girsh* and *Prudential*.

[6] *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

reviewing documents and information in response to Defendants' discovery requests, and participating in settlement negotiations. *See* Declaration of Kristi Wagner on behalf of ACR Trust (Ex. 1), at ¶ 4; Declaration of James Bounds on behalf of San Antonio (Ex. 2) at ¶ 4; Declaration of Walter Saraceni on behalf of NY Plumbers (Ex. 3) at ¶ 4; Declaration of Carmine D. Russo on behalf of DEA (Ex. 4) at ¶ 4; Declaration of John Heim on behalf of NYHTC (Ex. 5) at ¶ 4.

Likewise, Plaintiffs retained experienced counsel who actively pursued the claims on behalf of the Settlement Class and negotiated a favorable resolution of the Action. ¶¶ 19-88. *See Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012), *aff'd*, 559 F. App'x 151 (3d Cir. 2014) ("courts in this Circuit traditionally attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class").

B. The Settlements Were Negotiated at Arm's-Length, Including with the Assistance of an Experienced Mediator

In determining whether a proposed class action settlement should be approved, the Court should also consider whether the settlement was "negotiated at arm's-length." Fed. R. Civ. P. 23(e)(2)(B). This includes consideration of other related circumstances to ensure the procedural fairness of a settlement, including whether there was sufficient discovery before settlement and whether the proponents of the settlement are experienced in similar litigation. *See generally Warfarin Sodium*, 391 F.3d at 535. Courts have also recognized that the participation of an experienced, respected mediator in the settlement process points to a proposed settlement's procedural fairness. *See Oliver v. BMW of N. Am., LLC*, 2021 WL 870662, at *9 (D.N.J. Mar. 8, 2021) ("The participation of an independent mediator in settlement negotiations 'virtually ensures that the negotiations were conducted at arm's length and without collusion between the parties.'"). These considerations support approval of the Settlements.

Here, the Settlements were not reached until after substantial fact discovery was conducted. As detailed in the Joint Declaration, before reaching the Settlements, Lead Counsel conducted a comprehensive investigation into the claims asserted (¶ 22); researched and prepared two detailed complaints (¶¶ 23, 59-62); briefed two rounds of motions to dismiss as well as a motion for class certification (¶¶ 24-28, 63-66); conducted extensive fact discovery, including the review and analysis of over 8.6 million pages of documents and participated in 39 depositions of fact witnesses (¶¶ 73-80); and consulted extensively with a damages expert (¶ 83).

Moreover, neither Settlement was reached until after extended arm's-length negotiations between counsel. ¶¶ 84-88. In addition, in case of the Valeant Settlement, the settlement negotiations were overseen and facilitated by an experienced mediator, Jed D. Melnick, Esq. of JAMS. ¶¶ 85-86. Plaintiffs and Valeant prepared detailed mediation statements, which they exchanged and submitted to Mr. Melnick, and Mr. Melnick conducted two mediation sessions in April 2021 and June 2021. *Id*. The agreement in principle for the Valeant Settlement was reached shortly after the second mediation session. ¶ 86. Where, as here, a settlement is reached through mediation overseen by an experienced mediator, there is strong presumption that the settlement negotiations were procedurally fair and non-collusive. *See Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 5627171, at *6 (N.D. Ind. Sept. 18, 2020) (approving a settlement that was "the product of two lengthy mediation sessions which were conducted by two of the leading mediators in this field, Jed Melnick and the Hon. Daniel Weinstein").

In addition, both Settlements were negotiated by counsel with extensive experience in class action litigation, who were familiar with the strengths and weaknesses of the case.[7] The knowledge

[7] *See Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014) (opinion of counsel "experience[d] in prosecuting complex class actions [who] strongly believe the Settlement is in the best interests of the Class . . . is entitled to great weight").

of Plaintiffs and Lead Counsel about the Action, and the proceedings themselves, had reached a stage where they could make a well-founded evaluation of the claims and propriety of settlement.

C. The Settlements Provide the Settlement Class Adequate Relief, Considering the Costs, Risks, and Delay of Litigation and Other Relevant Factors

Rule 23(e)(2)(C) overlaps considerably with many factors the Third Circuit articulated in *Girsh*. All of these factors entail "a 'substantive' review of the terms of the proposed settlement" and evaluate the fairness of the "relief that the settlement is expected to provide to" the Settlement Class. Fed. R. Civ. P. 23(e)(2), Adv. Comm. Note to 2018 Amendments. As discussed below, these factors support approval of the Settlements.

1. The Complexity, Expense and Likely Duration of the Litigation

Rule 23(e)(2)(C)(i) and the first *Girsh* factor support final approval of the Settlements, as courts consistently recognize that the expense, complexity, and possible duration of the litigation are key factors in evaluating the reasonableness of a settlement. *Girsh*, 521 F.2d at 157; *see also ViroPharma*, 2016 WL 312108, at *9 ("This factor is intended to capture the probable costs, in both time and money, of continued litigation."). Indeed, a settlement is favored where "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial." *Talone v. Am. Osteopathic Ass'n*, 2018 WL 6318371, at *14 (D.N.J. Dec. 3, 2018); *see also In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) ("Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.").

As discussed in the Joint Declaration and below, continued litigation of this Action presented numerous risks to Plaintiffs' ability to establish liability and damages. ¶¶ 92-105. And continuing to prosecute the Action through expert discovery, a ruling on Plaintiffs' class

certification motion, summary judgment motions, trial, and the inevitable post-trial appeals would have imposed substantial additional costs on the Settlement Class and delayed the Settlement Class's ability to recover. *See In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *12 (D.N.J. Nov. 15, 2016) ("Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming."); *see also generally In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *3 (C.D. Cal. Oct. 25, 2016) ("A trial of a complex, fact-intensive case like this could have taken weeks, and the likely appeals of rulings on summary judgment and at trial could have added years to the litigation.").[8] In contrast, the Settlements avoid the risk, expense, and delay of continued litigation while providing a substantial, near-term recovery for the Settlement Class.

2. The Risks of Continued Litigation

In assessing the fairness, reasonableness, and adequacy of a settlement, a court should also consider the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." *Girsh*, 521 F.2d at 157. "These [*Girsh*] factors balance the likelihood of success and the potential damages award if the case were taken to trial against the benefits of immediate settlement." *In re Wilmington Trust Sec. Litig.*, 2018 WL 6046452, at *5 (D. Del. Nov. 19, 2018). As discussed below, Plaintiffs faced significant risks to achieving a better result for the Settlement Class through continued litigation.[9]

[8] Additionally, even if Plaintiffs had prevailed at trial, Defendants would have surely appealed the verdict. Trial, post-trial motions, pre-judgment claims administration, and post-judgment appellate proceedings would have added significantly to the expense of this Action and delayed, potentially for years, any recovery to Settlement Class Members (with no assurance that plaintiffs would ultimately prevail or recover any more that the Settlements now provide). *See, e.g.*, *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011) (granting defendants' judgment as a matter of law based on loss causation, overturning jury verdict and award in plaintiff's favor), *aff'd*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d713 (11th Cir. 2012).

[9] *See generally W. Palm Beach Police Pension Fund v. DFC Glob. Corp.*, 2017 WL 4167440, at *5-6 (E.D. Pa. Sept. 20, 2017) (approving settlement where "[e]stablishing liability would be

Risks of Establishing Liability. Although this Court largely sustained Plaintiffs' claims at the pleading stage, Plaintiffs and Lead Counsel recognized that there were many factors that rendered the outcome of continued litigation, and ultimately a trial, in this Action uncertain.

The core allegations here were that Defendants conspired to conceal a secret network of pharmacies in order to sell expensive Valeant-branded drugs, such that the TPPs paid reimbursements inflated in terms of both amount, particularly where less expensive generic drugs were available, and number. Defendants contended that Plaintiffs could not establish that Defendants conspired to sell Valeant-branded drugs at inflated prices or volumes through the Philidor network of pharmacies and Plaintiffs were not assured of proving these allegations at summary judgment or trial. First, it is possible that evidence developed by Plaintiffs through discovery might not have been found to support Plaintiffs' liability case. For example, while Plaintiffs had alleged (based on media reports quoting former Philidor employees) that Valeant and Philidor engaged in wide-scale alterations of prescriptions to avoid generic substitution, the evidentiary record in support of those allegations was mixed. In their depositions, several Valeant and Philidor employees denied this occurred. Other evidence, including evidence concerning the role of Valeant's salesforce in generating Valeant prescriptions and the lack of generic equivalents for several Valeant drugs distributed through Philidor, could have also made it challenging for Plaintiffs to establish their theory of liability in order to overcome summary judgment or succeed at trial. ¶¶ 93-95.

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difficult for the Class [and] [e]stablishing damages would also be no picnic" and finding "these factors weigh heavily in favor of approving the settlement").

In addition, Plaintiffs may have faced challenges in establishing all the elements of their RICO claims including that Defendants participated in a RICO enterprise and/or engaged in a conspiracy to make TPPs and other payors overpay for Valeant-branded drugs. ¶ 96.

Risks Related to Causation and Damages. Even if Plaintiffs overcame each of the above risks and successfully established Defendants' liability, Plaintiffs faced serious risks in proving that Defendants' actions were the proximate cause of their losses and in proving the extent of their damages. Indeed, while these issues were not before the Court at the motion to dismiss stage, they were important drivers of the settlement value of this case.

Defendants would argue that Plaintiffs could not prove that they suffered any damages by reimbursing members for Valeant-branded drugs rather than generic alternatives, especially when no generic alternatives existed. Proving damages could have been challenging given the hypothetical underpinnings of Plaintiffs' damages model and might have raised individualized issues that could have precluded class certification. ¶ 98. In addition, several issues threatened to substantially limit the range of possible damages that could be established for the class at trial, including evidence showing that a substantial volume of the Valeant drugs filled through Philidor were not "covered" by TPPs in their reimbursement process or were otherwise not approved for reimbursement—and thus did not result in damages to class members. ¶ 99. In addition, Defendants' arguments with respect to Valeant drugs that lacked generic equivalents were strongest with respect to two drugs that constituted roughly half the Valeant sales through Philidor. Thus, Defendants' success on that issue might have substantially lowered any potential damages for the class. *Id*.

Resolution of these issues—and ultimately, establishing the Settlement Class's damages—would have hinged on extensive expert discovery and testimony, including conflicting testimony

from Plaintiffs' and Defendants' experts. Thus, "establishing damages at trial would lead to a battle of experts . . . with no guarantee whom the jury would believe." *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001); *see Ocean Power*, 2016 WL 6778218, at *20 ("the damage valuations of Plaintiff's and Defendants' experts would vary substantially. In the 'battle of experts,' it is impossible to predict with any certainty which arguments would find favor with the jury."). Courts have recognized that this uncertainty arising from a "battle of experts" supports approval of a settlement. *See Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997) ("[C]ourts have recognized the need for compromise where divergent testimony would render the litigation an expensive and complicated battle of experts.").

Defendants' expected motion for summary judgment and any trial would also pose further significant risks. And it is likely that Defendants would object to each adverse report and recommendation against them from Special Master Cavanaugh and then appeal further to the Third Circuit where permitted to do so. ¶ 103. Thus, there was no guarantee that any further litigation would have resulted in a higher recovery, or any recovery at all. Even if Plaintiffs prevailed at trial, Defendants would likely have appealed any such verdict and would have been able to renew the substantive arguments discussed above on their appeal. *Id*.

3. Risks to Maintaining the Class Action Through Trial

When the Parties reached their agreements to settle, a class had not yet been certified. The risks of certifying the class and maintaining the class action through trial also support approval of the Settlements. ¶ 101. While Plaintiffs believe that the Action is appropriate for class treatment, Defendants would have vigorously opposed class certification. Among other things, Defendants would contend that liability could not be proven on a class-wide basis because of individualized differences among class members, based on arguably distinct arrangements between TPPs and their PBMs, and PBMs' different policies and procedures. In addition, Defendants would likely

argue that individualized issues of proximate cause and damages preclude class certification. ¶ 101. For example, there was some support in discovery for the contention that the main method of driving prescriptions of Valeant drugs through Philidor was Valeant's deployment of its own salesforce to encourage doctors to write prescriptions for Valeant-branded drugs and route them through Philidor. Those prescriptions were reimbursed only if they conformed to each specific PBM's requirements. Thus, it would have been disputed whether physicians' agency in prescribing Valent-branded drugs precluded a finding of predominance. Defendants would have argued that for each prescription, whether Defendants' alleged fraud resulted in a fraud-induced cost to TPPs was an individualized question and could not be resolved on a common, class-wide basis. *Id*.

4. The Reasonableness of the Total Settlement Amount in Light of the Best Possible Recovery and the Risks of Litigation

The eighth and ninth *Girsh* factors—the reasonableness of the settlement in light of the best possible recovery and the risks of litigation—also favor approving the Settlements. "In making [an] assessment [of these factors], the Court compares the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, with the amount of the proposed settlement." *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *7 (D. N.J. July 29, 2013); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) ("[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved . . . [r]ather, the percentage recovery, must represent a material percentage recovery to plaintiff in light of all the risks").

The $23,125,000 total recovery obtained through the Settlements meets this threshold. The amount recovered through the Settlements is reasonable in light of the maximum damages that

could be reasonably established at trial and the risks presented by the litigation. The Parties did not agree on the methodology to determine damages in the Action, the assumptions to be used, or the amount that would be recoverable if liability were established. ¶ 104. Plaintiffs' damages expert conducted a number of different models to estimate damages based on certain assumptions about the amounts that the TPPs spent on reimbursement of Valeant drugs fulfilled through Philidor. The most refined of the models produced an estimate that the maximum reasonably recoverable damages ranged from $169 million to $242 million. *Id*. The range depends on whether liability could be established for drugs without an FDA-approved generic equivalent, and the actual recoverable amount might be substantially lower (likely under $100 million) once information on TPP reimbursement levels is considered. *Id*. The $23,125,000, therefore, represents a recovery of 9.6% to 23.1% of the likely damages if Plaintiffs prevailed on liability at trial, which Plaintiffs' Counsel believe is highly favorable in light of the substantial risks of establishing liability here. Notably, Plaintiffs expected Defendants to contend that Plaintiff could not prove that Settlement Class Members had suffered any cognizable damages. *Id*. Additionally, this range of recovery is *before* considering the myriad risks to liability—any of which could have resulted in the TPPs recovering less than the Settlement Amounts, or nothing. *Id*.

5. Stage of the Proceedings and Amount of Discovery Completed

A settlement following sufficient discovery and genuine arm's-length negotiation is "presumptively valid." *Devlin v. Ferrandino & Son, Inc.*, 2016 WL 7178338, at *5 (E.D. Pa. Dec. 9, 2016) ("[C]ourts generally recognize that a proposed class settlement is presumptively valid where ... the parties engaged in arm's length negotiations after meaningful discovery."). Further, "[a] court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and

factual issues surrounding the case." *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012).

From the outset of this Action through the Parties' execution of the Stipulations of Settlement on August 4, 2021, Plaintiffs and Lead Counsel spent substantial time and resources analyzing and zealously litigating the factual and legal issues involved in the Action. Before reaching the Settlements, Plaintiffs, through their counsel, had conducted substantial fact discovery—which included, *inter alia*: analyzing more than 8.6 million pages of documents from Defendants and third parties; serving and responding to numerous discovery requests and subpoenas; and participating in 39 depositions. ¶¶ 73-80. Before settlement, Plaintiffs, through their counsel, also briefed two rounds of Defendants' motions to dismiss. ¶¶ 24-28, 63-66. In addition, Plaintiffs and Lead Counsel participated in hard-fought settlement negotiations, including two formal mediations with Jed Melnick. ¶¶ 84-88.

This substantial record reveals that, when the Settlements were reached, Plaintiffs and Lead Counsel had more than enough information to make an informed decision about settlement based on the strengths and weaknesses of their case. *See Dartell v. Tibet Pharms., Inc.*, No. 14-3420, 2017 WL 2815073, at *5 (D.N.J. June 29, 2017).

6. The Ability of Defendants to Withstand a Greater Judgment

The seventh *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *Cendant*, 264 F.3d at 240; *Ikon Office Sols.,* 194 F.R.D. at 183 (defendants' inability to pay a greater sum would support approval of settlement). Even the "fact that [defendants] could afford to pay more does not mean that [they are] obligated to pay any more than what the [] class members are entitled to under the theories of liability that existed at the time the settlement was reached." *Warfarin Sodium Antitrust Litig.*, 391 F.3d at 538; *see also In re Schering-Plough Corp. Sec. Litig.*, 2009 WL 5218066, at *5 (D.N.J.

Dec. 31, 2009) ("pushing for more in the face of risks and delay would not be in the interests of the class").

This factor strongly supports the approval of the Philidor Defendants Settlement. Plaintiffs faced extremely significant ability-to-pay concerns for the Philidor Defendants. Philidor is a defunct entity with minimal assets; Matthew Davenport is deceased, and his Estate has limited assets; and Andrew Davenport is subject to a multi-million-dollar forfeiture order as a result of his criminal conviction. ¶ 102. Accordingly, the prospect of obtaining any significantly larger recovery from the Philidor Defendants was remote, if not impossible, and this further supports the reasonableness of the Philidor Defendants Settlement.

In contrast, as for Valeant, Plaintiffs believe that the company could afford to pay more than $23 million Valeant Settlement. However, Plaintiffs respectfully submit that this factor should not be viewed as determinative by this Court, considering all the other factors supporting approval of the Valeant Settlement. *See Vista Healthplan, Inc. v. Cephalon, Inc.*, 2020 WL 1922902, at *20 (E.D. Pa. Apr. 21, 2020) ("simply because a defendant 'could afford to pay more does not mean that it is obligated to'"; and finding that where "there is no question that the Defendants' total resources far exceed the Settlement amount, and Defendants did not profess any inability to pay during settlement negotiations," that factor "is therefore irrelevant in determining the fairness of the Settlement"); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (a "defendant is not required to 'empty its coffers' before a settlement can be found adequate").

7. The Reaction of the Settlement Class to Date

In assessing a settlement, courts in the Third Circuit also consider "the reaction of the class to the settlement." *Girsh*, 521 F.2d at 157; *NFL Players*, 821 F.3d at 438. The deadline for Settlement Class Members to object to the Settlements or request exclusion from the Settlement Class is November 11, 2021. ¶ 111. As of the date of this filing, there have been no objections to

either of the Settlements and there have been no requests for exclusion from the Settlement Class. *Id*.; Ex. 6, at ¶ 10. Plaintiffs will address objections, if any, as well as any requests for exclusion in their reply papers, after the deadline has passed.

8. The Relevant *Prudential* Factors Also Support the Settlements

Along with the Rule 23(2)(e) and traditional *Girsh* factors, the Third Circuit also advises courts to address the factors set forth in *Prudential*, where applicable. These factors are:

> (1) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; (2) the existence and probable outcome of claims by other classes and subclasses; (3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; (4) whether class or subclass members are accorded the right to opt out of the settlement; (5) whether any provisions for attorneys' fees are reasonable; and (6) whether the procedure for processing individual claims under the settlement is fair and reasonable.

148 F.3d at 323. Each of the *Prudential* factors also supports the Settlements.

With respect to the first *Prudential* factor, Plaintiffs and Lead Counsel had a well-developed understanding of the strengths and weaknesses of the case based on their extensive investigation of the Settlement Class's claims, litigation of two rounds of motions to dismiss, consultation with experts, substantial discovery and mediation efforts. *See supra* Section II.C.5. As for the second and third *Prudential* factors, Lead Counsel is unaware of any other classes or pending individual actions related to the same claims asserted in this Action. As for the fourth *Prudential* factor, Settlement Class Members were afforded the opportunity to opt out of the Settlement Class and, so far, none have chosen to do so. As for the fifth and sixth *Prudential* factors, Lead Counsel's request for attorneys' fees is reasonable as set forth below in Section II.D and in the accompanying Fee Memorandum, and the Plan of Allocation, which will govern the allocation of the Net Settlement Fund, is fair and reasonable as set forth below in Section III.

D. The Remaining Rule 23(e)(2) Factors Support Final Approval

In evaluating the Settlements, Rule 23(e)(2) instructs courts to also consider: (i) the effectiveness of the proposed method of distributing the relief provided to the class, including the method of processing class member claims; (ii) the terms of any proposed award of attorney's fees, including the timing of payment; (iii) any other agreement made in connection with the proposed settlement; and (iv) whether class members are treated equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv), (e)(2)(D). These factors also support final approval of the Settlements.

First, the proposed method of distribution and claims processing ensures equitable treatment of Settlement Class Members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii), (e)(2)(D). Settlement Class Members' claims will be processed and the Net Settlement Funds distributed pursuant to a standard method routinely approved in third-party payor class actions. The Court-authorized Claims Administrator, A.B. Data Ltd. ("A.B. Data"), will review and process all Claims received, provide Claimants with an opportunity to cure any deficiency or request judicial review of the denial of their Claims, if applicable, and will ultimately mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Funds, as calculated under the Plan. None of the Settlement proceeds will revert to Defendants. *See* ECF Nos. 194-2, ¶ 13; 195-2, ¶ 13.

Second, the relief provided by the Settlements remains adequate upon consideration of the terms of the proposed attorneys' fees, including the timing of any such Court-approved payments. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). As discussed in the accompanying Fee Memorandum, the requested attorneys' fees of 30% of the Settlement Funds, to be paid upon the Court's approval, are reasonable in light of the efforts devoted by Plaintiffs' Counsel over the past five years, the recovery obtained for the Settlement Class, and the significant risks that Plaintiffs' Counsel faced in the litigation. The request for attorneys' fees is also in line with attorneys' fee percentages awarded to counsel in other complex class actions in this Circuit. Of particular note, the approval

of attorneys' fee awards is entirely separate from the approval of the Settlements, and neither Plaintiffs nor Plaintiffs' Counsel may terminate either Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. ECF Nos. 194-2, ¶ 16; 195-2, ¶ 16.[10]

Lastly, the only agreement the Parties entered into in addition to the initial Term Sheets and the Stipulations was a confidential Supplemental Agreement between Plaintiffs and Valeant regarding requests for exclusion. *See* ECF No. 194-2, ¶ 36; *see also* Fed. R. Civ. P. 23(e)(2)(C)(iv). The Supplemental Agreement provides Valeant with the option to terminate the Valeant Settlement in the event that Settlement Class Members who timely and validly request exclusion from the Settlement Class meet certain conditions. ECF No. 194-2, ¶ 36. This type of agreement is standard in class actions and does not undermine the fairness of the Settlements. *See, e.g.*, *Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *11 (N.D. Cal. Sept. 4. 2018) ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.").

* * *

For the reasons set forth above and in the Joint Declaration, the Settlements are fair, reasonable, and adequate when evaluated under any standard or set of factors and thus warrant the Court's final approval.

III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

Approval of a "plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Par Pharm.*, 2013 WL 3930091, at *3; *Ocean Power*,

[10] Pursuant to the Stipulations, Court-awarded attorneys' fees will be paid upon issuance of such an award.

2016 WL 6778218, at *23 (same). To meet this standard, a plan of allocation recommended by experienced and competent class counsel "need only have a reasonable and rational basis." *Par Pharm.*, 2013 WL 3930091, at *8. Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000).

Here, the Plan of Allocation, which is set forth at pages 9 to 10 of the Notice, was designed to equitably distribute the Net Settlement Funds on a *pro rata* basis to Settlement Class Members who submit valid Claims demonstrating that they purchased Valeant-branded drugs through Philidor or another of the Philidor Network Pharmacies during the Class Period. ¶¶ 112-114.

Pursuant to the Preliminary Approval Orders, and as set forth in the Notice, all Settlement Class Members who want to participate in the distribution of the Net Settlement Funds must submit a valid Claim Form postmarked no later than January 6, 2022. Under the Plan, a "Recognized Claim" will be calculated for each Claimant who submits a valid Claim Form. The "Recognized Claim" will be calculated as 80% of the total dollars spent by the Claimant to pay or provide reimbursement for some or all of the purchase price of one or more Valeant-branded drugs that were purchased from or fulfilled by Philidor or a Philidor Network Pharmacy during the Class Period. ¶ 114.

Claimants with a Recognized Claim of $100,000 or more are required to submit "Claim Documentation," such as itemized receipts, cancelled checks, invoices, statements, or other business or transaction records documenting payment for the purchases or reimbursement paid for Valeant-branded drugs purchased from or fulfilled by Philidor or a Philidor Network Pharmacy during the Class Period. ¶ 115. In addition, the Claims Administrator may also require Claimants below the $100,000 threshold to submit Claim Documentation where the Claims Administrator

disputes a material fact concerning the Claim Form. If a Claimant fails to submit acceptable Claim Documentation, the Claims Administrator may, in consultation with Lead Counsel, deny all or part of a claim, or may cap payment of a claim at 80% of the amount claimed. *Id*.

Authorized Claimants will recover their proportional "*pro rata*" amount of the Net Settlement Funds based on their Recognized Claim as compared to the Recognized Claims of all Authorized Claimants. ¶ 116; *see Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 105 (D.N.J. Feb. 6, 2018) ("*pro rata* distributions are consistently upheld" when courts consider plans of allocation).

In sum, the Plan of Allocation was designed to rationally allocate the proceeds of the Net Settlement Funds among Settlement Class Members based on the losses they suffered as a result of purchasing or reimbursing purchases of Valeant drugs whose prices were allegedly inflated as a result of the scheme with Philidor. Moreover, the Plan of Allocation was also fully disclosed in the Notice and, to date, no objections to the Plan have been received. ¶ 118. Accordingly, Plaintiffs and Lead Counsel respectfully submit that the Plan of Allocation is fair, reasonable, and adequate and should be approved. Fed. R. Civ. P. 23(e)(2)(C)(ii), (e)(2)(D).

IV. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

As set forth in Plaintiffs' motions for preliminary approval of the Settlements, the Settlement Class satisfies all the requirements of Rules 23(a) and (b)(3). *See* ECF No. 194-1 at 14-19; *see also* ECF No. 197, ¶¶ 1-3 (finding that the Court will likely be able to certify the Settlement Class in connection with final approval); ECF No. 196, ¶¶ 1-3 (same). None of the facts supporting certification of the Settlement Class have changed since Plaintiffs submitted their preliminary approval motions. Accordingly, Plaintiffs respectfully request that the Court certify the Settlement Class under Rules 23(a) and (b)(3) for purposes of effectuating the Settlements.

V. NOTICE TO THE SETTLEMENT CLASS SATISFIED RULE 23 AND DUE PROCESS

Plaintiffs have provided the Settlement Class with adequate notice of the Settlements. Here, notice satisfied both: (i) Rule 23, as it was "the best notice . . . practicable under the circumstances" and directed "in a reasonable manner to all class members who would be bound by the" Settlements, Fed. R. Civ. P. 23(c)(2)(B) & (e)(1)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); and (ii) due process, as it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

In accordance with the Court's Preliminary Approval Order, A.B. Data began mailing and/or e-mailing copies of the Notice Packet to potential Settlement Class Members on September 8, 2021. *See* Miller Decl. ¶¶ 4-5. A.B. Data mailed the Notice Packets to a list of TPPs and their representatives that it developed based on information obtained from U.S. Department of Labor Form 5500 filings, the Pharmacy Benefits Management Institute, and prior pharmaceutical litigations that A.B. Data has administered. *Id.* ¶ 3. Through October 27, 2021, A.B. Data has mailed 41,424 Notice Packets. *Id.* ¶ 4. In addition, A.B. Data caused the Summary Notice to be transmitted over the *PR Newswire* on September 22, 2021, and conducted a campaign of banner ads targeted at relevant websites often visited by administrators of employer healthcare plans and other TPPs. *Id.* ¶¶ 6-7. A.B. Data also established a dedicated website, www.ValeantTPPSettlement.com, to explain the Action and the Settlements as well as access to downloadable copies of the Notice and Claim Form and related documents. *See id.* ¶ 9. Copies of the Notice and Claim Form can also be downloaded from BLB&G's website, www.blbglaw.com.

Comparable notice programs have been found to be "the best notice practicable under the circumstances," Fed. R. Civ. P. 23(c)(2)(B), and approved by courts in this Circuit. *See In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 2021 WL 3929698, at *8 (E.D. Pa. Sept. 2, 2021) (approving comparable notice plan for a TPP class, which, as here, involved mailing to A.B. Data's proprietary list of identified TPPs and a thirty-day digital banner ad campaign on ThinkAdvisor.com/life-health).

The Notice informs Settlement Class Members of, *inter alia*: (i) the amount of the Settlements; (ii) the maximum amount of attorneys' fees and expenses that will be sought; (iii) the right of Settlement Class Members to object to the Settlements; (iv) the right of Settlement Class Members to request exclusion from the Settlement Class; (v) the binding effect of a judgment on Settlement Class Members; (vi) the dates and deadlines for certain Settlement-related events; and (vii) the opportunity to obtain additional information about the Action and the Settlement by contacting Lead Counsel, the Claims Administrator, or visiting the Settlement website. *See* Fed. R. Civ. P. 23(c)(2)(B). The Notice also contains the Plan of Allocation and provides Settlement Class Members with information on how to submit a Claim Form in order to be eligible to receive a distribution from the Net Settlement Funds. The content disseminated through this notice campaign was more than adequate. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) ("Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class.").

VI. CONCLUSION

For the reasons set forth here and in the Joint Declaration, Plaintiffs respectfully request that the Court grant final approval of the Settlements, approve the Plan of Allocation, and grant final certification of the Settlement Class for settlement purposes.

Dated: October 28, 2021

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#3060294

CERTIFICATION OF SERVICE

I hereby certify that on October 28, 2021, I caused a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Settlements and Approval of Plan of Allocation to be electronically filed with the Clerk of the Court using the ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: October 28, 2021

s/ James E. Cecchi

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