UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

IN RE CELEBREX (CELECOXIB) ANTITRUST LITIGATION This document relates to: Direct Purchaser Actions	Lead Case No. 2:14-cv-00361

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, APPROVAL OF FORM AND MANNER OF SETTLEMENT NOTICE, APPOINTMENT OF SETTLEMENT ADMINISTRATOR AND ESCROW AGENT, AND ORDER SETTING SCHEDULE FOR FINAL FAIRNESS HEARING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

I. INTRODUCTION

The direct purchaser class representative plaintiffs, American Sales Company, LLC, Rochester Drug Co-Operative, Inc., and Cesar Castillo, Inc. (the "direct purchasers"), respectfully submit this memorandum of law in support of their motion for preliminary approval of their settlement with the defendants, Pfizer Inc., G.D. Searle LLC, and Pfizer Asia Pacific Pte. Ltd. (collectively, "Pfizer").

After extensive, hard-fought litigation, the parties have entered into a settlement agreement that provides for the payment of $94 million in cash to the direct purchaser class previously certified by this Court in exchange for the dismissal of this litigation with prejudice and mutual releases between the parties (the "settlement agreement"). The settlement agreement, attached as Exhibit 1 to the Declaration of Thomas M. Sobol ("Sobol Declaration") filed herewith, along with a confidential supplemental agreement filed with the Court under seal as Exhibit 1.A, contains all of the settlement's applicable terms and conditions.

Preliminary approval of the settlement is appropriate and fair, reasonable, and adequate pursuant to Rule 23 of the Federal Rules of Civil Procedure. The direct purchasers agreed to settle with Pfizer following years of litigation and after two formal settlement conferences – one with a private mediator and one with Magistrate Judge Krask. The settlement is the result of good faith, arm's-length negotiations among counsel experienced in class actions generally and in pharmaceutical antitrust litigation in particular. The settlement assures that direct purchaser class members will receive substantial cash payments now while avoiding the uncertainties and delays of continued litigation and potential appeals. The settlement has been discussed with counsel for each of the three largest class members, whose purchases of Celebrex during the class period account for approximately 94% of the purchases made by the class and each of whom approves of the settlement.

Accordingly, the direct purchasers respectfully request that the Court:

1. Grant preliminary approval of the settlement as fair, reasonable, and adequate under Rule 23(e) of the Federal Rules of Civil Procedure;

2. Approve the proposed form and manner of settlement notice to the class,[1] including procedures for objecting to the settlement;

3. Appoint Epiq Class Action & Claims Solutions, Inc. as settlement administrator, as supported by the Declaration of Steven M. Gassert[2];

4. Appoint Huntington National Bank as escrow agent for the settlement funds and approve the proposed form of escrow agreement[3]; and

5. Adopt the schedule set forth in the proposed order, including the setting of the date for the final fairness hearing, during which the Court will consider:

    a. The direct purchasers' request for final approval of the settlement and entry of a proposed order and final judgment;

    b. Class counsel's application for an award of attorneys' fees and reimbursement of expenses, payment of settlement administration costs, and service awards to the named class representative plaintiffs; and

    c. Dismissal of this action.

II. BACKGROUND

A. Direct Purchasers' Claims & Procedural Background.

This is an antitrust class action brought on behalf of the class of direct purchasers of the prescription drug Celebrex (celecoxib) and/or its AB-rated generic equivalents. The direct purchasers allege that Pfizer, in an effort to extend its patent on celecoxib (the active ingredient in Celebrex), tried to revive its invalidated U.S. Patent No. 5,760,068 (the "'068 patent") by making material misrepresentations of fact to the United States Patent and Trademark Office ("PTO"). The direct purchasers allege that Pfizer made these material misrepresentations in the

[1] *See* Sobol Decl. Ex. 2.

[2] *See* Sobol Decl. Ex. 3.

[3] *See* Sobol Decl. Ex. 4.

course of prosecuting its application for reissue of the '068 patent, an application which the PTO ultimately granted as U.S. Patent No. RE44,048 (the "RE'048 patent"). The direct purchasers further allege that Pfizer then filed suit against five generic manufacturers – Teva, Lupin, Mylan, Watson, and Apotex – for purported infringement of the fraudulently obtained RE'048 patent, and that the purpose of these patent suits was to extend Pfizer's monopoly on the sale of Celebrex (celecoxib) in the U.S. market.

Generic celecoxib is significantly less expensive than branded Celebrex. The direct purchaser allege that, as a result of the delay in the availability of generic celecoxib caused by Pfizer's fraudulent procurement and enforcement of the RE'048 patent, members of the class paid higher prices to meet their celecoxib needs than they would have paid had generic celecoxib been available sooner.

The direct purchasers filed their initial complaint on July 1, 2014 and sought leave to file a consolidated amended complaint a few months later.[4] On October 20, 2014, Pfizer moved to dismiss the consolidated amended complaint for failure to state a claim.[5] In December 2014, this Court consolidated the direct purchaser actions[6] and, on November 6, 2015, granted in part and denied in part Pfizer's motion, dismissing the direct purchasers' sham litigation claim but finding they had adequately pleaded a cognizable claim of *Walker Process* fraud.[7]

[4] ECF Nos. 1, 40-41.

[5] ECF Nos. 45-47.

[6] ECF No. 56.

[7] ECF No. 73. On August 26, 2016, in a related case brought by indirect purchasers of Celebrex (Lead Case No. 2:14-cv-395), the Court further dismissed 78 state law claims based on state antitrust and consumer protection statutes and the common law of unjust enrichment on grounds of federal preemption and lack of standing. Order, *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 14-cv-395 (E.D. Va. Aug. 26, 2016), ECF No. 22. The Court dismissed all remaining claims and entered final judgment on February 17, 2017. ECF Nos. 112, 113. The indirect

Discovery in this case has been extensive: the parties collectively produced and reviewed over 800,000 documents (comprising over seven million pages), took 28 depositions of party witnesses, and served expert reports from 20 experts opining on topics such as PTO practice and procedure, the regulatory process governing approval of generic drugs, pharmaceutical manufacturing and supply chain operations, and the economics of AB-rated generic drug competition. The parties also sought discovery from several non-party manufacturers of generic celecoxib, resulting in the production of over 10,000 documents and six depositions of witnesses from Greenstone, Teva, Mylan, and Watson, collectively. The direct purchasers vigorously litigated issues relating to Pfizer's assertions of attorney-client privilege over both the content of its document productions and the testimony of its fact witnesses.[8]

On August 24, 2017, following the parties' briefing and oral argument on class certification, the Court adopted and approved in full the findings and recommendations set forth in Magistrate Judge Miller's July 28, 2017 Report & Recommendation granting class certification of a 32-member class.[9] The Court subsequently entered an order making supplemental findings with respect to class certification, appointing lead counsel and class representatives, approving the form and manner of notice to class members concerning the pendency of the litigation, and appointing a notice administrator.[10] The Court certified a 32-member class of direct purchasers as follows:

> All persons or entities in the United States and its territories and possessions who purchased brand or generic versions of Celebrex

---

purchasers have appealed this decision to the United States Court of Appeals for the Fourth Circuit.

[8] *See, e.g.*, ECF Nos. 112, 118, 124, 163, 250.

[9] Order, ECF No. 443 (adopting Magistrate Judge's Report & Recommendation, ECF No. 394).

[10] ECF No. 455.

> directly from any manufacturer at any time during the period May 30, 2014 through March 2, 2015 (the "Class Period"). Excluded from the Direct Purchaser Class are Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities. Also excluded are persons or entities that, during the Class Period, purchased only generic versions of Celebrex and did not also purchase brand Celebrex. Also excluded are persons or entities that did not purchase brand Celebrex before December 10, 2014 and after December 10, 2014 only purchased brand Celebrex and not generic Celebrex.[11]

On June 27, 2017, the parties filed motions for summary judgment. Pfizer sought summary judgment finding that it did not commit *Walker Process* fraud in its prosecution of the RE'048 patent.[12] The direct purchasers moved for entry of partial summary judgment as to Pfizer's alleged material misrepresentations and omissions to the PTO.[13] The parties also filed *Daubert* motions seeking to exclude some or all of the testimony of, combined, nine expert witnesses.[14] Magistrate Judge Miller heard oral argument on the parties' summary judgment and *Daubert* motions on September 7, 2017.

On September 15, 2017, the parties exchanged pretrial disclosures pursuant to Rule 26(a)(3) and filed, collectively, 23 motions *in limine*. In the weeks following, the parties engaged in extensive negotiations to narrow the areas of disagreement in their motions *in limine* and proposed witness lists, exhibit lists, and deposition designations. The parties were just two days from a final pre-trial conference with Magistrate Judge Miller when they reached a settlement.

B. Settlement Negotiations & Proposed Settlement.

In August 2017, the parties scheduled a two-day mediation with a private mediator, former Federal District Judge Gary A. Feess. The mediation ended on August 14, 2017 without

[11] *Id.* at 1-2.

[12] ECF No. 315.

[13] ECF No. 352.

[14] ECF Nos. 312, 319, 325, 329, 334, 339.

resolution. The parties then scheduled a settlement conference on October 18, 2017 before Magistrate Judge Robert J. Krask. During this conference, and with the Judge Krask's assistance, the parties reached a proposed settlement of all direct purchaser claims.

The settlement defines the proposed settlement class identical to the class previously certified by this Court on August 29, 2017. The settlement agreement provides that Pfizer will pay $94,000,000.00 (the "settlement fund") to settle the claims of the direct purchaser class within 45 days of preliminary approval. In exchange, the direct purchasers agree to release Pfizer from any claims relating to any conduct or events which could reasonably have been alleged in the direct purchaser action or concerning purchases of celecoxib and arising under the Sherman Act or other antitrust or unfair competition laws.[15]

The direct purchasers propose to provide notice of the settlement agreement to each individual class member through direct mail and through the posting of the notice on a litigation-dedicated website. Class members will have 60 days to object. Assuming the Court grants final approval of the settlement, disbursements of the settlement fund to individual class members will be made on a pro-rata basis based on each class member's total purchases of branded and/or generic Celebrex relative to the total amount of all class purchases of branded and generic Celebrex, as reflected in all timely submitted proof of claim forms.[16]

Because the direct purchaser class members were already given the opportunity to opt-out of the class, a second opt-out opportunity is unnecessary. Class members will, however, still have the opportunity to object to the settlement agreement.[17] The parties have submitted *in camera* a confidential supplemental agreement between the parties concerning the effect of any

[15] *See* Sobol Decl. Ex. 1 ¶ 10.

[16] *See* Sobol Decl. Ex. 3 ¶¶ 13-16.

[17] *See* Sobol Decl. Ex. 1 ¶ 15.

opt-outs from the class should the Court provide for a second opt-out period.[18]

Before entry of any final approval order, expenses necessary to administer the settlement, provide notice to the class, and pay any applicable taxes may be paid from the settlement fund. Under the terms of the settlement agreement, no Court approval will be necessary for payment of administrative expenses in amounts (in the aggregate) of less than $250,000.[19] Counsel for the direct purchaser class will seek, solely from the settlement fund, attorneys' fees in the amount of up to one-third of the settlement fund, plus the reimbursement of reasonable costs and expenses incurred. Class counsel will also seek service awards up to $100,000 for each of the three named class representative plaintiffs, each to be paid from the settlement fund. Lead counsel will file a motion for approval of the fee and expense award and the class representative plaintiff service awards after the Court has granted preliminary approval of the settlement agreement and in accordance with a schedule approved by the Court. Payment of attorneys' fees and expenses will be made within five business days after the settlement agreement becomes final.[20]

III. ARGUMENT

A. The preliminary approval standard.

Preliminary approval of a proposed class action settlement under Rule 23(e) is the first step in a two-step process.[21] At the preliminary approval stage, courts make an initial evaluation of the fairness of the settlement terms.[22] Rule 23(e) instructs that a class action "may be settled . . . or compromised only with the court's approval." The Rule requires the court to "direct notice in a reasonable manner" to class members and determine that the proposed

[18] *See* Sobol Decl. Ex. 1.A.

[19] *See* Sobol Decl. Ex. 1 ¶ 5(b).

[20] *See id.* ¶ 9.

[21] Fed. Judicial Ctr., *Manual for Complex Litigation* § 21.632 (4th ed. 2004).

[22] *Id.*

settlement "is fair, reasonable, and adequate."[23] Thus, "the role of a court reviewing the proposed settlement of a class action under [Rule] 23(e) is to assure that the procedures followed meet the requirements of the Rule and comport with due process and to examine the settlement for fairness and adequacy."[24] While the district court must assure the fairness of the settlement, "there is a strong initial presumption that the compromise is fair and reasonable."[25]

A hearing is neither necessary nor required under Rule 23(e) at the preliminary approval stage. As explained in the *Manual for Complex Litigation*, "[i]n some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties."[26]

In this circuit, *In re Jiffy Lube Securities Litigation*[27] provides district courts a structure with which to evaluate both the fairness and the adequacy of class settlements. For fairness, the factors to consider are "(1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel [in the area of law relevant to the case]."[28]

For adequacy, *Jiffy Lube* directs the district court to consider:

> (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the

---

[23] Fed. R. Civ. P. 23(e)(1)-(2); *see also Winingear v. City of Norfolk*, No. 12-cv-560, 2014 WL 12526327, at *1 (E.D. Va. June 5, 2014) ("[Rule 23(e)] requires that class members receive notice of the settlement before the court approves it.").

[24] *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001) (quoting *Vaughns v. Bd. of Educ. of Price George's Cty.*, 18 F. Supp. 2d 569, 578 (D. Md. 1998)).

[25] *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) (quoting *In re Saxon Sec. Litig.*, Nos. 82 Civ. 3103 & 83 Civ. 3760, 1985 WL 48177 (S.D.N.Y. Oct. 30, 1985)).

[26] Fed. Judicial Ctr., *supra*, § 21.632.

[27] 927 F.2d 155 (4th Cir. 1991).

[28] *Id.* at 158-59; *see also In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254-55 (E.D. Va. 2009) (applying the *Jiffy Lube* factors to assess the fairness of a settlement).

> plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expenses of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement."[29]

While "all five factors enter into the calculus, the strength of the plaintiff's claims on the merits deserves the most weight."[30]

B. The proposed settlement meets the standard for preliminary approval.

All considerations here, under both the Federal Rules and Fourth Circuit precedent, counsel in favor of preliminary approval of the settlement agreement.

1. Fairness

The posture of the case at the time settlement was proposed. "Considering the posture of the case at the time of settlement allows the Court to determine whether the case has progressed far enough to dispel any wariness of 'possible collusion among the settling parties.'"[31] Here, the settlement agreement was reached one month before trial was set to begin. The parties had aggressively litigated the case for several years, including extensive motion practice and completion of all fact and expert discovery.

The parties also retained and served reports by a combined 20 experts in the fields of patent law, PTO practice and procedure, pharmaceutical operations and supply chains, FDA regulatory strategy and compliance, generic drug development, medicinal chemistry, medicine, clinical pharmacology, health economics and policy, and market economics, pricing, and regulation, many of whom were deposed. The parties filed numerous *Daubert* motions and

[29] *Jiffy Lube*, 927 F.2d at 159; *see also Mills Corp.*, 265 F.R.D. at 254-55 (applying the *Jiffy Lube* factors to assess the adequacy of a settlement).

[30] *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 14-cv-238, 2016 WL 1070819, at *4 (E.D. Va. Mar. 15, 2016) (citing *Berry v. Schulman*, 807 F.3d 600, 615 (4th Cir. 2015)).

[31] *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 571 (E.D. Va. 2016) (quoting *Mills Corp.*, 265 F.R.D. at 254).

motions *in limine*. By the time of the successful settlement conference, the parties had exchanged proposed trial exhibits, witness lists, and deposition designations and engaged in extensive negotiations over their scope, including at a day-long in-person attorney conference. The degree of adversarial litigation evident by the record in this case well satisfies this element of the fairness prong.[32]

The extent of discovery conducted. The purpose of this factor is to confirm that the parties and their counsel "appreciate the full landscape of their case when agreeing to enter into [a] [s]ettlement."[33] Here, there can be no doubt that the parties had amassed a deep understanding of this case. By the time they reached a settlement, they had completed fact and expert discovery (which included the production and review of over 800,000 documents), taken and defended over two dozen depositions, fully briefed numerous motions on privilege and other discovery matters, obtained certification of the class after extensive briefing and oral argument, exchanged expert reports, and subpoenaed and obtained discovery from several non-party generic manufacturers. With settlement occurring only a month before the first scheduled day of trial, the parties intimately understood the landscape of this case.

The circumstances surrounding the negotiations. This factor seeks to "ensure that counsel entered into settlement negotiations on behalf of their clients after becoming fully informed of all pertinent factual and legal issues in the case.'"[34] For this factor, "[c]ourts look to the number of meetings between the parties to discuss settlement, the quality of those negotiations, and the

[32] *See id*. (finding vigorous briefing on motion to dismiss and engagement of a professional mediator as sufficient "adversarial encounters [to] dispel any apprehension of collusion between the parties." (quoting *In re NeuStar, Inc. Sec. Litig.*, No. 14-cv-885, 2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015))).

[33] *Mills Corp.*, 265 F.R.D. at 254.

[34] *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 840 (E.D. Va. 2016) (quoting *Mills Corp.*, 265 F.R.D. at 255).

duration of time over which negotiations took place."[35]

Here, the parties agreed to retain the services of a private mediator for a two-day mediation. And while that mediation did not result in a settlement, at this Court's urging, the parties continued settlement discussions via email and telephone. Nearly two months later, the parties considered scheduling a second mediation. They ultimately agreed to a settlement conference with Magistrate Judge Krask. On October 18, 2017, after a day-long conference before Magistrate Judge Krask, the parties reached a settlement.

The experience of counsel in the area of antitrust class action litigation. Class counsel have significant experience in delayed generic entry cases[36] and are well versed in both the prosecution and settlement of this type of antitrust litigation, having been involved in many such cases for over the past fifteen years.[37] Class counsel have demonstrated throughout this litigation

---

[35] *Id*. (citing *MicroStrategy*, 148 F. Supp. 2d at 665).

[36] *See, e.g.*, *Burke v. Shapiro, Brown & Alt, LLP*, No. 14-cv-838, 2016 WL 2894914, at *3 (E.D. Va. May 17, 2016) (finding this factor supports preliminary approval where "Class Counsel have extensive experience in litigating" cases in the relevant area of law); *see also Manuel*, 2016 WL 1070819, at *3.

[37] Some or all of the attorneys in this case have been counsel of record in dozens of pharmaceutical antitrust direct purchaser class actions in which the courts have granted final approval of class settlements. *See, e.g.*, *In re Prograf Antitrust Litig.*, No. 11-md-2242 (D. Mass.) (final approval of settlement granted November 2, 2016); *Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-cv-3824 (E.D. Pa.) (final approval of settlement granted January 28, 2015); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141 (E.D. Mich.) (January 20, 2015); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 12-cv-83 (E.D. Tenn.) (September 24, 2014); *In re Neurontin Antitrust Litig.*, No. 02-cv-1390 (D.N.J.) (July 31, 2014); *In re Flonase Antitrust Litig.*, No. 08-cv-3149 (E.D. Pa.) (June 14, 2013); *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431 (E.D. Pa.) (November 7, 2012); *Rochester Drug Co-Op. v. Braintree Labs., Inc.*, No. 07-cv-142 (D. Del.) (May 31, 2012); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-cv-52 (D. Del.) (Feb. 21, 2012); *In re DDAVP Antitrust Litig.*, No. 05 Civ. 2237 (S.D.N.Y.) (November 28, 2011); *In re Wellbutrin SR Antitrust Litig.*, No. 04-cv-5525 (E.D. Pa.) (November 21, 2011); *Meijer, Inc. v. Abbott Labs.*, No. C 07-5985 (N.D. Cal.) (August 11, 2011); *In re Nifedipine Antitrust Litig.*, MDL No. 1515 (D.D.C.) (January 31, 2011); *In re OxyContin Antitrust Litig.*, No. 04-md-1603 (S.D.N.Y.) (January 25, 2011); *In re TriCor Antitrust Litig.*, No. 05-cv-340 (D. Del.) (April 24, 2009); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, No. 05-cv-2195 (D.D.C.) (April 20, 2009).

that they understand this particular area of antitrust law and have prosecuted this case with vigor and commitment, as previously recognized by the Court.[38]

2. Adequacy

The relative strength of the plaintiffs' case on the merits. This factor, similar to the factor that follows, addresses "how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case."[39]

While the direct purchasers have always been confident in their claims, there is no guarantee that a jury would render a favorable jury verdict on liability, or that such verdict would withstand appellate scrutiny. Proving liability in this case would require the jury to synthesize, digest, and deliberate a complex, intersecting body of scientific, economic, and regulatory evidence. Further, Pfizer has been represented by some of the best law firms in the country, which have vigorously represented their client and continuously maintained that Pfizer's actions were lawful. Thus, notwithstanding the direct purchasers' confidence, there is no guarantee that the direct purchasers would succeed in establishing liability through trial and appeal.[40] In conducting settlement negotiations, lead counsel was cognizant of the numerous and multi-layered risks and complexities that continued litigation presented to the class, particularly with regard to liability. Absent the settlement, these risks and complexities could result in the class receiving no recovery at all. In contrast, the settlement will provide substantial and immediate

[38] *See, e.g.*, Sept. 7, 2017 Hr'g Tr. at 174-75 ("I want to commend everyone who has litigated the case and has had anything to do with the brief writing, because it's been topnotch.").

[39] *Brown*, 318 F.R.D. at 573 (quoting *Mills Corp.*, 265 F.R.D. at 256).

[40] *See, e.g.*, *Fleisher v. Phoenix Life Ins. Co.*, Nos. 11-cv-8405 & 14-cv-8714, 2015 WL 10847814, at *8 (S.D.N.Y. Sept. 9, 2015) ("While Plaintiffs and Class Counsel believe that they would prevail in their claims asserted against Defendants, they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial and appeals.").

relief and compensation to class members. This factor weighs heavily in favor of preliminary approval of the settlement.

The existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial. Despite believing strongly in their case, the direct purchasers also acknowledge that there are several hurdles to reaching a jury verdict in their favor. For one, proof of fraud is challenging in any case, but it is especially so in a complicated antitrust case that includes complicated aspects of patent law. Explaining the alleged fraud to a jury in an understandable manner would be time-consuming and challenging. Pfizer believed strongly in its defenses, including the fact that the patent examiner, having previously rejected Pfizer's reissue application, was fully aware of the record before him. Proceeding to trial would, as this Court has already recognized, carry significant risks for the direct purchasers, who have invested millions of dollars litigating this case.[41]

The anticipated duration and expenses of additional litigation. By the time the parties reached a settlement, the litigation had already been pending for over four years, and the parties had already spent significant sums preparing for trial. This includes attorney hours, document hosting platform fees, court reporter fees, videographer fees, expert fees, and travel expenses. Class counsel estimate that the cost of litigating through trial would be between $3.7 and $4 million, with more than $2.7 million for expert fees alone.[42]

The solvency of the defendants and the likelihood of recovery on a litigated judgment.

[41] During the September 7, 2017 hearing on summary judgment and *Daubert* motions, this Court encouraged settlement discussions due to the high risk faced by both sides.

[42] Reply in Further Supp. of Direct Purchaser Class Pls.' Mot. for Class Certification at 11, ECF No. 272.

Pfizer is among one of the largest pharmaceutical companies in the United States.[43] Pfizer would likely have been able to pay a significant judgment had the case proceeded to trial and a verdict been returned in favor of class plaintiffs. Here, the direct purchasers do not contend that the settlement is fair because Pfizer could not withstand a greater judgment and thus do not believe this risk is relevant.

The degree of opposition to the settlement. As per the order of this Court, class action pendency notice was provided to all class members after this Court certified the 32-member direct purchaser class.[44] The pendency notice provided class members with the opportunity to opt out of the class, but no class member exercised that right. Though the settlement notice will afford class members the opportunity to object to the settlement agreement, class counsel's fee and expense application, and/or the class representative service awards, class counsel does not anticipate any opposition. The Court will have an opportunity to evaluate this prong once again at the fairness hearing once class members have been provided a notice of the settlement terms and an opportunity to object.

C. The Court should appoint Epiq Class Action & Claims Solutions, Inc. as claims administrator and approve the proposed manner of notice.

The direct purchasers request that Epiq Class Action & Claims Solutions, Inc. be appointed as the claims administrator for the settlement. The claims administrator will be tasked with providing direct mail notice to each class member, providing each class members with a claim form should the Court grant final approval of the settlement, determining the proper share

[43] *See* Press Release, Pfizer, Pfizer Reports Third-Quarter 2017 Results (Oct. 31, 2017), https://s21.q4cdn.com/317678438/files/doc_financials/Quarterly/2017/Q3_2017_PFE_Earnings_Release.pdf (reporting $13.2 billion in revenue for Q3 2017).

[44] *See* Sobol Decl. Ex. 3 ¶¶ 3-7.

of the settlement to be paid to each class member, and effectuating distribution of the net settlement fund after approval by the Court.

Rule 23(e)(1) instructs the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Epiq recommends that all class members be notified of the settlement agreement individually by U.S. First Class mail – identical to the method used to provide notice of the pendency of this action to the certified class. Epiq will provide the Court with proof of mailing, including confirmation of any notices returned as undeliverable. To provide additional information to class members, including copies of the Court's decisions and any other Court documents, Epiq will update information on the already established website, http://www.celebrexdirectlitigation.com. The website is referenced in the proposed notice of settlement. The website will make the full text of the Court's decisions and orders and other papers readily available to class members to allow them to remain reasonably apprised of the progress of the settlement.

Epiq and class counsel have prepared a notice that effectively conveys the required information to class members. The proposed notice is designed to alert class members to the litigation by using a bold headline, enabling class members to quickly determine if they are potentially affected by the settlement agreement. Plain language text provides important information regarding the subject of the litigation, the class definition, and the legal rights of class members. In addition, the proposed notice prominently features class counsel's contact information, directions to a website where supplemental information is provided, and Epiq's address for class members to obtain other information or submit objections, if desired.

The proposed notice, attached as Exhibit 2 to the Sobol Declaration, describes the class; the procedural status of the litigation; the significant terms of the proposed settlement, including

the amount of money Pfizer has agreed to pay; the releases they will receive; and the plan for allocation of the funds. The notice also outlines the Court approval process and advises class members of their rights under Rule 23, including the right to object to and be heard as to the reasonableness and fairness of the proposed settlement and the request for attorneys' fees by class counsel. The notice is substantially similar, in both form and substance, to notices used in other direct purchaser generic delay cases and satisfies both the notice requirements of Rule 23(e) and the due process requirements that must be met to bind each member of the class.

D. The Court should appoint Huntington National Bank as escrow agent and approve the proposed form of escrow agreement.

Class counsel request that this Court approve Huntington National Bank as escrow agent for the settlement funds. Huntington National Bank, established in 1866, is among the largest 1% of banks in the United States based on size, holds over $57 billion in assets, and includes 700 offices nationwide. Huntington National Bank's National Settlement Team has handled more than 1,000 settlements for law firms, claims administrators, and regulatory agencies. Class counsel have previously used the services of Huntington National Bank as escrow agent in multiple class action settlements securely and successfully. Pfizer has agreed to the use of Huntington National Bank as escrow agent in this settlement.

The direct purchasers have also provided for the Court's approval the proposed form of escrow agreement.[45] This proposed agreement is based on Huntington National Bank's standard escrow agreement and has been used successfully by class counsel in past cases. Pfizer has approved this proposed form and will be a signatory to the escrow agreement if approved.

E. The Court should schedule a fairness hearing and set corresponding deadlines.

Assuming this Court grants preliminary approval of the settlement, the direct purchasers

[45] *See* Sobol Decl. Ex. 4.

propose, as set forth in the attached proposed order, the following schedule for completing the settlement approval process:

1. Pfizer shall serve notices pursuant to the Class Action Fairness Act of 2005 within **10 days** of entry of this Court's preliminary approval order;

2. Notice to the class will be completed within **10 days** of the date of preliminary approval, and the claims administrator shall file a declaration concerning notice to the class within **20 days** of the date of preliminary approval;

3. Class counsel will submit its motion for attorneys' fees, expenses, and class representative service awards within **30 days** of the date of preliminary approval;

4. Class members may submit any objection to the settlement, class counsel's attorney fee and expense application, and the request for class representative service awards within **60 days** of the date of preliminary approval;

5. Class counsel will submit a motion and memorandum in support of final approval of the settlement within **75 days** of the date of preliminary approval; and

6. The Court will set a date for a final fairness hearing no fewer than **100 days** from the date of preliminary approval.[46]

This schedule is fair to class members and provides each class member an opportunity to review the preliminary approval papers, the settlement agreement, and any fee petitions before an objection is due.

IV. CONCLUSION

For the foregoing reasons, the direct purchasers respectfully request that the Court enter the proposed order granting preliminary approval of the settlement, approving the form and manner of settlement notice to the class, appointing Epiq Class Action & Claims Solutions, Inc. as settlement administrator, appointing Huntington National Bank as the escrow agent for the settlement funds, approving the proposed form of escrow agreement, and setting the schedule for

[46] Under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711-15), a settling defendant must provide notice to "appropriate federal officials," including the Attorney General of the United States, no later than 10 days after a settlement is filed with the Court. 28 U.S.C. § 1715. Final approval may not be issued earlier than 90 days from the date of that notice. *Id.*

the final fairness hearing, at or after which this Court will determine whether to grant final approval of the settlement.

Dated: November 22, 2017

Respectfully submitted,

/s/ William H. Monroe, Jr.
William H. Monroe, Jr. (VSB No. 27441)
Kip A. Harbison (VSB No. 38648)
Marc C. Greco (VSB No. 41496)
Melissa M. Watson Goode (VSB No. 73516)
GLASSER & GLASSER, P.L.C.
Crown Center, Suite 600
580 East Main Street
Norfolk, VA 23510
Telephone: (757) 625-6787
Facsimile: (757) 652-5959
bill@glasserlaw.com

Local Counsel for Direct Purchaser Plaintiffs and the Direct Purchaser Class

Thomas M. Sobol (*pro hac vice*)
Kristen A. Johnson (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003
tom@hbsslaw.com
kristenj@hbsslaw.com

Lead Counsel for Direct Purchaser Plaintiffs and the Direct Purchaser Class

John D. Radice (*pro hac vice*)
A. Luke Smith (*pro hac vice*)
Kenneth Pickle (*pro hac vice*)
RADICE LAW FIRM, P.C.
34 Sunset Blvd
Long Beach, NJ 08008
Telephone: (646) 245-8502
Facsimile: (609) 385-0745
jradice@radicelawfirm.com
lsmith@radicelawfirm.com

kpickle@radicelawfirm.com

Counsel for Plaintiff American Sales Company, LLC and the Direct Purchaser Class

David F. Sorensen (*pro hac vice*)
Zachary D. Caplan (*pro hac vice*)
Ellen T. Noteware (*pro hac vice*)
Richard D. Schwartz (*pro hac vice*)
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-4604
dsorensen@bm.net
zcaplan@bm.net
enoteware@bm.net
rschwartz@bm.net

Peter Kohn (*pro hac vice*)
Joseph T. Lukens (*pro hac vice*)
Richard D. Schwartz
FARUQI & FARUQI, LLP
101 Greenwood Avenue, Suite 600
Jenkintown, PA 19046
Telephone: (215) 277-5770
Facsimile: (215) 277-5771
pkohn@faruqilaw.com
jlukens@faruqilaw.com

Barry S. Taus (*pro hac vice*)
Archana Tamoshunas (*pro hac vice*)
TAUS, CEBULASH & LANDAU LLP
80 Maiden Lane, Suite 1204
New York, NY 10038
Telephone: (212) 931-0704
Facsimile: (202) 931-0703
btaus@tcllaw.com
atamoshunas@tcllaw.com

Counsel for Plaintiff Rochester Drug Co-Operative, Inc. and the Direct Purchaser Class

Linda P. Nussbaum (*pro hac vice*)
Bradley J. Demuth (*pro hac vice*)
NUSSBAUM LAW GROUP, P.C.

1211 Avenue of the Americas, 40th Floor
New York, NY 10036
Telephone: (917) 438-9189
Facsimile: (212) 681-0300
lnussbaum@nussbaumpc.com
bdemuth@nussbaumpc.com

Juan R. Rivera Font
Juan R. Rivera Font LLC
Ave. Gonzalez Guisti #27, Suite 602
Guaynabo, PR 00968
Telephone: (787) 751-5290
juan@riverafont.com

Counsel for Plaintiff Cesar Castillo, Inc. and the Direct Purchaser Class

CERTIFICATE OF SERVICE

I, William H. Monroe, Jr., hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically email notification of such filing to:

Richard S. Glasser (VSB No. 04092)
Michael A. Glasser (VSB No. 17651)
William H. Monroe, Jr. (VSB No. 27441)
Kip A. Harbison (VSB No. 38648)
Marc C. Greco (VSB No. 41496)
Melissa M. Watson Goode (VSB No. 73516)
GLASSER & GLASSER, P.L.C.
Crown Center, Suite 600
580 East Main Street
Norfolk, VA 23510
Tel: (757) 625-6787
Fax: (757) 652-5959
richardg@glasserlaw.com
michael@glasserlaw.com
bill@glasserlaw.com
kip@glasserlaw.com
marcg@glasserlaw.com
mgoode@glasserlaw.com

Linda P. Nussbaum (*pro hac vice*)
Bradley J. Demuth (*pro hac vice*)
NUSSBAUM LAW GROUP, P.C.
1211 Avenue of the Americas, 49th Floor
New York, NY 10036
Tel: (917) 438-9189
Fax: (212) 681-0300
lnussbaum@nussbaumpc.com
bdemuth@nussbaumpc.com

David F. Sorensen (*pro hac vice*)
Zachary D. Caplan (*pro hac vice*)
Ellen T. Noteware (*pro hac vice*)
Richard D. Schwartz (*pro hac vice*)
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604

Peter Kohn (*pro hac vice*)
Joseph T. Lukens (*pro hac vice*)
FARUQI & FARUQI, LLP
101 Greenwood Avenue, Suite 600
Jenkintown, PA 19046
Tel: (215) 277-5770
Fax: (215) 277-5771
pkohn@faruqilaw.com
jlukens@faruqilaw.com

John D. Radice (*pro hac vice*)
A. Luke Smith (*pro hac vice*)
Kenneth Pickle (*pro hac vice*)
RADICE LAW FIRM, P.C.
34 Sunset Blvd
Long Beach, NJ 08008
Tel: (646) 386-7688
Fax: (609) 385-0745
jradice@radicelawfinn.com
lsmith@radicelawfinn.com
kpickle@radicelawfinn.com

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

Barry S. Taus (*pro hac vice*)
Archana Tamoshunas (*pro hac vice*)

dsorensen@bm.net
zcaplan@bm.net
enoteware@bm.net
rschwartz@bm.net

TAUS, CEBULASH & LANDAU LLP
80 Maiden Lane, Suite 1204
New York, NY 10038
Tel: (212) 931-0704
Fax: (202) 931-0703
btaus@tcllaw.com
atamoshunas@tcllaw.com

Counsel for Direct Purchaser Class Plaintiffs and the Direct Purchaser Class

Dimitrios T. Drivas (*pro hac vice*)
Adam Gahtan (*pro hac vice*)
Raj S. Gandesha (*pro hac vice*)
Sheryn George (*pro hac vice*)
Vanessa Park-Thompson (*pro hac vice*)
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020
Tel: (212) 819-8200
Fax: (212) 354-8113
ddrivas@whitecase.com
agahtan@whitecase.com
rgandesha@whitecase.com
sgeorge@whitecase.com
vanessa.park-thompson@whitecase.com

John F. Baughman (*pro hac vice*)
Farrah R. Berse (*pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 373-3000
Facsimile: (212) 492-0008
jbaughman@paulweiss.com
fberse@paulweiss.com

Stephen E. Noona, VSB No. 25367
KAUFMAN & CANOLES, P.C.
150 West Main Street, Suite 2100
Norfolk, VA 23510
Tel: (757) 624-3000
Fax: (888) 360-9092
senoona@kaufcan.com

Counsel for Defendants Pfizer, Inc., G.D. Searle LLC, and Pfizer Asia Pacific Pte. Ltd.

Dated: November 22, 2017

/s/ William H. Monroe, Jr.
William H. Monroe, Jr. (VSB No. 27441)