**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

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| THE HOSPITAL AUTHORITY OF METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, d/b/a NASHVILLE GENERAL HOSPITAL and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN,<br><br>Plaintiffs,<br><br>v.<br><br>MOMENTA PHARMACEUTICALS, INC. and SANDOZ INC.,<br><br>Defendants. | Civil Action No. 3:15-cv-01100<br><br>Chief Judge Waverly D. Crenshaw, Jr.<br>Magistrate Judge Barbara D. Holmes |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT**

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Plaintiffs Nashville General Hospital[1] and DC 37[2] hereby respectfully move this Court to approve the settlements reached in this case with defendants Momenta Pharmaceuticals, Inc. ("Momenta") and Sandoz Inc. ("Sandoz") (together, "Settlements"). Totaling ***$120 million in cash***, they reflect an outstanding result in this fiercely contested case.[3]

## I. INTRODUCTION

This case sought recovery on behalf of thousands of hospitals, third-party payors ("TPPs") and people without insurance who paid more than they should have for the anti-coagulant drug enoxaparin. The overcharges—which lasted for at least four years—resulted from Defendants' alleged efforts to monopolize the market for generic enoxaparin, by bringing the official testing method for enoxaparin under a patent they held that would prevent anyone else from using it. The case was unique and challenging from beginning to end—according to Defendants, "the first of its kind."[4] Perhaps that is why no government enforcement agency or other direct or indirect purchaser plaintiff sought to bring it.

After four years of hard-fought litigation, Plaintiffs obtained a class-wide settlement—$120 million cash—on the eve of trial. The recovery is the second-largest indirect purchaser pharmaceutical recovery in history, and represents half of maximum single damages. If approved, none of the money will ever revert to the Defendants; the net recovery, after fees, costs and service awards, will go straight to the pockets of injured class members.

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[1] The Hospital Authority of Metropolitan Government of Nashville and Davidson County.
[2] American Federation of State, County and Municipal Employees District Council 37 Health and Security Plan.
[3] Plaintiffs have conferred with defense counsel and the relief sought is unopposed. LR 7.01(a)(1).
[4] Dkt. 363, at 1 (citing *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, No. 04-5898, 2010 WL 3855552, at *6 (E.D. Pa. Sept. 30, 2010) ("It is undisputed that 'it is immensely difficult to determine class-wide economic impact in indirect purchaser cases.'")); *see also* Dkt. 273 at 1.

The verdict of the class has been unanimous: "We approve." Not a single class member has objected to the settlements, the request for attorney's fees, costs, or the service awards. That silence speaks volumes in an indirect purchaser pharmaceutical action, where gigantic, sophisticated health insurers have in-house lawyers and outside counsel who analyze and advise them on the adequacy of proposed class settlements. Were the settlements inadequate, or the fees, costs, or service awards unfair or unreasonable, these class members would not have hesitated to let the Court know by objecting. The other relevant factors—including, *inter alia*, Plaintiffs' and counsel's zealous advocacy, the complexity and risk of trial, and the arms-length negotiations that led to the resolution—similarly support approval. The proposed distribution plan, which distributes funds *pro rata* according to dollar value of purchases in the retail and non-retail channels, is fair, reasonable, and adequate. Critically, because there were no objections, there should be no appeal: following finality, class members should receive their payments as soon as the claims have been analyzed by the claims administrator, A.B. Data.

The settlements and fee request merit approval under each of the factors set forth in newly-amended Rule 23(e), as well as those enumerated by binding Sixth Circuit precedent.[5] The following procedural steps remain to bring this litigation to a close:

*First*, the Court should enter a final approval order finding that:

a) the settlements are "fair, reasonable, and adequate,"

b) the notice to class members complied with Rule 23 and due process, and

c) the proposed plan of distribution is "fair, reasonable, and adequate."

*Second*, the Court should enter an order finding that the request for attorney's fees and costs is reasonable, and the Class Representatives should receive service awards of $200,000

[5] *See Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007) ("*UAW*").

each for their exemplary service work leading this action.

*Third*, following approval of the Settlements, notice plan, and distribution plan, Plaintiffs and Sandoz will submit, and the Court will enter, an order dismissing the case and entering judgment as to Sandoz.

*Fourth*, once Momenta makes its second payment of $20 million pursuant to the Settlement Agreements (either within five business days of final approval or, by September 5, 2020, whichever is later), Plaintiffs and Momenta will submit, and the Court will enter, an order dismissing the case and entering judgment as to Momenta.

*Finally*, once the claims period expires, the claims administrator has analyzed and adjudicated the claims, and the time period for any appeals has expired, Class Plaintiffs and A.B. Data will move the Court to order disbursement of the net settlement fund to Class members.

## II. PROCEDURAL HISTORY

### A. Litigation History

As set forth in greater detail in Plaintiffs' motion to direct notice to the class and pending motion for approval of attorney's fees (Dkts. 486 & 504, respectively), Nashville General and DC 37 represented a class of hospitals, TPPs, and people without insurance that allegedly paid inflated prices of a critical life-saving drug, enoxaparin, due to Momenta and Sandoz's alleged deception of the USP. After litigating the pleadings for several years and conducting class certification discovery, Plaintiffs first moved to certify the class on November 16, 2018. Dkt. 243. After a day of testimony, Plaintiffs proposed a change to the class definition, which led to a motion to amend the class definition and, on June 18, 2019, a second motion to certify the class. Dkt. 349. A second hearing was held on July 12, 2019, and following closing argument briefs, the Court granted the motion on September 20, 2019. Dkts. 427 & 464.

Following class certification, the case proceeded to expert disclosure and discovery.

Between May and July 2019, the parties served *twenty-six* merits expert reports from thirteen experts (each was also deposed).[6] The merits reports covered a wide range of topics, including economics and damages, substitutability of other drugs, patent infringement, FDA and USP rules and procedures, and hospital billing practices.[7]

In August 2019, Defendants moved for summary judgment (Dkt. 403), which Plaintiffs opposed on September 20, 2019 (Dkt. 433). The parties then began intensive preparations for trial, set to begin January 7, 2020. With trial preparation ongoing, the parties continued to contest class certification issues. Defendants sought a Rule 23(f) petition to the Sixth Circuit, and asked this Court and then the Sixth Circuit to stay the case pending resolution of that petition. Plaintiffs opposed these efforts. The Court declined to stay the case (Dkts. 462 & 463).

Pursuant to the Court's October 22, 2019 order, notice was sent to the litigation class on October 30, 2019[8], and the opt-out deadline expired December 19, 2019.[9] Rust Consulting, the notice provider for litigation notice, did not receive any requests to opt out.[10] A copy of the final report regarding requests for exclusions was sent to Defendants on January 8, 2020.[11] Pursuant to the Court's order directing notice to the Class, that final report is filed herewith.

### B. Settlement

#### 1. Mediation & Settlement Terms

The parties retained the Honorable Edward Infante (Ret.) of JAMS as a mediator in the

[6] Dkt. 486-2 (Glackin Decl. ISO Motion to Direct Notice) ¶¶ 13-15. These 26 reports were in addition to the five reports served in connection with class certification, for a total of 31.
[7] Dkt. 486-2 ¶¶ 13-14.
[8] Full Final Report and Updated Declaration of Rebecca A. Blake for Rust Consulting, Inc. ("Blake Decl.") ¶ 6.
[9] Dkt. 464 ¶ 7; Blake Decl. ¶ 12.
[10] Blake Decl. ¶ 13.
[11] *See* Momenta Settlement Agreement ¶ 31(a); Sandoz Settlement Agreement ¶ 30(a); Blake Decl.

summer of 2019 and held an unsuccessful mediation in July. On November 13, 2019, the parties met again and that evening reached a settlement to resolve the litigation for cash payments by Defendants totaling $120 million. After a month of intense negotiations over specific terms, the Settlement Agreements were signed December 10, 2019.

The settlements with Momenta and Sandoz are nearly identical in all substantive respects (other than payments) and resolve the claims of the certified class against both Defendants. Sandoz will pay a total of $85 million within five business days of final approval,[12] and Momenta will make its first payment of $15 million at the same time, and its final payment of $20 million the later of September 5, 2020 or five days after final approval.[13] In return for the cash payments totaling $120 million, the class will release certain claims against Defendants.[14]

**2. Preliminary Approval and Notice of Settlements**

Plaintiffs moved to direct notice to the class of the proposed settlements on December 20, 2019, and on January 3, 2020, the Court granted the motion. Dkt. 488, *as amended*, Dkt. 492. The Court's order directing notice ("Notice Order") appointed the firm A.B. Data, Ltd. ("A.B. Data") as Notice and Claims Administrator and set a schedule for notice. *Id*.

A.B. Data provided notice as directed by the Court:[15]

**Publication Notice**. Working with Class Counsel, A.B. Data prepared a Summary Notice, which was submitted to USA Today and PR Newswire for publication on January 24, 2020.[16] Beginning the same day, A.B. Data coordinated at least 211 million internet banners and

[12] Sandoz Settlement Agreement ¶ 11. Sandoz advanced $300,000 for notice. *Id*. ¶ 11.
[13] Momenta Settlement Agreement ¶ 11. Momenta advanced $200,000 for notice. *Id*. ¶ 11.
[14] Sandoz Settlement Agreement ¶ 1(v); Momenta Settlement Agreement ¶1(v) ("Released Claims"). The terms of the release are set forth fully in the Settlement Agreements.
[15] *See* Declaration of Eric J. Miller Regarding A) Mailing of Notice; B) Publication of Summary Notice; and C) Report on Objections and Claims Received to Date ("Miller Decl.").
[16] Miller Decl. ¶¶ 4-5 & Exhibit A (Summary Notice).

Facebook ads to appear on popular websites through February 22, 2020 across the U.S.[17] When clicked, the banners directed potential members of the Class to the case-specific website or Facebook page. In addition, A.B. Data acquired sponsored search listings on Google AdWords so a link to the case website would appear on search result pages when searching for key words like "deep vein thrombosis."[18] Finally, a thirty-day banner ad campaign appeared on the website ThinkAdvisor.com/life-health.[19]

**Direct Mail**. A.B. Data mailed a Postcard Notice[20] directly to Class members. For TPP Class members, A.B. Data utilized its proprietary TPP Mailing List, compiled from publicly available sources such as U.S. Department of Labor Form 5500 filings and the Pharmacy Benefit Management Institute, and informed by A.B. Data's past work administering notice and claims in pharmaceutical antitrust cases.[21] The Postcard was mailed to a total of 41,423 TPPs.[22] For hospitals, A.B. Data purchased a mailing list of 24,426 contacts from InfoUSA to reach hospitals, medical centers, and healthcare facilities in accordance with the Notice Plan.[23] A.B. Data mailed notice directly to 65,846 Class members by First-Class Mail on January 24, 2020.[24] When the Court approves the supplemental notice to hospitals, A.B. Data will mail a second postcard notice to hospitals.[25]

**Website & Telephone**. The website designated for the case is

[17] A sample internet banner for consumers is attached as Exhibit B to the Miller Declaration.
[18] Miller Decl. ¶ 6.
[19] The banner ads for this campaign are attached as Exhibit C to the Miller Declaration.
[20] Miller Decl., Exhibit D.
[21] Miller Decl. ¶ 8.
[22] Miller Decl. ¶ 8.
[23] Miller Decl. ¶ 9.
[24] Miller Decl. ¶ 11.
[25] Dkt. 510.

www.DVTMedsLawsuit.com.[26] The website includes information about the case including the deadline to object, the claim filing deadline, the date and time of the Final Approval Hearing, and Class Counsel's request for attorney's fees and costs and service awards.[27] The website also provides access to the Notice and Claim Forms, the proposed Distribution Plan, and allows Class members to submit claims online.[28]

A.B. Data also established a telephone hotline. The automated attendant answers calls and presents callers with a series of choices in response to basic questions and allows for callers to speak to a live operator during business hours.[29]

### 3. Class Action Fairness Act Notice

The Class Action Fairness Act ("CAFA") requires that "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official[.]"[30] Momenta provided notice on December 27, 2019 and Sandoz provided notice on December 30, 2019.[31] No attorneys general have submitted statements of interest or objections.[32]

### 4. Class Counsel's Motion for Fees, Costs, and Service Awards

On March 2, 2020, Class Counsel moved for an award of attorney's fees, costs, and Class Representative service awards. Dkt. 504. Class Counsel requests a fee award of one-third of the

[26] The same website was used for Court-ordered notice to the Class of certification in the Fall of 2019. *See* Final Report and Updated Declaration of Rebecca A. Blake for Rust Consulting, Inc. ("Blake Decl.") ¶ 10.
[27] Miller Decl. ¶ 13.
[28] Miller Decl. ¶ 13.
[29] Miller Decl. ¶ 12.
[30] 28 U.S.C. § 1715(b), (d) (CAFA notice requirement must be met before final approval).
[31] *See* Dkts. 489; 487.
[32] Declaration of Brendan P. Glackin In Support of Final Approval ("Glackin Decl. ISO Final Approval), ¶ 4.

settlement ($40 million) and costs of $2,269,268.79 incurred while pursuing the action. The motion also seeks service awards of $200,000 each for Nashville General and DC 37. The motion was posted to the settlement website the following morning, March 3, 2020.[33]

**5. No Class Member Objected**

Objections to the Settlements and the requests for fees, costs, and service awards were due March 16, 2020. Dkt. 492. No class member objected.[34]

**6. Claims**

The claims deadline was originally July 3, 2020. Dkt. 492. However, in light of the COVID-19 crisis, Plaintiffs moved the Court to extend the claims deadline to September 1, 2020. Dkt. 510. The Court has yet to rule on the request.

As of April 24, 2020, 171 claims have been filed by TPPs, 8 claims have been filed by hospitals, and 6,812 claims have been filed by consumers; the claims total over $146 million.[35] Plaintiffs anticipate that many more claims will be filed in the coming months. Large TPPs and claims aggregators often wait until shortly before the claims deadline to file their claims.[36] For example, Plaintiffs have been contacted by one of the largest TPPs in the country to answer questions in connection with its claims, which it is preparing, but has not yet filed.[37] Plaintiffs were also contacted by and answered questions for a claims aggregator working on behalf of hospitals to gather and submit claims.[38]

**7. Plan of Distribution**

Plaintiffs submitted the proposed plan of distribution to the Court with their motion to

[33] Miller Decl. ¶ 13.
[34] Glackin Decl. ISO Final Approval ¶ 3; Miller Decl. ¶ 15.
[35] Miller Decl. ¶ 16.
[36] Miller Decl. ¶ 16.
[37] Glackin Decl. ISO Final Approval ¶ 5.
[38] *Id*.

direct notice to the Class,[39] and reattach it here (Glackin Decl. Ex. A). The proposed distribution plan apportions the settlement fund between the retail and non-retail channels, and within those channels between Lovenox and generic enoxaparin, based on each category's share of the class wide damages.[40] Claimants will be paid on a *pro rata* basis based on dollar value of purchases net of direct manufacturer rebates, refunds, discounts, and other appropriate offsets determinable from their transactional data.[41] If there are extra funds in any category (because the allocated funds exceed claims in that category), the extra funds will roll over to the other categories.[42]

## III. LEGAL STANDARD

A class action may not be settled without notice to the class and court approval.[43] A final approval hearing is required by law.[44] In the Sixth Circuit, the following factors further guide the court's determination as to whether a class action settlement is "fair, reasonable, and adequate": (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.[45]

Newly-amended Rule 23(e)(2) requires analysis of a similar set of factors:

> (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; (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; and (iv) any

[39] *See* Motion to Direct Notice to Class, Dkt. 486, Glackin Decl. Ex. C (distribution plan).
[40] Glackin Decl. Ex. A.
[41] *Id*.
[42] *Id*.
[43] Fed. R. Civ. P. 23(e) .
[44] *Id.*
[45] *UAW*, 497 F.3d at 631.

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).

## IV. ARGUMENT

Each of the relevant factors favors approval of the Settlements.

### A. The Settlement Is Fair, Reasonable, and Adequate for the Class

#### 1. Absent Class Members Unanimously Support the Settlement

Among the seven factors the Sixth Circuit instructs district courts to consider in evaluating a proposed settlement is the "reaction of absent class members."[46] An "overwhelming positive class response highlights the fairness of the settlements to unnamed class members and weighs heavily in favor of approval of the settlements."[47] Class member reaction is measured by the number of opt-outs and objections—a low number of both favors final approval.[48] Here, ***the Class unanimously supports the Settlement***: no class member objected to either the settlement or the request for fees, costs, and service awards.[49]

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[46] *Id.*

[47] *In re Se. Milk Antitrust Litig.*, No. 2:07-cv-208, 2012 WL 2236692, at *34 (E.D. Tenn. June 15, 2012).

[48] *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("That the overwhelming majority of Class Members have elected to remain in the Settlement Class, without objection, constitutes the 'reaction of the class,' as a whole, and demonstrates that the Settlement is 'fair, reasonable, and adequate.'"); *Office & Prof'l Emps. Int'l Union v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 311 F.R.D. 447, 458 (E.D. Mich. 2015) (objection from "[o]nly one class member" is "extremely minimal level of opposition" and "is an indication of [the] settlement's fairness") (internal quotation marks omitted); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming district court's approval of settlement where forty-five of 90,000 class members objected to the settlement, and 500 class members opted out); *In re Toys R Us-Del, Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 456 (C.D. Cal. 2014) ("The negligible number of opt-outs and objections indicates that the class generally approves of the settlement.").

[49] Class members could opt out of the litigation class by December 19, 2019. Consistent with the discretion afforded it by Rule 23(e)(4), the Court declined to order a second opt-out period when

*Footnote continued on next page*

Not a single objection would be unusual in any class of thousands, but is particularly rare in an indirect purchaser pharmaceutical action. A large portion of the class is made up of highly sophisticated entities—TPPs and hospital systems—that have lawyers who can, and do, analyze a class and potential claims, and the recovery obtained. This includes entities like UnitedHealth Group (16.1 million covered lives in 2012[50]), Aetna (5.4 million covered lives in 2012[51]); Blue Cross/Blue Shield (45.1 million covered lives in 2012[52]), Cigna (1.9 million covered lives in 2011[53]), and Kaiser Permanente (8.88 million covered lives in 2012[54]). These five entities alone covered over 42% of privately insured individuals in the United States in 2012, during the class period.[55] Many of the hospitals that will recover from the Settlements are similarly large: for example, HCA Healthcare based in Nashville, Tennessee, manages hundreds of hospitals and surgery centers[56], and its 2019 revenues of $51.33 billion[57] place it as number 67 on the Fortune 500 list of largest U.S. companies by revenue.[58]

In fact, active participation by large TPPs is commonplace in pharmaceutical class

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*Footnote continued from previous page*
it directed notice to the Class of the settlement. *See also Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 354 (6th Cir. 2009) (courts "not compelled" to require additional opt-out from settlement).
[50] 2012 UnitedHealth Group Form 10-K, at p. 3.
[51] 2012 Aetna Annual Report, at p. 11.
[52] *See* Debra A. Donahue, *Blue Cross Blue Shield Plans Saw Enrollment Gains in 2012*, Mark Farrah Associates (Jan. 4, 2013), *available at* https://www.markfarrah.com/uploaded/mfa-briefs/blue-cross-blue-shield-plans-saw-enrollment-gains-in-2012.pdf (reporting that Blue Cross Blue Shield Plans covered 96 million lives, and that Blue Cross Blue Shield bore the risk on 47% of them, i.e., 45.1 million).
[53] 2011 CIGNA Form 10-K, at p. 48.
[54] CHFFA Revenue Bond Financing Program, Executive Summary—Kaiser Foundation Hospitals, https://www.treasurer.ca.gov/chffa/meeting/staff/2013/20130409/390.pdf.
[55] *See* Carmen Denavas-Walt et al., "Income, Poverty, and Health Insurance Coverage in the United States: 2012," United States Census Bureau, at 67 (Sept. 2013) (listing the number of privately insured persons in the United States as 198,812,000), *available at* https://www2.census.gov/library/publications/2013/demo/p60-245/p60-245.pdf.
[56] HCA Healthcare 2019 Form 10-K, at 1.
[57] HCA Healthcare 2019 Form 10-K, at 51.
[58] https://fortune.com/fortune500/2019/hca-healthcare/ (last accessed Apr. 24, 2020).

actions, and often prolongs litigation. For example, in *Lidoderm*, several of the largest insurers in the country sought to exclude both themselves and their administrative-services only ("ASO") plans.[59] This led to more litigation and ultimately an evidentiary hearing and order concluding the insurers did not have standing to exclude ASO entities.[60] The same happened in *Aggrenox* after six large insurers represented by the same law firm sought exclusion from the settlement.[61] In the *Skelaxin* end-payor action in the Eastern District of Tennessee, Judge Collier cancelled the settlement hearing and was preparing to hold an evidentiary hearing to evaluate the authority of insurers to opt-out on behalf of ASO plans when the insurers withdrew their exclusion requests.[62] In the *Thalomid* action in New Jersey, more than 80 class members, including several large insurers, opted out, prompting the defendant Celgene to exercise its option to terminate the settlement.[63] While the parties ultimately negotiated a reduced settlement for the remaining class,[64] the litigation is far from over, as at least one large insurer, UnitedHealth, has already filed suit seeking individual recovery.[65]

Here, the deadline to opt out of the class expired prior to the class receiving notice of the settlements. However, if the settlements were inadequate or unfair—or the requested fees, costs,

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[59] *In re Lidoderm Antitrust Litig.*, 14-md-02521 (N.D. Cal. Oct. 30, 2017), Dkt. 893 (requesting adjudication of opt-outs by large insurers including Aetna, Anthem, CIGNA, and several Blue Cross/Blue Shield entities, among others). An ASO plan is funded by the employer, who bears the insurance risk.

[60] *Lidoderm*, Dkt. 946 ("Order Regarding Opt-Outs").

[61] *In re Aggrenox Antitrust Litig.*, 14-md-2516 (D. Conn. June 13, 2018), Dkt. 804-1 (insurers Aetna, Inc., Blue Cross and Blue Shield of Florida, Inc., Blue Cross and Blue Shield of Vermont, Inc., BlueCross BlueShield of Tennessee, CareFirst of Maryland, Inc., Group Hospitalization and Medical Services, Inc., and Cigna Health and Life Insurance Co. requested exclusion).

[62] *In re Skelaxin (Metaxalone) Antitrust Litig.*, MDL Case No. 1:12-MD-2343 (E.D. Tenn. Feb. 9, 2015), Dkt. 845.

[63] *In re: Thalomid & Revlimid Antitrust Litig.*, No. 2:14-cv-06997 (D.N.J. Dec. 29, 2019), Dkt. 300.

[64] *Id.*, Dkt. 312 ($34 million settlement announced April 2020).

[65] *See, e.g., United HealthCare Services Inc. v. Celgene Corp.*, No. 0:20-CV-00686 (D. Minn.).

and service awards were unreasonable—these class members unquestionably have the tools to advocate for themselves. In addition to objecting this could have included—as an alternative remedy—a request for exclusion from the settlement.[66] Indeed, in anticipation of at least the possibility of significant opt-outs, the parties negotiated (and the Notice Order implemented) a detailed procedure by which the notice administrator would seek information from opt-outs and compile the findings into an Exclusion Report and Recommendation, to be submitted to the Court for its approval.[67] But because the same large insurers that opted out of other litigation chose instead to participate in the settlement, that procedure went unused. In approving the *Cardizem* settlement, the court cited the fact that from the "large, and largely sophisticated, constituency" of TPP class members, only five opted out.[68] That is even truer here, where not a single class member (TPP, hospital, or consumer) sought exclusion or objected.[69] This factor strongly supports approval of the Settlements, and the requested fees, costs, and service awards.

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[66] *See, e.g.*, *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (district courts have discretion to permit late opt outs).

[67] *See* Momenta Settlement Agreement ¶¶ 4(b), 31(b); Sandoz Settlement Agreement ¶¶ 4(b), 30(b); *see also* Notice Order ¶ 13 (requiring submission of Exclusion Report and Recommendation to Court).

[68] *Cardizem*, 218 F.R.D. at 526; *see also In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 478–79 (S.D.N.Y. 1998) (fact that "none of the thousands of institutional Class members, who have the largest financial stake, have objected to the Proposed Settlements" supported approval); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 502 (E.D. Mich. 2000) ("that not one class member objected to the settlement agreement [is] most persuasive").

[69] Courts should also consider the opinions of class counsel and class representatives. *UAW*, 497 F.3d at 631. "Plaintiffs here have been represented by well qualified attorneys with extensive experience in litigating and settling complex class action antitrust actions . . . Their collective judgment that the settlement is in the best interest of class members weighs heavily in favor of the Court's final approval of the agreement." *In re Se. Milk Antitrust Litig.*, No. 2:07-CV-208, 2013 WL 2155379, at *5 (E.D. Tenn. May 17, 2013); *see also Office & Prof'l Emps.*, 311 F.R.D. at 457 ("Class counsel are highly experienced; they have carefully assessed the proposed settlement; and they have cogently explained why they believe the settlement to be in the best interests of the Class.").

### 2. Nashville General, DC 37, and Class Counsel's Zealous Advocacy

The Court is familiar with the Class Representatives and Class Counsel's zealous advocacy in this case. The case, and the class, would not exist—and the class could not expect any recovery, much less $120 million—if Class Counsel, Nashville General, and DC 37 had not taken on the burden of pursuing the claims on their behalf. Even today, no other purchaser of enoxaparin (direct or indirect) has attempted to bring similar claims.

Class Counsel and Plaintiffs pursued the case despite repeated challenges from Defendants, beginning with the pleadings. Defendants challenged standing, claimed *Noerr-Pennington* immunity, and asserted the Court had neither personal nor subject-matter jurisdiction over certain claims. The case faced serious setbacks, including dismissal of the damages claims under the Sherman Act, and then denial of Plaintiffs' first motion to certify the class. Plaintiffs and Class Counsel redoubled their efforts, pouring an immense amount of time and resources into the case in the hopes of achieving recovery for indirect purchasers of enoxaparin. Plaintiffs negotiated for production of over half a million documents (more than 2.6 million pages), which they reviewed and analyzed to support their certification motion, oppose summary judgment, and prepare claims for trial. They deposed ten fact witnesses and analyzed more than 50 deposition transcripts taken in the Massachusetts actions for use in this case. To ensure adequate production, they brought several discovery disputes to the Magistrate Judge for resolution—succeeding on nearly every one. Six experts prepared a total of seventeen reports, and counsel took and defended fourteen expert depositions.

The schedule, in particular later in the case, was grueling: from May to November 2019, class counsel (a single law firm) worked at a breakneck pace to amend the class definition and move a second time to certify the class, complete fact discovery and depositions, exchange 26 merits reports with Defendants and then take or defend depositions of thirteen experts, oppose

summary judgment, oppose Defendants' Rule 23(f) petition and associated stay requests, and—finally—prepare for trial. Their advocacy on behalf of the class during these critical months laid the groundwork for the extraordinary recovery.

Nashville General and DC 37's commitment to the cause far surpassed the usual class representative role. Nashville General produced a total of 14,071 documents and purchase and payment data from 2010 through 2018[70], and DC 37 produced 2,601 documents and complete reimbursement data reflecting purchases of enoxaparin and Lovenox for the period 2011 through 2016.[71] They sat for numerous depositions (11 total throughout the course of the case), as well as conferred with class counsel on litigation strategy and settlement negotiations.[72] Most significant, however, were the substantive contributions each Class Representative made to supporting class certification, including the testimony of two Nashville General employees at evidentiary hearings on issues of pharmacy and billing practices.[73] Documents, testimony, and data produced by Nashville General and DC 37 revealed important facts regarding pass-through in the non-retail and retail channels, which Dr. Lamb relied on in forming his opinions. The Class Representative contributions were critical to certifying the class.

### 3. The Settlements Were Negotiated at Arms-Length After Four Years of Contentious Litigation, Shortly Before Trial

The Settlement Agreements came only after over four years of hard-fought litigation and extensive discovery, and are the product of arms-length negotiations without evidence of fraud or collusion.[74] "Courts respect the integrity of counsel and presume the absence of fraud or

[70] Dkt. 486-2 ¶ 18.
[71] Dkt. 486-2 ¶ 19.
[72] *Id.* ¶¶ 18-19.
[73] *Id.* ¶ 12.
[74] Fed. R. Civ. P. 23(e)(2)(B) . *See also Priddy v. Edelman,* 883 F.2d 438, 447 (6th Cir. 1989) ("In evaluating a proposed settlement of a class action, the district court is required to examine

*Footnote continued on next page*

collusion in negotiating the settlement, unless evidence to the contrary is offered."[75] Here, experienced counsel for Plaintiffs and Defendants negotiated over two separate sessions, with the help of a well-respected neutral third-party mediator, Judge Edward Infante.[76] Attorney representatives of Nashville General and DC 37 attended the mediation in person and participated actively.[77] The settlements have none of the "hallmarks" of potentially collusive settlements—such as discussion of attorney's fees or an agreement from Defendants about them, or reversion of unused funds to Defendants—that merit further scrutiny.[78]

**4. The Class's Recovery Is Outstanding**

The Settlements provides for a $120 million cash payment into a common fund for class member recovery, less Court-approved attorney's fees, costs, and Class Representative service awards. No amount of the settlement funds will revert to Defendants. The cash payment, more than 50% of single damages, represents an extraordinary recovery and should be approved.

**a. The Case Faced Potential Risks**

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from

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the terms of the settlement and the process by which the settlement was arrived at, to make sure that the terms are reasonable and that the settlement is not the product of fraud, overreaching, or collusion."); William Rubenstein et al., *Newberg on Class Actions* § 13:14 (5th ed. 2019) ("*Newberg*") ("The primary procedural factor courts consider in determining whether to preliminarily approve a proposed settlement is […] arms-length non-collusive negotiations.").

[75] *Se. Milk*, 2013 WL 2155379, at *6.

[76] *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 350-51 (N.D. Ohio 2001) ("Moreover, when a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair."); *Se. Milk*, 2013 WL 2155379, at *6 ("Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.") (internal quotation marks omitted).

[77] Dkt. 486-2 ¶¶ 18-19.

[78] *UAW*, 497 F.3d at 628; *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 308 (3d Cir.2005) (noting the "special danger of collusiveness when the attorney fees . . . were negotiated simultaneously with the settlement").

which the benefits of the settlement must be measured."[79] The Sixth Circuit also instructs courts to consider "the risk associated with the expense and complexity of litigation."[80] This factor weighs heavily in favor of approving the Settlements.

"[T]his extraordinarily complex case raised a multitude of difficult issues in the areas of antitrust law, patent law, and the laws governing pharmaceutical drugs,"[81] and Plaintiffs faced "enormous risk" at trial.[82] As with any indirect purchaser case, Plaintiffs took on the "immensely difficult"[83] challenge of proving pass-through. But the charge was even more daunting in this case, which presented a novel theory of antitrust liability premised on the alleged exclusion of a *second* generic competitor by the first generic. Defendants highlighted this rarity at every turn,[84] asserting "this case is the first of its kind."[85] Defendants claimed that "[t]his case is different from all other pharmaceutical cases" because while "[m]ost pharmaceutical cases deal with simple, oral-prescription drugs distributed by chain pharmacies in the 'retail' channel," "enoxaparin distribution is far more complex and includes distribution in multiple channels."[86] Despite certification of the class, the risk that the jury might accept Defendants' arguments at trial remained, because "[i]t is for the jury to determine whether the potential class members

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[79] *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984) (citation omitted).
[80] *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992). *See also* Fed. R. Civ. P. 23(e)(2)(C)(i) ("the costs, risks, and delay of trial and appeal").
[81] *Cardizem*, 218 F.R.D. at 533.
[82] *Se. Milk*, 2013 WL 2155379, at *4.
[83] Dkt. 361 at 2.
[84] Dkt. 273 at 2 n.4 ("[M]ost delayed-entry cases concern delay of a first generic product, which makes some sense from an antitrust perspective because the brand manufacturer controls 100% of the molecule before generic entry…").
[85] Dkt. 363 at 1 (citing *Sheet Metal Workers*, 2010 WL 3855552, at *6 ("It is undisputed that 'it is immensely difficult to determine class-wide economic impact indirect purchaser cases.'")); *see also* Dkt. 273 at 1.
[86] Dkt. 273 at 2-3 (emphasis excluded) ("hospitals (which are not traditional 'end payors') are never in the same class as end-payor consumers and patients that pay hospital bills.").

were injured, and if so, to what extent; or to determine that they were not."[87]

Defendants mounted vigorous defenses to liability, as evidenced by the 31 expert reports from 14 experts the parties exchanged throughout the case. These reports covered a range of topics including economics and damages, substitutability of other drugs, patent infringement, FDA and USP rules and procedures, and hospital billing practices. In particular, Defendants focused on causation and damages, given that Amphastar was excluded from the market for just three and a half months, yet Plaintiffs (and their expert) asserted the short delay nevertheless had long-term effects on the market. According to Defendants, Dr. Lamb also used the wrong data to calculate damages in the retail channel and pass-through was not 100%; therefore, they claimed, class members in the retail channel were not injured, or at most damaged significantly less. They also argued that the damages period was too long. Adjustments for these and other purported errors, asserted Defendants, meant the total class-wide damages did not exceed $9 million. Thus, "[g]iven the complexity of the issues in the litigation and their hotly contested nature, as well as the inherently unpredictable nature of a jury trial, there [wa]s clearly a risk that plaintiffs would receive little or nothing at trial."[88] And even if the jury had sided with Plaintiffs on everything but Defendants' class period defense, the class recovery (with exemplary damages[89]) would not have exceeded $21.6 million.

Had Plaintiffs taken the case to trial, the case would not end—and the class would not recover—with a favorable verdict in early 2020. If Plaintiffs prevailed, Defendants doubtless

[87] Dkt. 426 at 33.
[88] *Se. Milk*, 2013 WL 2155379, at *4; *see also id.* ("All litigation poses such risks of course but antitrust litigation especially so.").
[89] The various *Illinois Brick*-repealer jurisdictions have different levels of exemplary damages. Some have mandatory trebling, for some it is doubling, for some there are additional proof requirements (e.g., willfulness) to receive exemplary damages; and a few do not offer exemplary damages at all.

would have appealed any number of issues, including class certification (indeed, they had already sought a Rule 23(f) petition challenging it before trial). An appeal would have meant years of delay for class members to be paid (if they recovered at all), and would have occupied valuable judicial resources.[90] Courts in this Circuit recognize "a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources."[91] That is particularly true of pharmaceutical antitrust actions like this one—as the Eastern District of Michigan recognized in approving the *Cardizem* settlement:

> Settlement of this antitrust action serves the public interest by ensuring effective enforcement of the antitrust laws and deterrence of anti-competitive conduct in the marketplace. *See Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co*., [381 U.S. 311, 318 (1965)]. This is particularly important in the pharmaceutical industry where the potential harm to society caused by agreements to prevent or delay entry of cheaper generic products has recently received considerable attention.[92]

In light of these considerations, the class's recovery of half of single damages represents an outstanding result. The total cash payment of $120 million is the second largest pharmaceutical indirect purchaser recovery (only *Cipro*, another of class counsel's cases, recovered more—but after 17 years of litigation[93]). All but one other case have settled for less than $100 million.[94]

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[90] *See Sheick v. Auto. Component Carrier LLC*, No. 2:09-CV-14429, 2010 WL 4136958, at *21 (E.D. Mich. Oct. 18, 2010).
[91] *Cardizem*., 218 F.R.D. at 530 (internal quotation marks omitted).
[92] *Id*. at 530.
[93] *Cipro Cases I & II*, JCCP Nos. 4154 & 4220 (Cal. Super. Ct.) (total of $399 million for indirect purchasers).
[94] *See, e.g., In re Lidoderm Antitrust Litig*., 14-md-02521, 2018 WL 4620695, at *2 (N.D. Cal. Sept. 20, 2018) ($105 million); *In re Cardizem CD Antitrust Litig*., 218 F.R.D. 508 (E.D. Mich. 2003) ($80 million); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 74 (D. Mass. 2005) ($75 million); *In re Aggrenox Antitrust Litig*., No. 14-md-2516, (D. Conn. July 19, 2018), Dkt. 821 ($54 million); *In re Solodyn Antitrust Litig.*, No. 14-md-02503 (D. Mass. July 18, 2018), Dkt. 1175 ($43 million); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 394 (D.D.C. 2002) ($35 million for end-payor third-party payors); *In re Wellbutrin XL Antitrust*

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The $120 million recovery is even more significant in that it represents *over half of the class's single damages*, as analyzed by Plaintiffs' expert Dr. Lamb—and *13 times* Defendants' damages figure of $9 million. Such recoveries are rare. *Lidoderm*'s $105 million settlement was 46% of plaintiffs' total estimated damages.[95] *Solodyn*'s $43 million settlement was a small fraction of plaintiffs' estimated damages of $500-$790 million.[96] In *Relafen*, the District of Massachusetts approved a $75 million settlement that represented 26% of plaintiffs' expert estimated damages (and 55% of defendants' expert's damages).[97] *Warfarin*'s recovery of $44.5 million, "more than 33% of the maximum possible recovery," was similarly approved.[98] Recovery of half of single damages is an "excellent" result by any measure.[99]

**b. The Proposed Fees, Costs, and Service Awards Are Reasonable**

Rule 23(e)(2) instructs that courts consider the "terms of the proposed award of attorney's fees, including timing of payment" in assessing a proposed settlement. Class counsel separately filed a motion for award of attorney's fees, costs, and service awards for the Class Representatives.[100] Any attorney's fees and costs will be paid from the gross settlement upon the Court's final approval of the Settlements.[101]

In view of the outstanding results achieved in the case for the Class and the risk Class

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*Litig.*, 2:08-cv-02433 (E.D. Pa. July 22, 2013), Dkt. 473 ($11.75 million); *In re Loestrin 23 Fe Antitrust Litig.*, No. 13-md-02472 (D.R.I. Feb. 6, 2020), Dkt. 1400 (settlement of $62.5 million, added to earlier settlement of $1 million, announced in January 2020); *In re: Thalomid & Revlimid Antitrust Litig.*, No. 2:14-cv-06997 (D.N.J.) ($34 million settlement announced April 2020).

[95] *Lidoderm*, 2018 WL 4620695, at *2.

[96] *Solodyn*, 14-md-02503 (D. Mass. Oct. 15, 2017), Dkt. 682.

[97] *Relafen*, 231 F.R.D. at 74.

[98] *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 258 (D. Del. 2002).

[99] *In re Polyurethane Foam Antitrust Litig.*, 135 F. Supp. 3d 679, 689 (N.D. Ohio 2015).

[100] Dkt. 504.

[101] Momenta Settlement Agreement ¶¶ 24; Sandoz Settlement Agreement ¶¶ 23.

Counsel took in pursuing the case alone, Class Counsel have requested an award of one-third of the settlement fund ($40 million) and reimbursement of $2,269,268.79 in costs expended for the litigation. As explained in the fee brief, the fee is consistent with the factors articulated by the Sixth Circuit in *Ramey v. Cincinnati Enquirer, Inc*.[102] In particular, the fee compensates Class Counsel for the extraordinary result obtained in this unique case: the second largest class recovery ever in an indirect purchaser pharmaceutical case, and over 50% of total damages for the four-year class period. That recovery comes only because Class Counsel took on the heavy cost of litigation, with risk of total loss. Since October 2015, a single law firm invested tens of thousands of hours of time from 76 different timekeepers, and millions of dollars of cash completely on contingency.[103] At several points in the litigation—when the damages claims were dismissed, and when the first class certification motion failed—the case stood in grave peril, with a threat of no recovery. Nevertheless, Class Counsel pushed forward through a crushing schedule nearly to the eve of trial in order to obtain the best result possible for the Class. In antitrust class actions courts regularly award a one-third fee for less impressive results on less risky claims.[104] For example, in *Lidoderm* the Court awarded $35 million from a $105 million fund that represented less than half of single damages, despite the presence of significant

[102] 508 F.2d 1188, 1196 (6th Cir. 1974).
[103] *See generally* Dkts. 504-1; 504-2.
[104] *See, e.g.*, *In re Se. Milk Antitrust Litig.*, No. 07-208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013) (33% of $158.6 million); *In re Titanium Dioxide Antitrust Litig*., No. 10-cv-00318 (RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (33% of $163.5 million); *In re Urethane Antitrust Litig.*, No. MDL 1616, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (33% of $835 million); *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839, at *9-10 (D.D.C. July 16, 2001) (33+% of $365 million); *In re Relafen Antitrust Litig*., No. 01-12239 (D. Mass. Apr. 9, 2004), Dkt. 297 at 7-8 (33% of $175 million); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-CV-83, 2014 WL 2946459, at *3 (E.D. Tenn. June 30, 2014) (33% of $73 million). *See also Schuh v. HCA Holdings, Inc.*, No. 11-1033 (M.D. Tenn. Apr. 14, 2016), Dkt. 563 (awarding 30% of $215 million settlement fund).

opt-outs.[105] The requested fee is reasonable; indeed, no class member objected to it.

The motion also requests a $200,000 service award each for Nashville General and DC 37. Again, no class member objected to the request. Indeed, these substantial service awards are entirely fair and reasonable given the class representatives' extraordinary contribution to enforcement of the antitrust laws. There was no government enforcement action here; but for the service of the class representatives, the misconduct would have gone unpunished (other than the smaller Amphastar settlement), future antitrust violations undeterred, and the class uncompensated.[106] "[C]ourts have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives"[107] and "recognize their willingness to act as a private attorney general."[108] Nashville General and DC 37 took up the banner of enforcement when others did not. In that role, they committed hundreds of hours of time and effort to the case, producing thousands of documents and comprehensive purchase and billing data, sitting for depositions and, in the case of Nashville General, testifying at two separate class certification hearings.[109] Representatives from both Plaintiffs were closely involved in strategy and mediation discussions throughout the case, and key to achieving the generous class recovery. While the Sixth Circuit has neither approved nor disapproved service awards as a general matter,[110] it has recognized that "there may be circumstances where

[105] *Lidoderm*, 2018 WL 4620695, at *2; *id.*, Dkts. 894 & 946.
[106] *See In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004) (nothing that incentive payments were "particularly appropriate in this case because there was no preceding governmental action alleging a conspiracy").
[107] *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003).
[108] *Rodriguez v. West Pub'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009).
[109] *See generally* Dkts. 504-1; 504-2; 504-3; 504-4.
[110] *See Shane Grp. Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 310-11 (6th Cir. 2016).

incentive awards are appropriate."[111] District courts in this Circuit regularly grant incentive awards upon a showing that the representative plaintiff actively committed "time and effort [] pursuing the litigation"[112] and conferred a benefit on the class. The class benefits here, including recovery that will reach into the tens of millions for certain large class members, more than merit a significant service award for the class representatives.

**c. There Are No Other Agreements Related to the Settlements**

Rule 23(e)(3) requires parties to identify "any agreement made in connection with" the settlement. Plaintiffs have not entered into any such agreements.[113]

**B. The Plan of Distribution Is Fair, Reasonable, And Adequate**

The Court must also determine that the distribution plan is fair, reasonable, and adequate.[114] "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel."[115] *Pro rata* "distribution has frequently been determined to be fair, adequate, and reasonable in comparable cases,"[116] including pharmaceutical cases.[117]

Plaintiffs submitted the proposed plan of distribution to the Court with their motion to

[111] *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013) (internal quotation marks omitted).
[112] *In re UnumProvident Corp. Derivative Litig.*, No. 02-386, 2010 WL 289179, at *9 (E.D. Tenn. Jan. 20, 2010); *see also, e.g.*, *Se. Milk*, 2013 WL 2155387, at *8-9.
[113] As noted in the motion to direct notice, the parties executed a supplemental agreement governing the threshold for opt-outs, but no class member opted out of the class. Such agreements are typically kept confidential and not filed in the public record.
[114] Fed. R. Civ. P. 23(e)(2)(C)(ii) .
[115] *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 519 (E.D.N.Y. 2003) (quoting *In re Am. Bank Note Holographics, Inc.*, 127 F.Supp.2d 418, 429–30 (S.D.N.Y.2001)).
[116] *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 14-CV-2058 JST, 2015 WL 9266493, at *8 (N.D. Cal. Dec. 17, 2015) (collecting cases).
[117] *Lidoderm*, No. 3:14-md-02521-WHO (N.D. Cal. Sept. 20, 2018), Dkt. 1056 ¶ 14.

direct notice to the class.[118] No class member objected to it. The plan distributes the settlement fund between the retail and non-retail channels, and within those channels between Lovenox and generic enoxaparin, based on each category's share of the class-wide damages, as follows:[119]

| | Retail Channel | Non-Retail Channel |
|---|---|---|
| Brand | 2.9% | 20.1% |
| Generic | 58.7% | 18.3% |

This reflects the fact that prices of branded and generic enoxaparin had different relationships in these channels, particularly due to generic automatic substitution laws in the retail channel. If the initial proposed distribution to an allocation category would result in the class members in a particular category receiving more than the amount that they paid for branded Lovenox or generic enoxaparin, then the amount initially allocated to that category that is in excess of those class members' collective payments will be divided proportionally between remaining allocation categories.[120] Class members will be paid on a *pro rata* basis based on dollar value of purchases net of direct rebates, refunds, discounts, and other appropriate offsets that can be determined from their data.[121] Extra funds in any category will roll over to the other categories.[122]

The distribution plan is fair, reasonable, and adequate, and should be approved.[123]

### C. The Court-Approved Notice Program Satisfied Due Process

A court approving a class action settlement must "direct notice in a reasonable manner to all class members who would be bound by the proposal."[124] For a Rule 23(b)(3) class, the court must also "direct to class members the best notice that is practicable under the circumstances,

[118] *See* Dkt. 486-2, Glackin Decl. Ex. C.
[119] Glackin Decl. ISO Final Approval, Ex. A.
[120] *Id*.
[121] *Id*.
[122] *Id*.
[123] Plaintiffs also seek service awards of $200,000 each. Dkt. 504. No Class member objected to this request. Such awards are consistent with a fair, reasonable, and adequate settlement.
[124] Fed. R. Civ. P. 23(e)(1)(B) .

including individual notice to all members who can be identified through reasonable effort."[125]

Notice here satisfied due process. TPP and hospital class members received direct notice via a postcard mailed through First Class Mail.[126] Consumers were reached through publication notice in *USA Today* and *PR Newswire*, as well as ads on Google and Facebook.[127] Class members were directed to the settlement website, which includes information regarding the Action including the deadline to object, the claim filing deadline, the date and time of the Final Approval Hearing, and Class Counsels' request for attorney's fees and costs and service awards.[128] The website also provides access to the Notice and Claim Forms, the proposed Distribution Plan, and allowed class members to submit claims online. A telephone hotline is also available to answer class member questions.

Defendants provided CAFA notice on December 27, 2019 (Momenta) and December 30, 2019 (Sandoz). Dkts. 489; 487. No attorney general objected.[129]

## V. CONCLUSION

Plaintiffs respectfully request that the Court: (1) finally approve the Settlements as fair, reasonable, and adequate; (2) approve the proposed Plan of Allocation; and—once Sandoz and Momenta make payment consistent with the Settlement Agreements—(3) enter orders for dismissal and judgment.

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[125] Fed. R. Civ. P. 23(c)(2)(B) ; Newberg § 11:53 (notice is "adequate if it may be understood by the average class member"); *see also UAW*, 497 F.3d at 629 (The notice should be "' 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.") (quoting *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950)).
[126] Miller Decl. ¶¶ 7-11.
[127] Miller Decl. ¶¶ 4-6.
[128] Miller Decl. ¶ 13.
[129] Glackin Decl ISO Final Approval ¶ 4.

Dated: April 24, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of April, 2020, the foregoing document was filed electronically with the U.S. District Court for the Middle District of Tennessee. Notice of this filing was served via the court's electronic filing system on counsel listed below:

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