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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ADRIANA M. CASTRO, M.D., P.A.; SUGARTOWN PEDIATRICS, LLC; and MARQUEZ and BENGOCHEA, M.D., P.A., on behalf of themselves and all others similarly situated, Plaintiffs, v. SANOFI PASTEUR INC., Defendant.	Civil Action No. 2:11-cv-07178-JMV-MAH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES

Dated: June 23, 2017

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After more than five years of highly contested litigation against Defendant Sanofi Pasteur Inc. ("Sanofi"), Co-Lead Counsel for the certified Class achieved a settlement of $61.5 million in cash with no right of reversion (the "Settlement").[1] Class Counsel prosecuted this matter on a purely contingent basis and have received no payment for their services or reimbursement of the millions of dollars of expenses (including expert fees) that they have expended on behalf of Plaintiffs and the Class. Co-Lead Counsel now submit this memorandum in support of their request for an order: (i) awarding attorneys' fees in the amount of one-third of the $61.5 million cash value of the Settlement—$20.5 million (plus accrued interest); (ii) reimbursing Class Counsel for reasonably incurred litigation expenses in the amount of $7,199,310.00; and, (iii) approving service awards of $100,000 for each of the three Class Representatives.[2]

The $61.5 million Settlement exceeds the monetary value of similar healthcare-related antitrust bundling cases—brought by some of the same Class Counsel as here, working with

[1] On September 30, 2015, the Court granted class certification and appointed Berger & Montague, P.C. and Nussbaum Law Group, P.C., who had served as interim Co-Lead Counsel from the inception of the litigation, as Co-Lead Counsel. ECF 416. Earlier in the case, Ms. Nussbaum had served as interim Co-Lead Counsel as a member of a different firm, Grant & Eisenhofer, P.A. The Court also appointed the law firms of Cohn Lifland Pearlman Herrmann & Knopf LLP and Carella, Byrne, Cecchi, Olstein Brody & Agnello, P.C. as Co-Liaison Counsel. Other leading antitrust firms, acting under the direction of Co-Lead Counsel, have served as counsel for the Class including: Hausfeld LLP, Cohen Milstein Sellers & Toll PLLC, Faruqi & Faruqi LLP, Criden & Love P.A., The Law Offices of Joshua P. Davis, Taus Cebulash & Landau LLP, Fine Kaplan & Black R.P.C., The Law Offices of David A. Balto, Grant & Eisenhofer P.A., Gavin Law, Hilliard Shadowen LLP, Lieff Cabraser Heimann & Bernstein LLP, Radice Law Firm, P.C., Sperling & Slater P.C., Vanek Vickers & Masini P.C., Bolognese & Associates LLC, Finkelstein Thompson LLP, and Kohn Swift & Graf P.C. All Plaintiffs' counsel are collectively referred to as "Class Counsel." Class Counsel are seeking attorneys' fees and reimbursement of expenses. *See* Declaration of Co-Lead Counsel for the Class Eric L. Cramer, Esq. in Support of (1) Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Payment of Service Awards to the Class Representatives, and, the forthcoming. (2) Plaintiffs' Motion for Final Approval of Settlement ("Cramer Co-Lead Decl."), at ¶¶2, 45-69, Exhibits H to CC to Cramer Co-Lead Decl.

[2] The Court appointed named plaintiffs Adriana M. Castro, M.D., P.A., Sugartown Pediatrics, LLC, and Marquez and Bengochea, M.D., P.A. as Class Representatives. ECF 416.

some of the same expert economists and consultants, on behalf of a similar class of direct purchasers of medical products.[3] The Settlement will provide immediate, meaningful, and certain benefits to Class members. Specifically, each of the nearly 30,000 Class members, including physician practices, hospitals, and vaccine sellers, who do not opt out will receive their *pro rata* share of the $61.5 million Settlement Fund after reduction for attorneys' fees, reimbursed expenses, service awards, and administrative costs ("Net Settlement Fund"). Sanofi has no right of reversion, and thus Class members will receive the full benefit of the Net Settlement Fund. In addition, as part of the Settlement, Sanofi released its antitrust counterclaim against Plaintiffs and the Class. *See* Cramer Co-Lead Decl. ¶¶41, 43.

The substantial Settlement was the result of Co-Lead Counsel, along with other Class Counsel, having devoted more than 43,200 hours in attorney and paralegal time to this litigation and advancing $7,199,310.00 in out-of-pocket costs. Class Counsel, thus, took enormous risks in pursuing this case. The investment of substantial time and money alone would not have sufficed to achieve the Settlement given the complex factual, legal, and economic issues raised in this litigation. Co-Lead Counsel, with assistance of other Class Counsel, applied their skill and extensive antitrust experience to prosecuting this litigation on behalf of, and to the benefit of, the Class.[4] *See* Cramer Co-Lead Decl. ¶¶5-44. Confirming the excellence of the legal services

[3] *See infra* at pp. 25 to 26.

[4] The Class is defined as "All persons or entities in the United States and its territories that purchase Menactra directly from defendant Sanofi Pasteur Inc. ("Sanofi") or any of its divisions, subsidiaries, predecessors or affiliates, such as VaxServe, Inc., during the period from March 1, 2010 through and including December 31, 2014 ("Class Period") and excluding all governmental entities, Sanofi, Sanofi's divisions, subsidiaries, predecessors, and affiliates Kaiser Permanente and the Kaiser Foundation (collectively, "Kaiser"), and any purchases by entities buying Menactra pursuant to a publicly-negotiated price (*i.e.* governmental purchasers)." Preliminary Approval Order, ECF 512, at 1.

provided to the Class, the Court praised the work of Class Counsel (and Sanofi's counsel) after the three-day evidentiary *Daubert* hearing as follows:

> I just want to thank you for an outstanding presentation. I don't say that lightly. And I know how much–I can only imagine how much work has gone into this case in general and this hearing in particular. And it's not lost on me at all when lawyers come very, very prepared. And really, your clients should be very proud to have such fine lawyering. I don't see lawyering like this every day in the federal courts, and I am very grateful. And I appreciate the time and the effort you put in, not only to the merits, but the respect you've shown for each other, the respect you've shown for the Court, the staff, and the time constraints. And as I tell my law clerks all the time, good lawyers don't fight, good lawyers advocate. And I really appreciate that more than I can express.[5]

Class Counsel's request for an attorneys' fee award of one-third of the cash value of the Settlement Fund (plus accrued interest)—*i.e.*, an award of $20.5 million (plus interest)—is well within the guidelines established by relevant precedent. Courts in the Third Circuit frequently award fees to class counsel of one-third of the cash value of comparable antitrust class action settlements.[6] Additionally, not only have each of the Class Representatives submitted a

[5] Cramer Co-Lead Decl. ¶33 (citing Tr. at 658-59 (Sept. 11, 2015)).

[6] *See, e.g.*, *In re Neurontin Antitrust Litig.*, No. 02-1830 (D.N.J. Aug. 6, 2014) (awarding one-third fee on settlement of $191 million); *In re Hypodermic Prods. Antitrust Litig.*, No. 05-1602, ECF 461 (D.N.J. Apr. 10, 2013) (awarding one-third fee on settlement of $45 million); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-85, 2005 WL 3008808 (D.N.J. Nov. 9, 2005) ("*Remeron*") (awarding one-third fee on settlement of $75 million); *In re Doryx Antitrust Litig.*, No. 12-3824 (E.D. Pa. Sept. 15, 2014) (awarding one-third fee on settlement of $15 million); *Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.*, No. 07-1078, ECF 713 (E.D. Pa. July 14, 2014) (awarding one-third fee on settlement of $130 million); *In re Fasteners Antitrust Litig.*, No. 08-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014) (awarding one-third fee on settlement of $17.55 million); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748 (E.D. Pa. 2013) (awarding one-third fee on settlement of $150 million); *In re Wellbutrin XL Antitrust Litig.*, No. 08-2431, ECF 485 (E.D. Pa. Nov. 7, 2012) (awarding one-third fee on settlement of $37.5 million); *Rochester Drug Co-Operative, Inc. v. Braintree Laboratories, Inc.*, No. 07-142, ECF 243 (D. Del. May 31, 2012) (awarding one-third fee on settlement of $17.5 million); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52, ECF 193 (D. Del. Feb. 21, 2012) (awarding one-third fee on settlement of $20 million); *In re Wellbutrin SR Antitrust Litig.*, 2011 U.S. Dist. LEXIS 158833, at *20 (E.D. Pa. Nov. 21, 2011) (awarding one-third fee on settlement of $49 million) (no Westlaw cite available); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340, 2009 U.S. Dist. LEXIS 133251, at *15 (D. Del. Apr. 23, 2009) (awarding one-third fee on

declaration supporting the Settlement, and Class Counsel's fee and expense request, but three large sophisticated Class members (Cardinal Health, AmerisourceBergen, and McKesson (together, "the National Wholesalers"), collectively constituting approximately 30% of Class sales, have each submitted letters to the Court explicitly supporting the Settlement, Class Counsel's fee and expense request, and the sought incentive awards for the Class Representatives.[7] The National Wholesalers are each Fortune 100 companies who have monitored this case through their outside counsel, appreciate the work of Class Counsel, and support this motion in its entirety. *Id*.

The total lodestar for Class Counsel at historical rates is $22,086,998.45. The fee Co-Lead Counsel thus seek reflects a slightly negative "multiplier" of only 0.928, and therefore includes a negative risk premium despite the wholly contingent nature of the engagement. Typically, courts in the Third Circuit approve multipliers well above 1, substantially in excess of what Class Counsel are seeking here.[8]

Class Counsel's request for reimbursement of expenses is similarly appropriate. All expenses were necessarily incurred in the prosecution of the litigation, which

> (i) lasted more than five years,
>
> (ii) required appointment of a Special Master to resolve complex and prolonged discovery disputes (at the parties' considerable expense),

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settlement of $250 million) (no Westlaw cite available); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) (noting that "courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses"); *McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 650 (E.D. Pa. 2015), *appeal dismissed* (June 12, 2015), *appeal dismissed* (Oct. 29, 2015), *appeal dismissed* (Nov. 2, 2015) (awarding 31.2% fee on settlement of $35.5 million settlement); *Brady v. Air Line Pilots Ass'n*, 627 F. App'x 142, 144 (3d Cir. 2015) (affirming award of 30% fee on $53 million settlement).

[7] *See* Cramer Co-Lead Decl. Exhibits D to F.

[8] *See, e.g.*, *Remeron*, 2005 WL 3008808, at *17 (D.N.J. Nov. 9, 2005) (collecting cases awarding multipliers between 1.73 and 9.3 and noting that awarded multiplier of 1.86 is on the "low end of the spectrum"); *see also infra* at n.63.

(iii) necessitated discovery of more than a dozen third parties,

(iv) involved several rounds of briefing on Sanofi's antitrust counterclaim,

(v) required Class Counsel's retention of two prestigious economic experts (including Prof. Einer Elhauge of Harvard Law School, a leading scholar on health law policy and the economic effects of bundling),

(vi) involved roughly 30 fact depositions and multiple rounds of expert reports and depositions,

(vii) included a three-day evidentiary hearing before Judge Arleo relating to *Daubert* and class certification issues,

(viii) involved the briefing of dozens of discovery and dispositive motions, including a Rule 12 motion, class certification, and summary judgment, and

(ix) required Class Counsel to store, organize, search, and review millions of pages of documents and huge amounts of data.

Finally, the requested $100,000 service award for each Class Representative is appropriate. By filing complaints against Sanofi, the Class Representatives—each a small pediatric practice—risked being cut off by the dominant supplier of quadrivalent meningococcal ("MCV4") vaccines and other pediatric vaccines, and was named in Sanofi's counterclaim accusing each of antitrust violations and subjecting each to exposure to potentially millions of dollars of liability. One plaintiff-deponent was even driven to tears at her deposition. Cramer Co-Lead Decl. ¶73 and Exhibit C (Marquez Decl.). Each Class Representative significantly contributed to the prosecution of this litigation by, among other things, producing documents, responding to dozens of discovery requests, and submitting to multiple days of depositions. *See* Cramer Co-Lead Decl. ¶¶70-73. These amounts are appropriate under applicable law given the risks taken and effort expended by each of the Class Representatives.[9]

[9] *See, e.g., Marchbanks Truck Service, Inc. v. Comdata Network, Inc.*, No. 07-1078, Dkt No. 713 ¶¶ 6-7 (E.D. Pa. July 14, 2014) (awarding service awards of totaling $240,000 including

I. FACTUAL BACKGROUND

A. Investigation and Complaint

This antitrust action did not follow a government investigation or lawsuit concerning the conduct challenged in this litigation. Despite submissions by a competitor (and others) to the Federal Trade Commission ("FTC") complaining about Sanofi's conduct, the FTC took no action. Cramer Co-Lead Decl. ¶5. Class members would have received nothing if not for the independent investigation by Berger & Montague, P.C. in consultation with economic experts and pediatricians, which began in mid-2011. *Id.* at ¶¶5-7. In particular, that investigation revealed that Sanofi's bundling of its MCV4 vaccine, Menactra, with its other pediatric vaccines appeared to have reduced competition between Menactra and its would be competitor, Menveo, then sold by Novartis. *Id.* Co-Lead Counsel learned, after this investigation, that this conduct

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$150,000, $75,000, and $15,000, respectively, to the class representatives); *In re: Titanium Dioxide Antitrust Litig.*, No. 10-00318, 2013 WL 6577029 (D. Md. Dec. 13, 2013) (awarding service awards totaling $175,000, including $125,000 to one class representative as part of approving a $163.5 million settlement); *In re Neurontin Antitrust Litig.*, No. 02-1830, Dkt No. 114 ¶31 (D.N.J. Aug. 6, 2014) (awarding $100,000 to two class representatives); *Sullivan v. DB Investments, Inc.*, No. 04-2819, 2008 WL 8747721, at *4, *37 (D.N.J. May 22, 2008) (approving $85,000 service awards for certain plaintiffs as part of approving $295 million settlement); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007) (approving incentive award of $75,000 as part of a $39.75 million settlement); *In re Elec. Carbon Prods.*, 447 F. Supp. 2d 389, 412-13 (D.N.J. 2006) (approving $72,000 in incentive awards to certain plaintiffs as part of approving $21.9 million settlement agreement); *In re Lupron Mktg. & Sales Practices Litig.*, MDL No. 1430, 2005 WL 2006833, at *7 (D. Mass. Aug. 17, 2005) (awarding a total of $100,000 to named plaintiffs and noting that "the named plaintiffs participated actively in the litigation"); *Beck v. The Boeing Company*, No. C00-0301P, ECF 1067, at 4 (W.D. Wash. Oct. 8, 2004) (approving service awards of $100,000 as part of a maximum $72.5 million settlement); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (approving $300,000 service award as part of an approximately $157 million settlement); *In re Revco Sec. Litig.*, Nos. 851, 89CV593, 1992 WL 118800, at *7 (N.D. Ohio May 6, 1992) (awarding $200,000 service award as part of a $29.75 million settlement); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531 (E.D. Mich. 2003) ($75,000 awarded to two class representatives as part of a $80 million settlement); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 203-04 (S.D.N.Y. 1997) (awarding $85,000 to a named plaintiff as part of a $115 million settlement).

may well have artificially inflated vaccine prices, and thereby harmed its clients and a nationwide class of vaccine purchasers. *Id.*

As a result, Co-Lead Class Counsel filed this antitrust action on behalf of its clients and others similarly situated on December 9, 2011. ECF 1. This litigation was originally assigned to the Honorable Jose L. Linares. On January 20, 2012, Plaintiffs filed a First Consolidated Amended Class Action Complaint ("CAC"). ECF 28. The CAC alleged that Sanofi held a dominant share of five pediatric vaccine markets, including Menactra's 100% monopoly in the conjugate quadrivalent meningococcal vaccine ("MCV4") market,[10] from 2005 to February 2010. Cramer Co-Lead Decl. ¶6. The CAC alleged further that when Sanofi learned that Novartis was planning to compete in the MCV4 market by entering with its own MCV4 vaccine, Menveo,[11] Sanofi responded in mid-2009 by bundling the sale of Menactra with certain of Sanofi's other dominant pediatric vaccines (the "Bundle"). *Id.* Plaintiffs claimed that Sanofi used the Bundle—rather than competing through lower prices or improved quality—to enhance and maintain its monopoly power in multiple vaccine markets, including the MCV4 market. *Id.*

The CAC alleged that Sanofi implemented the Bundle through contracts with physician buying groups ("PBGs"), group purchasing organizations ("GPOs"),[12] and healthcare systems, among others. *Id.* at ¶7. Plaintiffs alleged, in addition, that the Bundle effectively forced healthcare providers to buy substantially all of their MCV4 vaccines from Sanofi because, due to

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[10] The MCV4 market is one of the relevant product markets in this case. *Id.* The abbreviation MCV4 means that it: (1) is a meningococcal vaccine, (2) is conjugate, rather than polysaccharide, and (3) it immunizes against four different serotypes of meningococcal bacteria. *Id.* All MCV4 vaccines immunize patients against four strains of meningococcal bacteria that cause bacterial meningitis, a deadly disease that infects approximately 1,400-2,800 people in the United States per year. *Id.* at ¶6 n.6.

[11] Menveo has been sold only by GlaxoSmithKline since the end of 2014. *Id.* at ¶5.

[12] PBGs and GPOs aggregate the purchases of their members (physician practices and other healthcare providers), but do not buy vaccines themselves. *Id.* at ¶7 n.8.

the Bundle, buyers risked paying far higher prices for Sanofi's pediatric vaccines merely for buying Menveo from Novartis. *Id.* The CAC alleged that Sanofi's conduct had foreclosed the rival MCV4 vaccine sold by Novartis, and allowed Sanofi to maintain its monopoly power in the MCV4 market, thereby unlawfully violating Sections 1 and 2 of the Sherman Antitrust Act. *Id.*

B. Sanofi's Counterclaim, Motion to Dismiss, and Affirmative Defenses

On February 27, 2012, Sanofi filed a motion to dismiss and also a standalone class action counterclaim against Plaintiffs and all members of Plaintiffs' proposed class who did not opt out of any certified class. ECF 50 (motion to dismiss); ECF 54 (counterclaim). Filing a standalone counterclaim is highly unusual; in fact, this filing does not appear on the list of permissible pleadings found in Federal Rule of Civil Procedure 7. Consequently, Plaintiffs filed a motion to strike, or, in the alternative, to dismiss the counterclaim arguing, *inter alia*, that it was procedurally improper to file a standalone counterclaim. ECF 74. On July 10, 2012, the Court granted Plaintiffs' motion and struck Sanofi's counterclaim as procedurally improper. ECF 100.

In Sanofi's motion to dismiss, Sanofi argued that Plaintiffs: (1) lacked standing to sue because they were not directly injured by the challenged conduct; (2) failed to allege a Section 2 claim sufficiently because they purportedly did not adequately plead indispensability, coercion, or complete market foreclosure; and (3) failed to allege facts sufficient to state a Section 1 claim. ECF 50. On April 13, 2012, while briefing on Sanofi's motion to dismiss was ongoing, Sanofi moved for a stay of discovery. ECF 73. Plaintiffs opposed. ECF 79. On July 18, 2012, Magistrate Judge Hammer denied that stay motion. ECF 102. Shortly thereafter, on August 6, 2012, the Court sustained the CAC in its entirety. ECF 106 & 107 (Opinion and Order).

On August 21, 2012, Sanofi answered the CAC, asserted affirmative defenses, and refiled the counterclaim "against the Class Representatives and each opt-in member or non-opt-out

member of any class that may be certified in this action." ECF 111. The counterclaim alleged that Plaintiffs and other physician practice members of the proposed class had engaged in unlawful collective action through membership in PBGs, purportedly causing vaccine prices to fall below competitive levels. *Id.* Plaintiffs moved to dismiss the counterclaim, this time on its merits, and to strike certain of Sanofi's affirmative defenses. ECF 118. The Court dismissed Sanofi' counterclaim with prejudice, and struck certain of Sanofi's affirmative defenses. ECF 135.

Sanofi pursued interlocutory appellate relief of the dismissal of its counterclaim. ECF 137. Magistrate Judge Hammer granted Sanofi's motion for leave to file a motion for final judgment on the dismissed counterclaim. ECF 148. On March 18, 2013, Sanofi filed its motion for entry of a final judgment under Federal Rule of Civil Procedure 54(b) or, alternatively, certification under 28 US.C. §1292(b) of the Court's dismissal of the Counterclaim. ECF 158. Plaintiffs opposed the motion. ECF 162. On April 9, 2013, Judge Linares denied both Sanofi's request for entry of final judgment and leave for interlocutory appeal of the dismissal of its counterclaim. ECF 170.

C. Discovery

Discovery in this litigation was time-intensive, expensive, and hotly contested. It spanned four years and resulted in the appointment of a Special Master (paid for by the parties), dozens of fact and expert depositions (including depositions of four different experts collectively spanning ten days), review of more than four and a half million pages of party and non-party documents, and litigation of a wide range of discovery and other pretrial motions. Cramer Co-Lead Decl. ¶12.

1. Fact Discovery and Related Motions

After Sanofi's motion to stay discovery was denied, ECF 102, both Plaintiffs and Sanofi engaged in extensive discovery efforts over the course of almost two years. Sanofi served 964

requests for admission (subsequently reduced upon motion by Plaintiffs to 388), 24 interrogatories, and 54 document requests, along with multiple subpoenas on third parties (including PBGs, GPOs, and health systems, as well as Sanofi's competitors Novartis and GlaxoSmithKline) demanding documents. Cramer Co-Lead Decl. ¶13. Plaintiffs served 66 requests for admission, 25 interrogatories, and 89 document requests, along with nineteen subpoenas on third parties (including many PBGs, GPOs, and health systems, as well as Sanofi's competitors), demanding documents, and multiple Freedom of Information Act ("FOIA") requests to the U.S. Food and Drug Administration and the U.S. Centers for Disease Control and Prevention. *Id.* Document discovery resulted in the production of over one million documents (consisting of more than 4.5 million pages), and, due to third party productions, continued well past the scheduled close of discovery. *Id.* More than 30 days of fact depositions occurred including 19 depositions of Sanofi personnel, 7 third party depositions, and depositions of the Class Representatives. *Id.*

The parties also engaged in substantial discovery motion practice. After multiple discovery disputes were brought to Magistrate Judge Hammer, on June 7, 2013, Magistrate Judge Hammer appointed, at the parties' expense, Dean Ronald J. Riccio as a Special Master to help the Court resolve these various disputes. ECF 191. That appointment spawned its own motion practice. Cramer Co-Lead Decl. ¶14. Sanofi filed a motion for clarification of the Special Master's authority seeking a ruling that the Special Master could "issue orders and set deadlines for compliance with those orders." ECF 221 at 1-2. The Court denied Sanofi's request, concluding that granting such authority to the Special Master was appropriate "given the staggering volume of materials submitted thus far to the Special Master, and the risk that such

protracted and voluminous litigation by both parties may seriously impede the progress of the Special Master and the Court in resolving the disputes between the parties." *Id*.

The briefing before the Special Master on a variety of discovery issues was extensive. For instance, in order to comply with the Special Master's directive, Sanofi submitted a memorandum in excess of 900 pages objecting to Plaintiffs' responses to 388 of Sanofi's RFAs. Over the course of discovery, the Special Master issued several voluminous Reports & Recommendations. *See*, *e.g.*, ECF Nos. 211, 212, 213, 229, 238, 239, 260. Both parties, and non-party Novartis, filed objections to several of these rulings, spawning still further motion practice. Cramer Co-Lead Decl. ¶15.

Sanofi sought discovery from the personal files and records of Co-Lead Counsel Eric Cramer, Esq., in connection with Sanofi's unsubstantiated claim that Co-Lead Counsel "conspired" with Novartis to bring this litigation. Cramer Co-Lead Decl. ¶16. Such a move by opposing counsel is unusual, if not unprecedented. *Id.* And, in fact, after extensive motion practice, the Court ultimately denied most of that discovery. ECF 306. However, Sanofi sought related document discovery, including documents reflecting communications between Co-Lead Counsel and consulting experts regarding the pre-complaint investigation, via third party subpoena from Navigant Consulting, an economic consulting firm that provided consulting services as part of that investigation. Cramer Co-Lead Decl. ¶16. Co-Lead Counsel sought to quash the subpoena in the U.S. District Court for the Northern District of Illinois, but, following motion practice, Sanofi was permitted to obtain certain documents from and depose a Navigant witness. *Id.* Sanofi also sought substantial discovery from its competitors Novartis and GlaxoSmithKline, which resulted in several depositions of Novartis executives, hundreds of thousands of pages of document production, and multiple discovery disputes before the Court

and the Special Master. *Id.* at ¶13. Further, Sanofi served document subpoenas on two public interest non-governmental organizations that had raised concerns about the Bundle: the American Antitrust Institute and Citizens for Responsibility and Ethics in Washington. *Id.* at ¶17. These subpoenas resulted in litigation of motions to quash in the U.S. District Court for the District of Columbia. *Id.*

2. Expert Discovery and Related Motions

In addition to developing a substantial factual discovery record, the parties engaged in extensive expert discovery, which the Court bifurcated into class and merits phases. ECF 104.

a) Class Expert Discovery

Plaintiffs ultimately served five expert reports in support of class certification. Plaintiffs' primary expert economist, Harvard Law School Professor Einer Elhauge, served three reports and Plaintiffs' other economic expert, Dr. Jeffrey Leitzinger, served two more. Cramer Co-Lead Decl. ¶19. Sanofi, via its proffered expert economist, Mr. David Kaplan, served a rebuttal report, a sur-rebuttal report, *and* a sur-sur-rebuttal report to Prof. Elhauge's reports. *Id.* Plaintiffs maintained that Mr. Kaplan's sur-sur-rebuttal report was not authorized by the then-operative scheduling order. *Id.* at ¶19 n.9. Sanofi deposed Prof. Elhauge for five days and Dr. Leitzinger for two. *Id.* at ¶19. Plaintiffs deposed Mr. Kaplan for two days. *Id.*

Prof. Elhauge's class certification reports opined on, among other things, the relevant market, the pro- and anticompetitive effects of Sanofi's Bundle, and the effect of the Bundle on the prices paid by all or nearly all Class members for Menactra and Menveo. *Id.* at ¶20. Mr. Kaplan rebutted Prof. Elhauge's bundling analysis, and further opined that Prof. Elhauge's theory and models were flawed and unreliable. *Id.*

On December 12, 2014, just three days before Plaintiffs' class certification motion was due, the litigation was reassigned from Judge Linares to Judge Arleo. ECF 307. On December

15, 2014, Plaintiffs filed their class certification motion. ECF 309 & 310. On December 22, 2014, Sanofi requested permission to move for appointment of an independent expert under Federal Rule of Evidence 706, or as a technical advisor. ECF 313. After briefing relating to that issue, the Court declined the request noting that "the expert briefing in this matter of over one thousand pages and depositions submitted by both parties exhaustively explore the various factual questions for which experts may be valuable—here, economic, econometric, and statistical issues—and additional expert briefing before class certification would be duplicative at best and counter-productive at worst." ECF 330 at 2 n.1 (parentheticals removed).

On February 13, 2015, Sanofi filed its opposition to class certification and moved under *Daubert* to exclude Prof. Elhauge's opinions. ECF 335-38. The Court solicited input from the parties and scheduled a *Daubert* hearing. ECF 380. In September 2015, the Court held a three-day hearing addressed to Prof. Elhauge's opinions, during which both Prof. Elhauge and Mr. Kaplan testified on direct and cross. That hearing resulted in detailed evidence as to Prof. Elhauge's theories and analyses. Cramer Co-Lead Decl. ¶22. Later that month, the Court, concurrent with granting Plaintiffs' motion for class certification, denied Sanofi's *Daubert* motion. ECF 415 & 416. The Court noted that Prof. Elhauge is a "preeminent antitrust scholar at Harvard Law School" whom other courts have called "a highly qualified antitrust titan," and that he was "eminently qualified" to present expert testimony in this litigation. ECF 415 at 4, 10 (citing *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-620, 2015 WL 5767415, at *8 (E.D. Pa. July 29, 2015); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l Ltd.*, 247 F.R.D. 253, 273 (D. Mass. 2008)). The Court rejected a litany of arguments advanced by Sanofi and concluded that Prof. Elhauge's economic models demonstrating liability, impact, and damages were reliable, admissible, and supported by record evidence. *See id.* at 11-32. The Court's

Opinion also appears to be the first time that a differentiated Bertrand model was found reliable as a means of assessing impact and damages in an antitrust class action. *Id.* at 20-31.

Although the Court certified the class, the Class Opinion highlighted some of Sanofi's criticisms of Prof. Elhauge's opinions that would have been relevant later in the case. Cramer Co-Lead Decl. ¶24. For instance, Sanofi's expert opined that Prof. Elhauge's regression analysis did not include all of the appropriate variables. *Id.* Sanofi's expert also asserted that Prof. Elhauge's regression explained only a small amount of the variation in prices, and thus the results were either meaningless or that other economic models would more appropriately explain the competitive conditions of the marketplace. *Id*. The Court further observed that one of the fundamental premises of Prof. Elhauge's use of his damages model was that tacit price coordination would not have occurred at all absent the challenged conduct, even though the market was a duopoly which can be susceptible to price coordination in certain instances. *Id.* The Court properly found that whether price coordination was possible in the MCV4 market was a fact question for the jury; if the jury determined that the market would have been characterized by price coordination rather than competition, Prof. Elhauge's model for impact and damages may well have been void. *Id*. The Court also noted that a factual dispute existed as to whether the share of the market allegedly restricted by Sanofi's conduct was substantial enough to establish foreclosure. *Id*. Any one of these issues, and many others, could have contributed to summary judgment for Sanofi, or a defense verdict at trial. *Id.*

b) Merits Expert Discovery

After the Court certified this case as a class action, a merits round of expert discovery ensued. Prof. Elhauge served a merits report (dated Dec. 14, 2015); Sanofi's merits expert, NYU Law School's Dr. Daniel Rubinfeld, served a merits report (dated Feb 12, 2016); Prof. Elhauge served a rebuttal report (dated Apr. 25, 2016); and Dr. Rubinfeld served a "Supplemental

Report."[13] Combined, these merits expert reports reached one thousand pages in length (not including appendices and back-up data) on top of the over one thousand pages of class expert reports. Cramer Co-Lead Decl. ¶25.

Sanofi deposed Prof. Elhauge, for a full day (his fifth day of deposition in the case), and Plaintiffs deposed Dr. Rubinfeld, for a full day. *Id.* at ¶26. Merits expert discovery closed in July 2016.[14] *Id.*

3. Class Certification and Related Work

Class certification and related briefing was extensive. On December 15, 2014, Plaintiffs filed their class certification motion. ECF 309 & 310. On February 13, 2015, Sanofi filed its opposition to class certification and moved under *Daubert* to exclude Prof. Elhauge's opinions as expressed in his three class certification reports. ECF 335 to 338. On March 30, 2015, Plaintiffs opposed Sanofi's *Daubert* motion, filed a motion to strike three categories of documents that Sanofi had submitted in support of its opposition to class certification, and filed a reply in further support of their motion for class certification. ECF 342 to 347. On May 29, 2015, Sanofi filed a reply in further support of its *Daubert* motion and an opposition to Plaintiffs' motion to strike, and also sought leave to file a sur-reply to Plaintiffs' motion for class certification and its own motion to strike portions of Prof. Elhauge's work. ECF 358 to 366. On June 19, 2015, Plaintiffs filed a reply in further support of their motion to strike, and also filed letter motions concerning Sanofi's other filings. ECF 369 to 371. The parties also submitted a huge evidentiary record at class certification including many dozens of exhibits. Cramer Co-Lead Decl. ¶32.

[13] Plaintiffs maintained that the supplemental report, dated June 10, 2016, was not authorized under the then-pending scheduling order.

[14] Third party discovery relating to certain requests for Novartis documents continued beyond the close of fact discovery.

Following the three-day *Daubert* hearing in September 2015 before Judge Arleo, on September 30, 2015, the Court issued an Opinion and Order granting Plaintiffs' motion for class certification (and, as mentioned above, denying Sanofi's *Daubert* motion). ECF 415 & 416. The Court certified the following Class under Federal Rule 23(b)(3):

> All persons or entities in the United States and its territories that purchase Menactra directly from defendant Sanofi Pasteur Inc. ("Sanofi") or any of its divisions, subsidiaries, predecessors or affiliates, such as VaxServe, Inc., during the period from March 1, 2010 through such time as the effects of Sanofi's illegal conduct have ceased ("Class Period"), and excluding all governmental entities, Sanofi, Sanofi's divisions, subsidiaries, predecessors, and affiliates Kaiser Permanente and the Kaiser Foundation (collectively "Kaiser"), and any purchases by entities buying Menactra pursuant to a publicly-negotiated price (*i.e.*, governmental purchasers).

ECF 416.[15] The Court found Plaintiffs had "presented proof common to the proposed class on all elements of their antitrust claims." ECF 415 at 1. Among the common issues certified for class treatment were the boundaries of the relevant market, whether Sanofi possessed monopoly power, whether Sanofi willfully maintained or enhanced said monopoly power through its Bundle, the validity of Sanofi's claimed procompetitive justifications, and whether Sanofi's conduct inflated MCV4 vaccine prices. *Id.* at 34. Notably, Judge Arleo praised the work of Co-Lead Counsel at the hearing. *See supra* at page 3; Cramer Co-Lead Decl. ¶33.

The Court also appointed Berger & Montague, P.C. and the Nussbaum Law Group, P.C., who (along with Ms. Nussbaum's predecessor firm) had been serving as interim Co-Lead Counsel from the outset of the litigation, as Co-Lead Counsel. ECF 416.[16] The law firms of Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C. and Cohn Lifland Pearlman Herrmann & Knopf LLP were appointed as Co-Liaison Class Counsel. *Id.* Several other firms have served as

[15] On October 11, 2016, the Court amended the class definition to end the Class Period at December 31, 2014. ECF 476.

[16] Linda Nussbaum left Grant & Eisenhofer to establish Nussbaum Law Group P.C. in 2015 and the Court substituted as Co-Lead Counsel Ms. Nussbaum's new firm for her old firm. ECF 414.

counsel for the Class under the direction of Co-Lead Counsel during the course of this litigation. Cramer Co-Lead Decl. ¶34.

Sanofi petitioned the U.S. Court of Appeals for the Third Circuit under Federal Rule 23(f) for leave to appeal from Judge Arleo's Order certifying the class. *Id.* at ¶35. Plaintiffs opposed the petition. *Id.* On December 8, 2015, the Third Circuit summarily denied leave. Order, *Castro v. Sanofi Pasteur Inc.*, No. 15-8099 (3d Cir. Dec. 8, 2015).

On February 25, 2016, the litigation was reassigned from Judge Arleo to Judge Vazquez. ECF 426. On April 13, 2016, Plaintiffs filed a motion for approval of the notice plan, to compel the production of updated Class member information from Sanofi, and to limit the Class Period. ECF 435. Sanofi opposed the motion, raising several substantive objections. ECF 452. Via Opinion and Order, dated October 11, 2016, the Court granted in part and denied in part Plaintiffs' motion. ECF 475 & 476.

4. Summary Judgment

On September 16, 2016, Sanofi moved for summary judgment and (for a second time) to exclude Prof. Elhauge's opinions and analyses under *Daubert*—this time relating to his opinions on the merits. ECF 469 to 472. Plaintiffs opposed these motions on November 11, 2016. ECF 478 to 494. Sanofi's replies were scheduled to be due by January 20, 2017. ECF 497. The parties marshalled extensive record evidence to present to the Court at summary judgment, including hundreds of exhibits. Cramer Co-Lead Decl. ¶38. The case settled before Sanofi filed its replies. *Id.*

D. Mediation and Settlement

Settlement discussions in this case spanned a period of years. *Id.* at ¶39. In November 2014, the parties first mediated the dispute before a private mediator (The Honorable Chares B.

Renfrew (Ret.)). *Id.* This mediation, which had been preceded by extensive confidential briefing by the parties to the mediator, lasted a full day and ended without agreement. *Id.*

In March 2016, prior to commencement of expert witness merits depositions, the parties, for a second time, entered into a private mediation at the suggestion of Judge Arleo. *Id.* at ¶40. The Mediator was attorney William J. O'Shaughnessy, Esq. *Id.* The parties conferred with the Mediator weeks before the mediation, provided written responses to numerous questions he posed, submitted detailed confidential mediation statements, and a PowerPoint presentation. *Id.* The mediation took place on March 16, 2016. *Id.* Over the course of a day, Class Counsel and Sanofi, presented their respective positions to the Mediator, responded to his follow-up questions, explained the strengths and weaknesses of both sides' respective positions, and discussed settlement. *Id.* The mediation ended without resolution of the case. *Id.*

Only after fact and expert discovery had run their course, the Court had certified the Class, the Third Circuit had denied Sanofi's Rule 23(f) appeal of the class certification opinion, and Plaintiffs had filed their opposition to Sanofi's summary judgment and merits *Daubert* motion (on November 11, 2016), did the parties engage in further settlement discussions. *Id.* at ¶41. These final negotiations spanned several weeks, included input from the parties, concessions from both sides, and careful consideration of each side's strengths and weaknesses. *Id*. With full knowledge of the potential risks of this litigation, a completed fact and expert discovery record, including review of millions of pages of documents, dozens of depositions, voluminous expert opinions and expert testimony, and the current legal landscape, the parties' negotiations culminated in a settlement agreement in December 2016—almost exactly five years after the initial complaint was filed. *Id.* Plaintiffs entered into the Settlement with Sanofi for (a) payment of $61.5 million in cash to Plaintiffs and the Class, and (b) Sanofi's release of its

antitrust counterclaim, in exchange for Plaintiffs' and the Class's dismissal of this litigation with prejudice, and certain releases from Plaintiffs and the Class. *Id.*

II. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES

A. The Fee Request Satisfies the Legal Standards Governing Awards of Attorneys' Fees in Class Actions

Class Counsel's fee request satisfies all applicable legal and factual requirements, and is amply justified in this case. The U.S. Supreme Court has "recognized consistently that . . . a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."[17] The common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."[18] The Third Circuit favors the percentage-of-recovery method of calculating fee awards in common fund cases because it allows courts to reward litigation success and penalize failure.[19]

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[17] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also Boone v. City of Phila.*, 668 F. Supp. 2d 693, 713 (E.D. Pa. 2009); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members.").

[18] *Id.* Unlike in cases in which fees are assessed under a statute, fees in common fund cases "are not assessed against the unsuccessful litigant (fee shifting), but rather are taken from the fund or damage recovery (fee spreading), thereby avoiding the unjust enrichment of those who otherwise would be benefited by the fund without sharing in the expenses incurred by the successful litigant." *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 632 (E.D. Pa. 1986).

[19] *See In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 333 (3d Cir. 1998)). For a history of the Third Circuit's approach to awarding attorneys' fees, including a discussion of the Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 241 (1985) ("1985 Task Force Report") and the transition to the prevailing view that the percentage-of-the-fund method is preferred in common fund cases, *see In re Cendant Corp. Litig.*, 264 F.3d 201, 255-57 (3d Cir. 2001). As noted in *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306, n.16, a second Task Force was convened and issued a follow-up report in 2002, further endorsing use of the percentage-of-the-fund method in

To that end, courts in the Third Circuit and elsewhere routinely employ the percentage-of-the-fund method in antitrust class actions.[20] The Third Circuit urges district courts to perform a lodestar cross-check to ensure that application of the percentage-of-the-fund method results in a "sensible" recovery.[21]

Under these standards, Class Counsel's request for a fee of one-third of the $61.5 million Aggregate Settlement Fund (inclusive of interest)—in light of the successful prosecution of this complex and demanding litigation—is reasonable and appropriate. Class Counsel spent over 43,200 hours through June 22, 2017 on the litigation.[22] If awarded, the requested fee would equate to a negative lodestar multiplier of 0.928. Recently approved multipliers in other class actions similarly alleging anticompetitive practices in healthcare related industries are well above that figure—indeed the figure reflects that the sought fee would provide no premium at all despite the risks Class Counsel took with no guarantee of recoupment, and indeed would receive less than they would have received had they proceeded on an hourly basis.

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common fund cases. *See* Report of the Third Circuit Task Force, *Selection of Class Counsel*, 208 F.R.D. 340 (2002).

[20] *See, e.g.*, *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 497 (D.N.J. 2012) ("The percentage-of-recovery method, unlike the lodestar method, is used in cases that involve a monetary settlement or common fund."); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448 (D.N.J. 2008) ("In 'common fund' cases, the percentage of recovery method is appropriate."); *Remeron*, 2005 WL 3008808, at *12 ("[T]he percentage of fund method is the proper method for compensating Plaintiffs' Counsel in this common fund case."); *see also In re Fasteners Antitrust Litig.*, 2014 WL 296954, at *3 ("In practice, courts in the Third Circuit assess requests for attorney's fees in antitrust cases using the percentage-of-recovery method, and then cross-check the result with the lodestar method"); *Flonase*, 951 F. Supp. 2d at 746 ("The latter method [i.e. percentage-of-recovery], is 'generally favored in cases involving a common fund . . . .'") (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 300).

[21] *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 305-06.

[22] The hours spent preparing this fee brief were not included.

B. The Fee Requested by Class Counsel is Fair and Reasonable

The Third Circuit has instructed courts to consider the following seven factors when evaluating the reasonableness of a fee request under the percentage-of-recovery method:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000).[23] More recently the Third Circuit has suggested that it also may be important to consider the following additional factors:

> (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement.

In re AT&T Corp., 455 F.3d at 165-66 ("In reviewing an attorneys' fees award in a class action settlement, a district court should consider the *Gunter* factions, the *Prudential* factors, and any other factors that are useful and relevant to the particular facts of the case.") (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 340 (3d Cir. 1998)). Virtually all of the *Gunter* and *Prudential* factors overwhelmingly support the requested fee.

[23] The Court need not find that all of the *Gunter* factors were satisfied in order to grant Plaintiffs' fee request; satisfaction of some of the factors often outweighs the possible non-satisfaction of other factors. *See, e.g.*, *In re AT & T Corp.*, 455 F.3d at 166 ("The fee award reasonableness factors need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest.") (citation omitted).

1. Application of the *Gunter* factors

(a) The complexity and duration of the litigation

The complexity and duration of the litigation is "the first factor a district court can and should consider in awarding fees."[24] Courts in this Circuit often say that an "antitrust class action is arguably the most complex action to prosecute."[25] This litigation is a textbook example of that idea. Class Counsel diligently and skillfully prosecuted this litigation for five years in the face of intense opposition from Sanofi and its highly capable counsel at the New York, Washington, D.C., and Newark offices of the international law firm Proskauer Rose LLP, and local counsel Liza M. Walsh, among others. As detailed above, these efforts required briefing of complex and novel legal and factual issues, exhaustive discovery efforts that entailed extensive communications with Sanofi's counsel and briefing, and cutting-edge economic expertise. Indeed, the economic issues surrounding bundled discounts raised in this litigation resulted in extensive expert opinions and several days of expert deposition. Specifically, Class Counsel's efforts included the following:

- Investigating the underlying facts and developing the legal theories of the case, with no governmental action on which to piggyback;
- Drafting the initial complaint and the consolidated amended class action complaint;
- Researching pertinent law to the claims against Sanofi and potential defenses to those claims to, among other things, formulate a discovery strategy;
- Opposing and defeating Sanofi's motion to dismiss;

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[24] *Gunter*, 223 F.3d at 197.

[25] *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007, 2005 WL 2230314, at *29 (D.N.J. Sept. 13, 2005) (citing *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004)); *see also Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007).

- Opposing and twice defeating Sanofi's counterclaim, including Sanofi's attempts to seek interlocutory appellate relief following the second dismissal of its counterclaim;

- Issuing subpoenas to numerous third parties (including PBGs, GPOs, health systems, Sanofi's competitors Novartis, GlaxoSmithKline, and Merck, and two public policy entities) and engaging in meet and confer discussions concerning the scope of document productions from those third parties;

- Preparing and serving 66 requests for admission, 25 interrogatories, 89 document requests, and various Freedom of Information Act requests;

- Litigating and responding to 964 (later reduced to 388) requests for admission, 24 numbered interrogatories with numerous subparts, and 54 document requests from Sanofi;

- Briefing and arguing a multitude of discovery issues (including a multitude of discovery issues involving non-party Novartis) before both Magistrate Judge Hammer and Special Master Riccio, including thousands of pages of briefing on these issues;

- Briefing and arguing third party subpoenas and motions, including motions to quash in both the U.S. District Court for the Northern District of Illinois and the U.S. District Court for the District of Columbia;

- Reviewing, analyzing, summarizing, and organizing over one million documents (consisting of over 4.5 million pages) produced by Sanofi and third parties during the course of this litigation;

- Taking and defending dozens of depositions around the country of both party and non-party witnesses covering both class certification and merits issues, including depositions of four experts spanning ten days;

- Working with economic experts on expert reports at the class certification and merits stages and on deposing Sanofi's experts and analyzing Sanofi's expert reports;

- Briefing concerning motions to strike related to materials offered at class certification;

- Briefing and arguing a hotly-contested class certification motion and *Daubert* motion, which culminated in a three-day evidentiary hearing before Judge Arleo and a 45 page published Opinion;

- Briefing on Sanofi's subsequent petition to the Third Circuit for leave to appeal from Judge Arleo's Opinion and Order certifying the Class;

- Opposing Sanofi's summary judgment motion and second *Daubert* motion at the merits stage;

- Conducting arm's-length settlement negotiations, over many years, with two private mediators;
- Developing and drafting the Settlement Agreement, Long Form Notice, Publication Notice, and Claim Form and overseeing the notice process;
- Communicating with Class Representatives and large members of the Class regarding litigation strategy, updates on the litigation, settlement negotiations and the notice process; and
- Communicating with Class members throughout the litigation, including during the settlement and notice period.

See Cramer Co-Lead Decl. ¶46; *see also id.* at ¶¶4-41, 47.

Even now, the work on this litigation has not ended and will not end until the Settlement funds are finally distributed to Class members. Plaintiffs' Co-Lead Counsel will continue to expend many additional hours—for which Co-Lead Counsel are not seeking reimbursement—in connection with the Settlement administration process, responding to Class member inquiries, working to secure final approval of the Settlement, preparing for the final approval hearing, and responding to issues arising during Settlement administration, including the allocation and distribution of the Net Settlement Fund. *Id.* at ¶47. However, Class Counsel will seek additional reimbursement from the Net Settlement Fund related to future expenses incurred by the Settlement Administrator (Rust Consulting). Cramer Co-Lead Decl. ¶69.

The lengthy and time-consuming efforts summarized above in conjunction with the advanced procedural posture of the litigation weigh in favor of the fee request. *Bradburn*, 513 F. Supp. 2d at 339 (four-year-old antitrust case involving litigation over class certification and collateral estoppel, expert testimony on both class certification and on the merits, and numerous depositions supported fee request).

(b) The size of the fund and the number of people that benefit

The size of the fund created by and the number of people who benefit from the Settlement weigh in favor of approving the fee request.[26] The Settlement is an outstanding result for the Class—a class consisting of almost 30,000 entities, most of whom are physician practices. Namely, the Settlement provides significant, immediate and certain payment of $61.5 million, plus accrued interest, less attorneys' fees, expenses, administration costs, and service awards.[27] The Settlement achieves for the Class a dollar value higher than the most similar healthcare related antitrust bundling cases—brought by some of the same Class Counsel as here on behalf of similar classes of direct purchasers of medical devices and products. Cramer Co-Lead Decl. ¶42. Indeed, the $61.5 million Settlement achieved in this case is the largest by a wide margin:

[26] *See Gunter*, 223 F.3d at 198 (identifying "[t]he size of the settlement fund created and the number of persons benefitted is another important factor in fee-award cases").

[27] *See supra* at pp. 1 to 2.

Case (Year of Settlement)	Settlement Result (ordered by size of settlement)
***Castro v. Sanofi* (2017)**	**$61.5M**
Norvir (2011)[28]	$52M (settled after jury trial commenced)
Hypodermic Products (2013)[29]	$45M
Sharps Containers (2010)[30]	$32.5M (settled after jury trial commenced)
Endosurgical (2008)[31]	$13M (for direct & indirect purchaser classes combined)
Pulse Oximetry Devices (2009)[32]	$0 (summary judgment granted)
Catheters (2009)[33]	$0 (summary judgment granted)

Therefore, the significant cash value delivered to the Class as a result of the Settlement weighs in favor of granting Class Counsel's fee request.

(c) The skill and efficiency of counsel

Class Counsel are comprised of some of the preeminent plaintiffs' class action and antitrust litigation firms in the country, with decades of experience prosecuting and trying complex antitrust actions.[34] The principal attorneys for the Class here, Co-Lead Counsel Eric L. Cramer and Linda Nussbaum, are each highly experienced antitrust attorneys who have collectively resolved class action cases amounting to well over $4 billion during their respective careers. Cramer Co-Lead Decl. ¶48. Class Counsel applied their knowledge and experience to

[28] *Meijer, Inc. v. Abbott Labs.*, No. 07-cv-5985 (N.D. Cal.).

[29] *In re Hypodermic Products Antitrust Litig.*, MDL No. 1730, No. 05-cv-1602 (D.N.J.).

[30] *Natchitoches Parish Hosp. Svc. Dist. v. Tyco*, No. 05-12024 (D. Mass.).

[31] *In re Endosurgical Prods. Direct Purchaser Antitrust Litig.*, No. 05-cv-8809 (C.D. Cal.).

[32] *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991 (9th Cir. 2010) (affirming district court's dismissal on summary judgment).

[33] *St. Francis Medical Center v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069 (E.D. Mo. 2009).

[34] The background, experience, and qualifications are included in the Cramer Co-Lead Decl. at Exhibits H to CC.

obtain a positive result for the Class.[35] Class Counsel also faced formidable opposition from defense counsel from nationally recognized law firms and including counsel with decades of antitrust and class action experience who vigorously defended this litigation. The high quality of opposing counsel supports Class Counsel's attorneys' fee request.[36]

(d) The risk of non-payment

"A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust action[], including the uncertain nature of the fee, the wholly contingent outlay of large out of pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high."[37] One court observed in an antitrust action, "[i]t is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."[38] Indeed, the history of antitrust

[35] *See Gunter*, 223 F.3d at 195 n.1 (identifying the skill and efficiency of the attorneys involved as one of the factors to consider in evaluating a fee request).

[36] *See In re Computron Software, Inc.*, 6 F. Supp. 2d 313, 323 (D.N.J. 1998) (request for attorneys' fees was appropriate given "the complexity of the issues, the significant attendant risks of proceeding with the instant litigation, and the tenacity, vigor and professionalism with which all attorneys represented the interests of their clients"); *In re American Investors Life Ins. Co. Annuity Marketing and Sales Practices Litig.*, 263 F.R.D. 226, 244 (E.D. Pa. 2009) (where class counsel were highly skilled in litigating class actions against insurance companies, the defendants were represented by a leading law firm, and the case was vigorously litigated by both sides, this supported class counsel's fee request).

[37] *Remeron*, 2005 WL 3008808, at *14; *see also Gunter*, 223 F.3d at 195 n.1, 199 (explaining that the risk that counsel takes in prosecuting a client's case should also be considered when assessing a fee award).

[38] *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *see also Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) ("[T]he risk of not prevailing and therefore, the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee").

litigation is replete with cases in which plaintiffs succeeded at trial on liability but recovered no damages or very small damages at trial or after appeal.[39]

Even if Plaintiffs had brought their case to trial and succeeded, they still would have faced certain and lengthy appeals. As a court in this district has observed, "the risk of non-payment is heightened in a case of this nature where counsel accepts a case on a contingent basis."[40] In such cases, "the intrinsically speculative nature of th[e] contingent fee case enhances the risk of non-payment and bolsters the Court's analysis under this factor."[41] And, as another court explained in awarding a one-third fee in an antitrust class action to class counsel (including one of the Co-Lead Counsel here) in *Wellbutrin SR*:

> Class Counsel faced numerous risks in preparing and litigating this case, including the risks associated with the motion to dismiss, class certification, summary judgment, and – had the case continued – ultimately proving liability and damages at trial and potentially surviving any appeals. Underlying all of these risks was the enormous one of handling this case for its entire duration on a contingent basis, doing everything necessary to honor Class Counsel's commitment and obligations to the class. . . . The substantial risk of nonpayment that Class Counsel faced throughout this litigation strongly supports their fee request.[42]

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[39] *See, e.g.*, *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991 (9th Cir. 2010) (Ninth Circuit affirmed district court's dismissal on summary judgment, and plaintiffs received no damages); *St. Francis Medical Center v. C.R. Bard, Inc*., 657 F. Supp. 2d 1069 (E.D. Mo. 2009) (District court granted summary judgment in favor of defendant and plaintiffs received nothing); *In re Abbott Labs. Norvir Anti-Trust Litig.*, Case Nos. C 04-1511 CW, C 07-5702 CW, ECF No. 522 (N.D. Cal.) (Direct class settled for $52 million but co-plaintiff went to trial and lost); *U.S. Football League v. National Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("[T]he jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages."); *MCI Comm. Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983) (antitrust judgment remanded for new trial and damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (after two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the proposed class recovered nothing in an antitrust class case).

[40] *In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 438 (D.N.J. 2004) (citation omitted).

[41] *Id.*

[42] *In re Wellbutrin SR Antitrust Litig.*, No. 04-5525, ECF 413, at 11-12 (citations omitted).

And so it is here, where the Plaintiffs' claims involve a complex set of factual and legal issues that significantly increased the odds of nonpayment. For five years, Class Counsel had to be prepared to pay all of the costs and carry all of the risk that there might not be any recovery while "the Class itself risked nothing out-of-pocket."[43] The risk faced by Class Counsel was multifaceted, including defeating a motion to dismiss, obtaining class certification, and opposing two *Daubert* motions, among others.

Having prevailed in the face of the multiple attendant risks, Class Counsel should be rewarded. The substantial "risk factor" of nonpayment strongly supports Class Counsel's fee request.

(e) The amount of time devoted to the litigation

As explained above, this litigation required a substantial investment of time by Class Counsel.[44] Class Counsel necessarily expended more than 43,200 hours over more than five years preparing, litigating, and negotiating the settlement of this Action. And Class Counsel's commitment to this litigation is not over. Class Counsel will spend substantial additional time preparing for and participating in the final approval hearing and handling claims administration.[45] The amount of time that Class Counsel was required to devote to this action also supports approval of the fee request.[46]

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[43] *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 423 (E.D. Pa. 2010).

[44] "[T]he amount of time devoted to the case by plaintiffs' counsel" is one of the *Gunter* factors. *Gunter*, 223 F.3d at 195 n.1.

[45] *See* Cramer Co-Lead Decl. ¶47.

[46] *See, e.g.*, *In re Veritas Software Corp. Sec. Litig.*, 396 F. App'x 815 (3d Cir. 2010) (district court did not abuse its discretion in approving class counsel's fee application seeking 30% of settlement fund in securities fraud class action, where class counsel spent four years and thousands of hours of attorneys' labor in litigating the case); *Schwartz v. Avis Rent a Car Sys., LLC*, No. 11-4052, 2016 WL 3457160, at *13 (D.N.J. June 21, 2016) (class counsel fee request was reasonable given thousands of hours of attorney work spent on the case, as well as the

Class Counsel's lodestar calculations (discussed below) do not include any amount for anticipated future work. *See Remeron*, 2005 WL 3008808, at *15 (observing that class counsel would "likely incur hundreds of additional hours in connection with administering the settlement, without prospect for further fees"). That Class Counsel's fee request covers not only work that has been done to date, but also any such future work, makes the request that much more reasonable.

(f) Consistency with fee awards in comparable cases

Courts in the Third Circuit have repeatedly approved attorneys' fees awards of one-third of the settlement in antitrust class actions.[47] The fee request is also consistent with the fees awarded in the most closely analogous healthcare bundling cases brought by some of the same Class Counsel.[48] Because this percentage is consistent with the long-line of Third Circuit precedent, the requested fee is reasonable and should be approved.

(g) Presence or absence of objections

Pursuant to the Preliminary Approval Order, on May 17, 2017, the Settlement Administrator mailed the detailed Long Form Notice to each member of the Class. The Settlement Administrator also posted the Long Form Notice and other pertinent information on a website devoted to this case (www.MenactraAntitrustLitigationSettlement.com) and submitted a summary version of the Notice (the Publication Notice) to the medical journal *Pediatrics* for

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lengthy history of the highly contested litigation, involving extensive and complex motion practice and accompanying discovery demands).

[47] *See supra* n.6; *Gunter*, 223 F.3d at 198 (identifying "comparing awards in similar case" as an "important factor in fee-award cases").

[48] *See In re Hypodermic Prods. Antitrust Litig.*, No. 05-1602, ECF 461 (D.N.J. Apr. 10, 2013) (awarding one-third fee on settlement of $45 million) (Linares, J.); *Meijer, Inc. v. Abbott Labs.*, No. 07-cv-5985, ECF 514 (N.D. Cal. Aug. 11, 2011) ("*Norvir*") (awarding one-third fee on settlement of $52 million); *Natchitoches Parish Hosp. Svc. Dist. v. Tyco*, No. 05-12024, ECF 407 (D. Mass. Mar. 12, 2010) (awarding one-third fee on settlement of $32.5 million).

publication in its May 22, 2017 issue. The Class Notice notified all Class members of (1) the terms of the Settlement; (2) where additional information could be obtained; (3) Class Counsel's intention to seek attorneys' fees of one-third of the cash value of the Settlement, litigation costs, and service awards; and (4) the means by which Class members may object to any aspect of the Settlement, including the attorneys' fees motion and supporting papers. *See* Cramer Co-Lead Decl. ¶44. Although Class members have until July 10, 2017 to object or opt-out, as of June 22, 2017, there have not been any objections, and only 11 entities (representing less than 0.1% of Class members) have opted out. *Id.* Courts have found that a low number of objectors is particularly telling in cases—such as this one—in which Class members are sophisticated.[49]

As the Third Circuit noted in *Gunter*, the lack of a substantial number of objections is an important consideration in evaluating a fee request because "a client's views regarding her attorneys' performance and their request for fees should be considered when determining a fee award."[50] Further, the Class Representatives in this case support the Settlement, the proposed attorneys' fee award, and the reimbursement of expenses. *See* Cramer Co-Lead Decl. Exhibits A to C. In addition, three sophisticated Class members whose purchases constitute nearly 30% of the total class purchases, have submitted letters supporting the Settlement, proposed attorneys' fee award, the reimbursement of expenses, and the sought named plaintiff incentive awards. *See* Cramer Co-Lead Decl. Exhibits D to F. These National Wholesalers are each Fortune 100

[49] *See, e.g.*, *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-85, 2005 WL 3008808, at *6 (D.N.J. Nov. 9, 2005) ("[Where], . . . , a class is comprised of sophisticated business entities that can be expected to oppose any settlement they find unreasonable, the lack of objections indicates the appropriateness of the Settlement."); *Bradburn*, 513 F. Supp. 2d at 338 ("The absence of objections to the requested attorneys' fees in this case is particularly notable given the sophisticated nature of the absent Class Members.").

[50] *Gunter*, 223 F.3d at 199.

companies who are more than satisfied with Class Counsel's representation in this case and are fully supportive of the sought fee.

2. Application of the *Prudential* Factors

(a) The value of benefits accruing to Class members attributable to the efforts of Class Counsel as opposed to the efforts of others

The development of this case was entirely the result of the investigation and efforts of Class Counsel and, unlike many antitrust cases, did not follow on the heels of government action. To the contrary, the FTC received multiple letters from consumer groups challenging vaccine bundling and conducted an investigation, but never publicly commented on its investigation or pursued an enforcement action of any kind. Cramer Co-Lead Decl. ¶5. Class Counsel developed, on its own, factual and economic evidence of the alleged anticompetitive scheme.[51]

Class Counsel, in consultation with Prof. Elhauge, developed an innovative and cutting-edge theory of liability in this case to explain and demonstrate how bundled loyalty discounts can stifle competition and harm consumers even if a competitor continues to profit in the relevant market.[52] The theory of this case focused the proper antitrust inquiry on harm to competition rather than harm to a competitor. Prof. Elhauge opined, *inter alia*, that: (a) Sanofi had monopoly power in the relevant vaccine markets (DTaP, IPV, Hib, and meningitis); (b) the Bundle had no consumer benefits; (c) the Bundle divided the market into restrained customers

[51] *See supra* at pp. 6 to 8.

[52] Class Counsel engaged Prof. Elhauge to rely on his previous ground-breaking academic work concerning how bundled loyalty discounts divide markets. *See, e.g.*, Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397 (2009); Einer Elhauge, *How Loyalty Discounts Perversely Discourage Discounting*, 5 J. Comp. L. & Econ. 189 (2009); Einer Elhauge & Abraham L. Wickelgren, *Robust Exclusion and Market Division Through Loyalty Discounts (With/Without Buyer Commitment*), Harvard Public Law Working Paper No. 14-12 (2014)).

(those subject to the Bundle) and unrestrained customers, which division in turn lessened the ability and incentives of Sanofi and Novartis to compete; and (d) this market division harmed competition even though it may not have raised rivals' costs; and (e) the Bundle caused prices for all Class members to be higher than they would have been in the but-for world.[53]

Class Counsel, assisted by Prof. Elhauge, explained and showed how bundled loyalty discounts can be anticompetitive in the absence of a showing that the bundling raised rivals' costs. Cramer Co-Lead Decl. ¶29. Importantly for the present motion and the possible risks going forward, most courts declaring bundling illegal have based that result on a finding that that the conduct had made a rival less efficient and raised its costs. *Id*. Further, no previous court had explicitly accepted Prof. Elhauge's divided market theory. *Id.*

Proving injury and damages in this case also required an innovative legal and economic approach. Specifically, there was no "before" or "after" period that had the two vaccines competing free of the challenged bundling, and thus there was no analogous "competitive" period in the meningitis vaccine market that could be used as a point of comparison against the actual world. *Id*. Further, no other vaccine market provided an appropriate benchmark for a variety of reasons, including that few pediatric vaccine markets are free of the conduct being challenged in the case, loyalty discounts and bundling. *Id*. Class Counsel therefore engaged Prof. Elhauge to employ a simulation model known as a differentiated Bertrand price model to show that the Bundle inflated prices and to quantify the aggregate damages to the Class. *Id.*

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[53] Prof. Elhauge reviewed a substantial amount of the record evidence developed in this litigation. Cramer Co-Lead Decl. ¶27. As discussed above at pp. 13 to 14, Judge Arleo found Prof. Elhauge's analyses reliable and rejected multiple critiques advanced by Sanofi and its expert in over a thousand pages of expert reports, extensive briefing, and during the three-day evidentiary hearing. *See, e.g.*, ECF 415 at 1 ("Considering the testimony and briefing, the Court is convinced that Plaintiffs' expert, Professor Einer Elhauge, cannot be excluded as unreliable.").

Although this is a well-accepted merger simulation model to simulate competition in the post-merger world, this was the *first* judicial endorsement of a differentiated Bertrand model to demonstrate classwide injury and damages in a private antitrust action. *Id*. at ¶30. Sanofi argued that no other court had ever found Prof. Elhauge's market division opinion and differentiated Bertrand model to be admissible and certainly would have continued to press these arguments on appeal if Plaintiffs were to prevail at trial. *Id.* Plaintiffs' analysis resulted in an opinion that widens the circumstances under which bundled loyalty discounts may be considered anticompetitive, *i.e*., in the absence of a showing that the bundling raised rivals' costs. *Id.* By employing a differentiated Bertrand model for the first time in private antitrust litigation to show injury and damages, this case has provided plaintiffs with additional tools to advance their cases where "before/after" and "yardstick" methods are unavailable or unavailing. *Id*.[54]

That Plaintiffs survived a motion to dismiss, *Daubert* briefing, and a class certification motion, and opposed summary judgment based on a theory of liability developed by Class Counsel and their experts weighs heavily in favor of Class Counsel's fee request.[55]

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[54] Prof. Elhauge won the American Antitrust Institute's Outstanding Antitrust Litigation Achievement in Economics award for his work on this matter. Cramer Co-Lead Decl. ¶31 (citing American Antitrust Institute, *Antitrust Enforcement Award Honorees Announced* (Oct. 10, 2016), http://www.antitrustinstitute.org/content/antitrust-enforcement-award-honorees-announced). "This award is limited to contributions within government or private, civil, or criminal antitrust litigation by an individual economist, team of economists, or economic consulting firm. Nominees will be judged on: (a) contribution to the development of antitrust-related economic methodology, analysis, and/or presentation; and (b) the positive development of antitrust policy." *Id.* (quoting American Antitrust Institute, *Antitrust Enforcement Awards*, http://www.antitrustinstitute.org/enforcement-awards). Mr. Cramer serves on the Board of Directors of the American Antitrust Institute, and nominated Prof. Elhauge for the award, but he played no role in selecting the honorees or winner. That was done by a separate Blue Ribbon Committee.

[55] *See AT&T Corp.*, 455 F.3d at 173 (where class counsel was not aided by the efforts of any governmental group, this strengthened the district court's conclusion that the fee award was fair and reasonable).

(b) The percentage fee that would have been privately negotiated

A one-third contingency fee is standard in individual litigation, and often more in antitrust actions, given their complexities and risks.[56] It represents the market rate for fee awards in large antitrust class actions,[57] and thus would likely be the benchmark by which the parties would have privately negotiated a fee. The letters from the National Wholesalers, who are large sophisticated Fortune 100 companies, are a clear indication that the fee sought in this matter is akin to what would have been privately negotiated outside the context of Rule 23. This factor weighs in favor of granting Plaintiffs' motion.

(c) Innovative terms[58]

Although the Settlement is fairly standard in that it provides for a cash recovery for Class members, it also provides that Sanofi will release its antitrust counterclaim against the Class Representatives and members of the Class. This is important because Sanofi vigorously pursued its counterclaim during the litigation and Sanofi's agreement to release its counterclaim terminates this risk to the Class.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Request

The Third Circuit has held that it is "sensible" for district courts to perform a lodestar cross-check to ensure that application of the percentage-of-recovery method does not result in a

[56] *See Remeron*, 2005 WL 3008808, at *16 ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation.").

[57] *See supra* at n.6.

[58] *See Prudential*, 148 F.3d at 340.

recovery that is too great.[59] Once the lodestar is calculated,[60] "[t]he total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases."[61]

Using Class Counsel's historical rates, the lodestar totals $22,086,998.45, which is greater than the $20.5 million (plus interest) that Class Counsel seeks to recover here.[62] Thus, Class Counsel are not seeking *any* risk premium at all for their efforts in this contingent litigation, as the lodestar multiplier is below 1 at 0.928. Typically, Class Counsel in cases of this type recover multipliers ranging from 2-4, and they are often higher.[63] That Class Counsel here would, if their request were granted, recover a "negative" multiplier (even conservatively using historical rates) despite the outstanding results for the Class, the length of the litigation, and the risks involved confirms and bolsters the reasonableness of the fee request. A "resulting multiplier of less than one, (sometimes called a negative multiplier) suggests that the negotiated fee award is a reasonable and fair valuation of the services rendered to the class by class counsel." *Chun-*

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[59] *Rite Aid*, 396 F. 3d at 305-06; *see also In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 263 (D. Del. 2002) ("The Third Circuit suggests that the district court cross-check the percentage award against the 'lodestar' award to help ensure the reasonableness of the fee.").

[60] The lodestar is determined by multiplying the number of hours counsel reasonably expended by a reasonable billing rate for such services. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001).

[61] Manual for Complex Litigation (Fourth) § 14.122.

[62] Cramer Co-Lead Decl. ¶54.

[63] *See Segen v. OptionsXpress Holdings Inc.*, 631 F. Supp. 2d 465 (D. Del. 2009) (multiplier of 2.06); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340, ECF 543, at 9 (D. Del. April 23, 2009) (multiplier of 3.93); *Warfarin*, 212 F.R.D. at 263 (multiplier of 1.33); *Remeron*, 2005 WL 3008808, at *17 (D.N.J. Nov. 9, 2005) (noting that awarded multiplier of 1.86 is on the "low end of the spectrum"); *Nichols v. SmithKline Beecham Corp.*, No. 00-6222, 2005 WL 950616, at *24 (E.D. Pa. Apr. 22, 2005) (approving a 3.15 multiplier); *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995), *aff'd*, 66 F.3d 314 (3d Cir. 1995) (approving a 9.3 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001) (multiplier of over 6).

Hoon v. McKee Foods Corp., 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010); *see also In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 180 n.14 (3d Cir. 2013) (noting that the "negative lodestar multiplier" in this case "suggests that class counsel would not be overpaid for their services if compensated as requested"); *Milliron v. T-Mobile USA, Inc.*, No. CIV.A. 08-4149 (JLL), 2009 WL 3345762, at *14 (D.N.J. Sept. 10, 2009), *as amended* (Sept. 14, 2009), *aff'd,* 423 F. App'x 131 (3d Cir. 2011) ("A multiplier of less than one is quite reasonable for a lodestar cross-check."); *Rowe v. E.I. DuPont de Nemours & Co.*, No. CIV. 06-1810 RMB/AMD, 2011 WL 3837106, at *22 (D.N.J. Aug. 26, 2011) (recognizing a multiplier of "less than one" as reasonable).

III. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement from that fund of the reasonable litigation expenses they advanced on behalf of the class.[64] Accordingly, Class Counsel request reimbursement of out-of-pocket and unpaid expenses incurred litigating the case.

Class Counsel expended $7,199,310.00 in out-of-pocket and unpaid expenses, without any assurance of repayment, in litigating this case on behalf of the Class. By far the largest component of such expenses comprised of substantial and necessary payments to economic experts, who were essential to the prosecution of a case involving novel and complex economic

[64] *See In re: Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 n.12 (3d Cir. 2001) (quoting the 1985 Task Force Report for the conclusion that the "common-fund doctrine . . . allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred"); *see also AT&T Corp.*, 455 F.3d at 172 n.8 ("Expenses are generally considered and reimbursed separately from attorneys' fees."); *Warfarin*, 212 F.R.D. at 263 (approving costs and expenses reimbursements out of litigation fund as reasonable).

issues. Cramer Co-Lead Decl. ¶56-57. In particular, Plaintiffs' economic expert, Prof. Elhauge, is one of the world's leading experts on the economics of bundling. *See supra* at 32-35. He is the Carroll and Milton Petrie Professor of Law at Harvard University, where he teaches the economic analysis of antitrust law, health policy, contracts, and various other subjects. Cramer Co-Lead Decl. ¶¶19, 56. He also serves as a member of the Advisory Board of the Journal of Competition Law & Economics; has previously served as Chair of the Obama Campaign's Antitrust Advisory Committee; served with the FTC as a Special Employee on Antitrust Issues; is the editor of the Research Handbook on the Economics of Antitrust Law, author of U.S. Antitrust Law & Economics, co-author of Areeda, Elhauge & Hovenkamp, Vol X, Antitrust Law; and has published extensively about anticompetitive practices—including two award-winning articles that go to the heart of the challenged conduct in this case. *Id*.[65] The DOJ and FTC hosted Prof. Elhauge in 2014 to discuss the economics of bundling schemes and the anticompetitive market divisions they can create. *Id*. at ¶56. Commensurate with his experience, he has been described by this Court and other courts as "eminently qualified" and a "highly qualified antitrust titan." *Id.* at ¶¶23, 56. Prof. Elhauge served as an expert at both the class certification and merits stages of this litigation submitting five reports (three on class issues and two on merits issues) totaling well over a thousand pages, sat for five days of deposition

[65] Prof. Elhauge and Wickelgren's article, *Robust Exclusion and Market Division through Loyalty Discounts*, 43 Int'l J. Indus. Org. 111 (2015), was published in an economic journal following rigorous peer review. Subsequently, it won Best Academic Anticompetitive Practice Article by an ideologically diverse and distinguished board of top antitrust scholars with leading government experience. El. M. Rpt. ¶160. This board included Judge Douglas Ginsburg, a prior DOJ Antitrust Division head, William Kovacic, a former FTC head, Joshua Wright, a former FTC commissioner, Howard Shelanski, the head of OIRA (which conducts economic cost-benefit analysis of all US regulations prior to their implementation), Fredric Jenny of OECD, an economic organization representing the U.S. and other nations, and Alexander Italianer, the head of competition for the European Union. *Id.*

testimony, and provided direct and cross-examination testimony during the three-day *Daubert* hearing. *Id.* at ¶56. Prof. Elhauge received the American Antitrust Institute's Outstanding Antitrust Litigation Achievement in Economics award in 2016 for his work on this case. *Id.* at ¶¶31, 56.

Plaintiffs' other expert is Dr. Jeffrey Leitzinger. Dr. Leitzinger is a Ph.D. economist who is the President of the nationally-recognized economic consulting firm Econ One. *Id.* at ¶57. He is an expert in the economics of markets, market pricing, competitive analysis, and regulation. *Id.* During the course of his 35-year career as an economic consultant, Dr. Leitzinger has provided expert testimony in almost 200 proceedings in numerous forums regarding competition economics, commercial damages, econometrics and statistics, intellectual property, and valuation. *Id.* Those forums include U.S. district and bankruptcy courts, state courts, the Federal Energy Regulatory Commission, and various state tax and regulatory commissions as well as private and international arbitrations. *Id.* Relevant to this matter, Dr. Leitzinger has opined on numerous issues in dozens of antitrust actions. *Id.* His research has been used in connection with congressional legislation and tax and royalty policy, as well as corporate policy decisions by Fortune 500 companies. *Id.* Dr. Leitzinger submitted two reports and sat for two days of deposition testimony. *Id.*

Other significant expenses included costs associated with the storage of millions of pages of documents on a secure database and costs associated with travel to depositions, Court hearings, and mediations around the country. *Id.* at ¶¶58-59.[66] These expenses, as well as others

[66] Breakdowns of the litigation expenses paid directly by Class Counsel in support of the prosecution of this litigation, the expenses paid out of the Litigation Fund, and a summary of outstanding balances owed are included in the Cramer Co-Lead Decl. at ¶¶55, 60-69.

routinely charged to hourly-fee-paying clients, such as court reporting expenses, photo and data copying charges, and computerized legal research costs, were reasonable and appropriate.[67]

Given that the expenses were incurred without guarantee of reimbursement, Class Counsel had strong incentive to keep them reasonable, and did so. Plaintiffs' request for reimbursement is supported by the Class Representatives.[68] It is also supported by three sophisticated Class members constituting nearly 30% of the overall class purchases and thus would be entitled to 30% of the recovery.[69] Moreover, as of June 22, 2017, there had not been any objections filed by any Class member.[70] Class Counsel should be reimbursed for their reasonably incurred expenses.[71]

IV. THE REQUESTED SERVICE AWARD TO EACH CLASS REPRESENTATIVE IS REASONABLE

Plaintiffs request that the Court approve service awards to the Class Representatives of $100,000 for each of the three Class Representatives, namely Adriana M. Castro, M.D., P.A., Sugartown Pediatrics, LLC, and Marquez and Bengochea, M.D., P.A. In the Third Circuit,

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[67] *See, e.g.*, *Heekin v. Anthem, Inc.*, No. 05-1908, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (approving expenses of over $6.2 million on $30 million settlement).

[68] Cramer Co-Lead Decl. Exhibits A to C.

[69] Cramer Co-Lead Decl. Exhibits D to F.

[70] Cramer Co-Lead Decl. ¶44.

[71] *See In re OSB Antitrust Litig.*, No. 06-826, ECF 947, at 9 (E.D. Pa. 2006) (approving class counsel's fee request because "[t]his complex lengthy matter involved some eighty depositions, the creation and maintenance of a huge case database, and the preparation and review of expert economic analysis and reports"); *Remeron*, 2005 WL 3008808, at *17 (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro-hac vice")).

service awards may be paid to class representatives to reward efforts that benefit the class.[72] In evaluating the appropriateness of such awards, courts consider: (i) the financial, reputational and personal risks to the plaintiff; (ii) the degree of plaintiffs' litigation responsibilities; (iii) the length of the litigation; and (iv) the degree to which the plaintiffs benefited as Class members.[73]

Courts have long held that private class action suits are critical in enforcing the antitrust laws for the protection of the public. *See, e.g., Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 573 n.10 (1982) (noting "private suits are an important element of the Nation's antitrust enforcement effort"). Moreover, numerous courts have awarded named class plaintiffs for the benefits they have conferred on the class, and the amount requested here is consistent with typical awards.[74] This Court should therefore approve these appropriate and reasonable service awards to the Class Representatives.

The awards requested here are well deserved. As described more fully below, each of the Class Representatives has performed a "public service of contributing to the enforcement of mandatory laws."[75] Without the efforts of the Class Representatives, the Class would have recovered nothing. Furthermore, the amounts requested are appropriate in light of the unusual risks and sacrifices made by the Class Representatives during the five years this litigation was prosecuted. Importantly, all three of the Class Representatives were the target of Sanofi's antitrust counterclaim and, despite being aware of that risk, chose to continue to prosecute this

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[72] *See Bradburn*, 513 F. Supp. 2d at 342 ("It is particularly appropriate to compensate named representative plaintiffs with service awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class.").

[73] *See Bradburn*, 513 F. Supp. 2d at 342; *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 220 (E.D. Pa. 2011).

[74] *See supra* at n.7.

[75] *Bredbenner v. Liberty Travel, Inc.*, No. 09-1248, 2011 WL 1344745, at *22 (D.N.J. Apr. 8, 2011) (citation and quotation marks omitted).

litigation on behalf of the Class. The request for service awards is supported by three sophisticated Class members constituting nearly 30% of the overall class purchases, and as of June 22, 2017, no Class member has objected to the request. *See* Cramer Co-Lead Decl. ¶44 and Exhibits D to F.

Adriana Castro, M.D., P.A.

Dr. Adriana Castro has been a pediatrician in the Miami, Florida area for almost thirty years. *Id.* at ¶71 & Exhibit A. Dr. Castro sought to become a Class Representative and challenge Sanofi's heavy handed practices, especially after she spoke to other doctors who had similar experiences and felt that they had no recourse because Sanofi was "such a big guy." *Id*. Dr. Castro worked with Co-Lead Counsel and Class Counsel in developing the first complaint filed in this litigation and also in developing the CAC. *Id.* She also worked with Co-Lead Counsel and Class Counsel in responding to Sanofi's discovery requests, producing thousands of pages of documents from her practice's files, and sitting for a deposition. *Id.* The exemplary efforts of Adriana Castro on behalf of the Class without any promise of remuneration or repayment for her time and expenses supports the service award sought by Class Counsel.

Sugartown Pediatrics, LLC

Sugartown Pediatrics, LLC is a solo practice in Newtown Square and Malvern, Pennsylvania run by Dr. Louis Giangiulio (known as "Dr. G"). *Id.* at ¶72 & Exhibit B. Dr. G also attends to newborns at Paoli, Bryn Mawr and Lankenau Hospitals and previously served as a physician in the U.S. Army. *Id.* Dr. G sought to become a Class Representative because he believes that the terms of Sanofi's bundled contracts prevented him "from being able to purchase vaccines at the lowest cost I could procure them for my practice." *Id.* Like Dr. Castro, Dr. G worked with Co-Lead Counsel and Class Counsel in responding to Sanofi's discovery requests,

producing thousands of pages of documents from his practice's files, and sitting for a deposition. *Id.* Sugartown Pediatrics' unwavering support of this litigation on behalf of the Class without any promise of compensation for five years more than supports the service award for Sugartown Pediatrics sought by Class Counsel.

Marquez and Bengochea, M.D., P.A.

Marquez & Bengochea, M.D., P.A. is a husband and wife pediatric practice composed of Dr. Eysa Marquez-Brito and Dr. Jose Bengochea. *Id.* at ¶73 & Exhibit C. Drs. Marquez-Brito and Bengochea have served the healthcare needs of children in Coral Gables, Florida for over thirty years. *Id.* When asked why she decided to serve as a Class Representative, Dr. Marquez-Brito testified: "[M]y parents came here from Cuba and they had 10 cents in their pocketbook and I'm here and I became a doctor. We went away from monopolies and communism and this [Sanofi's bundling] is to me [an] unfair practice and I'm in it[.]" *Id.* Dr. Marquez-Brito also noted that even though the threat of Sanofi's counterclaim in response to her filing suit made her "very nervous" she felt that she had to take a stand because she "want[ed] to make a difference." *Id*. Like Dr. Castro and Dr. G, Drs. Marquez-Brito and Bengochea, worked with Co-Lead Counsel and Class Counsel in responding to Sanofi's discovery requests, producing thousands of pages of documents from their practice's files, and sitting for three days of deposition. *Id.* Marquez and Bengochea's efforts on behalf of the Class warrant the service award requested by Class Counsel.

V. CONCLUSION

Plaintiffs' Co-Lead Counsel respectfully request that the Court approve the attorneys' fee and expense application and enter an order awarding attorneys' fees in the amount of one-third of the $61.5 million cash value of the Settlement—$20.5 million (plus accrued interest), and

reimbursement of reasonably incurred expenses as they appear on the books and records of all of the firms acting as Class Counsel in this litigation in the amount of $7,199,310.00. Plaintiffs' Co-Lead Counsel also request service awards of $100,000 for each of the three Class Representatives.

Dated: June 23, 2017

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