UNITED STATES DISTRICT COURT
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. 11-7178(JMV)(MAH)

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, FINAL JUDGMENT, AND ORDER OF DISMISSAL

Peter S. Pearlman
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Park 80 Plaza West-One
250 Pehle Avenue, Suite 401
Saddle Brook, NJ 07663
Telephone: (201) 845-9600
Facsimile: (201) 845-9423

James E. Cecchi
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.
5 Becker Farm Road
Roseland, NJ 07068
Telephone: (973) 994-1700
Facsimile: (973) 994-1744

Co-Liaison Counsel for Plaintiffs and the Class

[Additional Counsel on Signature Page]

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I. INTRODUCTION[1]

After more than five years of contentious litigation, the $61.5 million cash settlement and release of Sanofi's antitrust counterclaim (the "Settlement") is an outstanding result for the Class of nearly 30,000 pediatricians and other direct purchasers of Sanofi's conjugate quadrivalent meningococcal vaccine ("MCV4 vaccine") Menactra.[2] Final approval of the Settlement is warranted as fair, reasonable, and adequate because, among other things: (1) the cash value of the Settlement is substantial, especially in view of the enormous risks involved in this case, and exceeds the recoveries in comparable healthcare-related antitrust bundling cases; (2) the Settlement is explicitly supported by the Class Representatives and three large sophisticated vaccine wholesalers accounting for approximately 30% of Class purchases; and (3) not a single Class member has objected to the Settlement and only 16 Class members (approximately 0.05% of Class members – *i.e.*, less than one tenth of one percent of Class members accounting for a miniscule amount – roughly 0.03% – of Class purchases) have opted out.[3]

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[1] Certain capitalized terms used in this brief are defined in Section I of the Settlement Agreement, which is attached as Exhibit 1 to the Declaration of James E. Cecchi, ECF 502-3 (filed on Jan. 27, 2017). The Defendant, Sanofi Pasteur Inc., joins in the relief requested, but does not join this memorandum.

[2] On September 30, 2015, this Court entered an Opinion and Order certifying a Class, appointing Berger & Montague, P.C. and Nussbaum Law Group, P.C. as Co-Lead Counsel, and appointing named plaintiffs Adriana M. Castro, M.D., P.A., Sugartown Pediatrics, LLC, and Marquez and Bengochea, M.D., P.A. as the Class Representatives. *See* ECF 415 & 416. As amended by the Court's October 11, 2016 Opinion (ECF 475), 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)." Apr. 24, 2017 Order, ECF 512 ("Preliminary Approval Order").

[3] On July 24, 2017, pursuant to the Preliminary Approval Order, Co-Lead Counsel reported no objections to the Settlement and only 16 opt-out requests. *See* Notice Concerning Exclusions and Notice Program, ECF 514. No objections or additional opt-outs have been received since then.

The Settlement will provide immediate, meaningful, and certain benefits to Class members. Specifically, each of the nearly 30,000 Class members who submit a Claim Form[4] will receive a *pro rata* share of the $61.5 million Settlement Fund after reduction for attorneys' fees, reimbursed expenses, service awards, administration costs, and any applicable taxes ("Net Settlement Fund") under a straightforward, efficient, and fair Plan of Distribution.[5] 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 is releasing its antitrust counterclaim against Plaintiffs and the Class, a claim it aggressively pursued during the course of this litigation.[6]

On April 24, 2017, this Court entered the Preliminary Approval Order. In that Order, the Court, among other things, preliminarily approved the Settlement as fair, reasonable, and adequate, and approved the form and manner of notice to be provided to the Class. Specifically, the Court found no obvious reasons to doubt the fairness of the Settlement, and determined that, among other things, the direct first-class mailing of the Court-approved long form notice to potential Class members, publication of the Court-approved short form notice in an appropriate and widely-circulated medical publication, and the posting of the notices and other relevant documents on a case-specific website comported with due process and Rule 23 of the Federal Rules of Civil Procedure. Pursuant to that Preliminary Approval Order, Co-Lead Counsel

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[4] A draft of the Claim Form is attached as Exhibit A to the Plan of Distribution of the Net Settlement Fund ("Plan of Distribution"), which is being concurrently submitted with this brief.

[5] No Class member has objected to Co-Lead Counsel's request for attorneys' fees, reimbursement of expenses, and service awards to the named Plaintiffs. As indicated in the Court-approved notices, Plaintiffs' fee application and supporting papers have been publicly available on the Court's docket, the websites of Co-Lead Counsel, and on the case-specific website (www.menactraantitrustlitigationsettlement.com) since June 23, 2017.

[6] *See* Declaration of Co-Lead Counsel 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 (2) Plaintiffs' Motion for Final Approval of the Settlement ("Cramer Co-Lead Decl."), ECF 513-1 (filed on June 23, 2017) at ¶¶41, 43.

directed timely distribution of the notices in the form and manner approved by the Court.[7] Pursuant to those notices, Class members had until July 10, 2017 to opt-out of or object to the Settlement or Class Counsel's request for attorneys' fees, reimbursement of expenses, and service awards (the "Fee Petition"). ECF 513.

No Class member has objected to either the Settlement or any aspect of the Fee Petition and only 16 Class members (who collectively represent a minuscule amount of Class sales) have opted out of the Settlement. Each of the Class Representatives supports the Settlement without reservation, as do three of the largest, most sophisticated Class members, AmerisourceBergen, Cardinal Health, and McKesson (together, "the National Wholesalers"), who together account for roughly 30% of the Class's total Menactra purchases over the Class Period.[8] The absence of any objections and the small amount of opt-outs from a class "is a rare phenomenon," particularly where, as here, there are sophisticated Class members. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005); *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) ("[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement"); *Dartell v. Tibet Pharm., Inc.*, No. CV 14-3620, 2017 WL 2815073, at *5 (D.N.J. June. 29, 2017) (Vazquez, J.) ("the lack of objectors weighs in favor of approving the settlement").

[7] The Court's Preliminary Approval Order stated that the "Settlement Administrator shall cause the short form notice to be published once in the medical journal *Pediatrics*[.]" Preliminary Approval Order ¶8. As discussed below and in the Notice Concerning Exclusions and Notice Program at 3-4, the short form notice was instead published in a comparable American Academy of Pediatrics' publication called *AAP News*. *See also* Decl. of Jessica Jenkins Regarding Notice by Mailing and Publication, ECF 514-1 (filed on July 24, 2017) ("Jenkins Decl.") at ¶¶11-12.

[8] *See* Cramer Co-Lead Decl., Exs. A-F, ECF 513-2 to 513-7.

As discussed further below, under the nine *Girsh* factors and relevant *Prudential* factors that courts in the Third Circuit consider when granting final approval, the Settlement is fair, reasonable, and adequate, and ought to be finally approved. *See Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998). In particular, the Settlement is appropriate in light of the complexity, expense, and likely duration of the litigation, the stage of the proceedings, and the costs and risks involved in the litigation.

For these reasons, the Court should grant final approval of the Settlement and Plan of Distribution and bring this hard-fought and long-running litigation—overseen by three different District Court Judges, a Magistrate Judge, and a Court-appointed Special Master—to a close.

II. BACKGROUND

A. Plaintiffs' Class Complaint Alleged that Sanofi Used Its Alleged Dominant Position in Several Pediatric Vaccine Markets to Insulate its Menactra Vaccine from Competition

On January 20, 2012, Plaintiffs filed the First Consolidated Amended Class Action Complaint ("CAC"). ECF 28. The CAC alleged that Sanofi had held a dominant share of five pediatric vaccine markets, including Menactra's 100% monopoly in the MCV4 market,[9] 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,[10] Sanofi responded in mid-2009 by bundling the sale of Menactra with

[9] The MCV4 market is one of the relevant product markets in this case. Cramer Co-Lead Decl. ¶6. 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.

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

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"),[11] 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 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.

[11] 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.

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's 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 competitor Merck), demanding documents, and multiple Freedom of Information Act 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, and, due to third party productions, continued well past the scheduled close of discovery. *Id.* More than 30 fact depositions occurred including 19 depositions of Sanofi personnel, 7 third party depositions, and 5 depositions of 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 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 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.* During class expert discovery, Sanofi deposed Prof. Elhauge for four days (and would later, during merits

expert discovery, depose Prof. Elhauge for another full day) and deposed Dr. Leitzinger for two days. *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. *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 Madeline C. 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."[12] 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.

During merits expert discovery, 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.[13] *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

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

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

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.

Following a three-day *Daubert* hearing at which the Court praised the work of Co-Lead Counsel, *id.* at ¶33, 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.[14] 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

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

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.

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.[15] 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 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 Third Circuit under Federal Rule of Civil Procedure 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 to appeal. 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 John Michael 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 transactional data 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

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

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 Charles 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, Co-Lead 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 *Daubert* motions (on

November 11, 2016), did the parties engaged 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.*

E. The Court Preliminarily Approved the Settlement and Directed That Notice Be Issued to the Class

On April 24, 2017, this Court granted preliminary approval to the Settlement, approved the appointment of Rust Consulting, Inc. ("Rust") as the Settlement Administrator, and approved the form and manner of notice to be provided to the Class. *See* Preliminary Approval Order. Specifically, the Court ordered a notice plan consisting of: (i) sending the long form notice via first class mail to the last known address of each person or entity in the Class; (ii) publishing the short form notice in a publication that is widely circulated among pediatricians and other direct purchasers of MCV4 vaccines; and (iii) posting the short and long form notices on a case-specific website. *Id.* at ¶¶6-9. The Court also ordered that a case-specific toll-free phone number and a post office box be established for receipt of Class member questions, requests, objections, or other correspondence. *Id.* at ¶¶9-10.

F. Rust Timely Disseminated the Court-Approved Notices to Class Members and Otherwise Implemented the Court's Preliminary Approval Order

After the Court issued the Preliminary Approval Order and at Co-Lead Counsel's direction, Rust implemented the notice plan the Court ordered. *See* Jenkins Decl. at ¶¶4-16.

First, after running potential Class member address information through the National Change of Address service, Rust distributed the Court-approved long-form notice by first-class mail to Class members on May 17, 2017 using 29,627 unique names and last known addresses in the mailing database derived from Sanofi's transaction data.[16] Jenkins Decl. ¶¶4-6. Of those 29,627 long form notice mailings, 2,002 were returned undeliverable (16 of which were returned as undeliverable after the July 10, 2017 postmark deadline for objections and exclusion requests). *Id.* at ¶8. A "skip trace," using all available information, was performed on 1,986 undeliverable long form notices in an attempt to obtain a new address for these potential Class members. *Id.* Of the traces performed, 385 resulted in updated addresses. *Id.* Long-form notices were then re-mailed to these potential Class members, but 15 long form notices were returned as undeliverable a second time. *Id*. Ultimately, Rust's reasonable efforts to obtain updated address information and re-mail long form notices resulted in a 94.5% deliverable rate (27,995 out of 29,627 long-form notices successfully delivered), which, in Rust's experience, is higher than

Second, Rust, in conjunction with its sister company Kinsella Media, LLC and as a result of a miscommunication within Rust, caused the short form notice to be published in the American Academy of Pediatrics' official news magazine *AAP News* on May 21, 2017, not *Pediatrics* as had been contemplated. Jenkins Decl. ¶11.[17] Because the readership of *AAP News*

[16] On May 25, 2016, Rust was provided with the names and addressed of 25,771 potential Class members in the Settlement. Jenkins Decl. ¶4 & n.2. On November 14, 2016, after Sanofi had produced updated transactional data pursuant to Court order, the names and addresses were supplemented with information concerning an additional 3,857 potential Class members. *Id.*

[17] The Court's Preliminary Approval Order stated that the "Settlement Administrator shall cause the short form notice to be published once in the medical journal *Pediatrics*[.]" Preliminary Approval Order ¶8. The Court presumably deemed the American Academy of Pediatrics'

and *Pediatrics* are similar and *AAP News* has a higher circulation than *Pediatrics*, publication of the short form notice in *AAP News* had at least the same reach and achieved the same purpose as publication in *Pediatrics*. *See supra* n.17.

Third, beginning on May 22, 2017, Rust established and has been maintaining a dedicated case-specific website (located at https://menactraantitrustlitigationsettlement.com), email address, toll-free telephone hotline, and post office box to aid in correspondence with potential Class members. *Id.* at ¶¶13-16. Both the long and short form notices provided potential Class members with the address for the website (which contains links to the dedicated email address, various case-specific documents including documents relating to approval the Settlement, and a list of important deadlines), the toll-free number, and address information for the post office box. *Id.* at ¶¶13-16. As of July 20, 2017, the website had received approximately 1,734 visits. *Id.* ¶14. As of July 20, 2017, the toll-free hotline, which was staffed with operators prepared to answer potential Class members' questions, had received 147 calls. *Id.* ¶16. Additionally, Co-Lead Counsel have directly fielded numerous Class member calls and email inquiries. *See* Notice Concerning Exclusions and Notice Program at 5.

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medical journal *Pediatrics* appropriate for publication of the short form notice in reliance on Co-Lead Counsel's statement that *Pediatrics* is "a widely circulated monthly publication read by nearly 60,000 pediatricians and other direct purchasers of MCV4 and other pediatric vaccines." Preliminary Approval Brief at 26, ECF 502 (filed on Jan. 27, 2017). Due to a miscommunication within Rust, the short form notice was instead published in the American Academy of Pediatrics' official news magazine *AAP News*. *See* Notice Concerning Exclusions and Notice Program at 3-4. However, *Pediatrics* and *AAP News* are both published by the American Academy of Pediatrics and are understood to be highly similar in terms of readership. *Id.* at 4. Further, circulation of *AAP News* is approximately 10% higher than *Pediatrics*. *Id.* According to the American Academy of Pediatrics, *AAP News* "is the trusted source of timely, relevant news and information about the field of pediatrics and the Academy . . . [c]ontent includes abstracted new research, practice management updates, vaccine news, product recalls and much more." American Academy of Pediatrics Website, AAP Gateway, http://www.aappublications.org /about. Publishing the short-form notice in *AAP News* had at least the same reach and achieved the same purpose as publication in *Pediatrics*.

G. The Proposed Distribution Plan.

The proposed Plan of Distribution allocates the Net Settlement Fund to Class members who submit timely, valid Claim Forms[18] ("Claimants") based on each Claimant's *pro rata* share of the total Menactra purchases made during the Class Period. Each Claimant's *pro rata* share will be calculated using Sanofi's transactional data (which identifies the purchases of each Class member during the Class Period).[19] Relying on Sanofi's data ensures efficient apples-to-apples comparisons as well as obviates the need for Class members to locate purchase records or do any substantial work. Rust, working with the nationally-recognized economic consulting firm Econ One, Inc., will mail a Claim Form to each Class member that includes that Class member's total Menactra purchases (as revealed by Sanofi's sales database). Any Claimant wishing to contest the calculations made from use of Sanofi's data, based on their own purchase data, will be provided an opportunity to do so as part of the procedure described below.

To compute each Claimant's *pro rata* share of the Net Settlement Fund, the total volume of Menactra purchases during the Class Period for each Claimant is divided by the total volume of Menactra purchases for all valid Claimants during the Class Period. Next, for each Claimant, that *pro rata* share is multiplied by the Net Settlement Fund amount to determine each Claimant's total dollar recovery. This type of methodology has been approved in many settlements in similar cases brought by direct purchasers to recover overcharges arising from impaired competition in cases involving pharmaceutical and medical products.[20] It is also

[18] The Claim Form is attached to the Plan of Distribution as Exhibit A.

[19] *See also* Plan of Distribution of the Net Settlement Fund, which is being filed concurrently.

[20] *See*, *e.g.*, *In re Doryx Antitrust Litig*. *(Mylan Pharms., Inc., v. Warner Chilcott Public Ltd.)*, No. 12-cv-3824 (E.D. Pa.), ECF 452-3, at 2 (*pro rata* shares of settlement fund computed on basis of class members' purchases of brand); *In re Skelaxin Antitrust Litigation*, No. 12-cv-83 (E.D. Tenn.), ECF 788 at 6 (same); *In re DDAVP Direct Purchaser Antitrust Litig*., No. 05-cv-2237 (S.D.N.Y.), ECF 101 at 19-20 (S.D.N.Y.) (same); *In re Miralax Antitrust Litig*., No. 07-cv-

consistent with the method described in the Court-approved long form notice that was mailed to potential Class members on May 17, 2017.

Plaintiffs have retained Dr. Jeffrey J. Leitzinger and Econ One, Inc. (of which he is the President), to assist with the computation of *pro rata* shares to Class members who did not exclude themselves from the Class and who submit a valid and timely Claim Form. Dr. Leitzinger has been working on this case for years, has already submitted two expert reports, and is fully familiar with the facts of the case and the damages calculations.

Rust will then send individualized, pre-printed, Claim Forms to each Class Member by First Class Mail within 45 days of the Court granting final approval of the Settlement and Plan of Distribution. Class Members must submit the Claim Form to Rust (with any necessary supporting documentation if the Claimant does not agree with information contained in its Claim Form) postmarked no later than 90 days from the Final Approval of the Settlement and Plan of Distribution (*i.e.*, 45 days after Claim Forms are mailed). At Co-Lead Counsel's discretion, this deadline may be extended another 30 days. Co-Lead Counsel may also seek further extensions of the deadline by order of the Court after any initial extension. Once all claims have been received and Rust has made its final determinations, Co-Lead Counsel will then seek the Court's approval on the final distribution to Class members. Once the Court approves Rust's determinations, checks will then be mailed to Claimants.

This proposed Plan of Distribution is: (a) practical and efficient as it uses sales data obtained from Sanofi, and thus does not require Class members to have retained their own

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142 (D. Del.), ECF 240, at 18 (same); *In re Prograf Antitrust Litig.*, No.11-md-2242 (D. Mass.), ECF 667-2, at 2 (same); *In re Metoprolol Succinate Direct Purchaser Antitrust Litig.*, No.06-cv-52 (D. Del.), ECF 192 at 18 (same); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-340 (D. Del.), ECF 536-1 at 19 (same); *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431 (E.D. Pa.), ECF 481-1 at 16 (same).

purchase records; (b) flexible, in that it allows Class members who wish to rely upon their own purchase records to challenge the data relied upon by Rust; (c) consistent with that which appeared in the Court-approved long form notice; and, (d) consistent with the relative overcharge suffered by each Class member, and thus fair to all members of the Class.

III. ARGUMENT

A. The Court Should Finally Approve the Settlement, Which Is Fair, Reasonable, Adequate, and in the Best Interest of the Class

Under Federal Rule of Civil Procedure 23(e), a settlement must be "fair, reasonable and adequate" to be approved. There is an "overriding public interest in settling class action litigation." *In re Pet Food Prods. Lib. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010) (citation omitted and internal quotation marks omitted). The Third Circuit thus applies a "'strong presumption in favor of voluntary settlement agreements,'" which is "'especially strong in class actions and other complex cases . . . because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2009)).

Here, the Settlement is entitled to a presumption of fairness. As noted above, the Court has already found that (1) the Settlement was the product of "arm's-length negotiations between highly experienced counsel and falls within the range of possible approval," and (2) there was "no obvious reasons to doubt [the Settlement's] fairness." Preliminary Approval Order at ¶2. Additionally, no Class member has objected to the Settlement and a mere 16 of the nearly 30,000 Class members (approximately 0.05% of Class members—*i.e.*, less than one tenth of one percent of Class members accounting for a miniscule amount—roughly 0.03%— of Class purchases) have opted out.

The Settlement was reached with full knowledge of a completed discovery record and filed summary judgment motion. Based on the Court's findings, the absence of any objection, and the affirmative support of the Class Representatives and sophisticated Class members constituting 30% of Class purchases (the National Wholesalers), the Settlement is presumed to be fair. *See Sullivan*, 667 F.3d at 320 n.54 (noting that "'initial presumption of fairness' may apply where "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; (4) only a small fraction of the class objected") (citation and internal quotation marks omitted); *see also In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.").

This presumption of fairness is confirmed by the analysis that courts must apply in evaluating class action settlements. Courts in the Third Circuit consider the nine *Girsh* factors:

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

Pet Food, 629 F.3d at 350 (quoting *Girsh*, 521 F.2d at 157); *see also Sullivan*, 667 F.3d at 319-20. While the Court "must make findings as to each" factor, *id.* at 350, no one factor is dispositive. *Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154, 169 (E.D. Pa. 2011).

In addition to the *Girsh* factors, courts should also consider a second set of factors, known as the *Prudential* factors, insofar as they apply:

- the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;

- the existence and probable outcome of claims by other classes and subclasses;

- the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants;

- whether class or subclass members are accorded the right to opt out of the settlement;

- whether any provisions for attorneys' fees are reasonable; and

- whether the procedure for processing individual claims under the settlement is fair and reasonable.

Pet Food, 629 F.3d at 350 (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998)); *see also Sullivan*, 667 F.3d at 320.

While the Court is required to consider *Girsh* factors and, where applicable, the *Prudential* factors, "[e]xperienced class counsel's approval is entitled to considerable weight and favors finding that the settlement is fair." *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 386 (D.N.J. 2012). Counsel should not be held to "an impossible standard, as a settlement is virtually always a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) (citations, internal quotations omitted). Ultimately, the "decision of whether to approve a proposed settlement is left to the sound discretion of the district court." *Dartell*, 2017 WL 2815073, at *4 (internal quotations omitted).

Here, the *Girsh* factors, the relevant *Prudential* factors, and the judgment of Co-Lead Counsel all favor final approval.

1. The *Girsh* Factors Weigh Heavily and Uniformly in Favor of Final Approval.

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

This first factor considers "the probable costs, in both time and money, of continued litigation." *In re Cendant*, 264 F.3d at 233 (citation and internal quotation marks omitted). "Courts must balance a proposed settlement against the enormous time and expense of achieving a potentially more favorable result through further litigation." *In re Remeron Direct Purchaser Antitrust Litig.,* No. CIV. 03-85, 2005 WL 3008808, at *4 (D.N.J. Nov. 9, 2005) (citation omitted). Cases that require large expenditures of time, money and other resources from the parties and the court are "good candidates" for settlement, *Deitz v. Budget Renovations & Roofing, Inc.,* No. 12-CV-718, 2013 WL 2338496, at *5 (M.D. Pa. May 29, 2013), and courts in this Circuit often say that an "antitrust class action is arguably the most complex action to prosecute." *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*, 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007).

This case was no exception. This litigation, which extended more than five years, included extensive briefing of complex legal, economic, and factual issues as well as exhaustive discovery efforts involving numerous third parties in the face of intense opposition from Sanofi. As detailed above, Co-Lead Counsel and Class Counsel's extensive efforts in this case included:

- 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;

- 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;

- 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;

- 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;

- Reviewing, analyzing, summarizing, and organizing over one million documents (consisting of over four and a half 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 five expert reports at the class certification stage and on deposing Sanofi's expert and analyzing Sanofi's rebuttal report, sur-rebuttal report, and sur-sur-rebuttal report;

- 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 lengthy 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, short form 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.

As the Court's records reflect, by the time of the Settlement, Plaintiffs had already undertaken thousands of hours of work over their more than five-year prosecution of this case. However, had the parties not settled, much more work would yet be forthcoming. Summary judgment motion briefing had not yet been completed, and any subsequent trial would have entailed extensive pretrial briefing and preparation, including the marshaling and presentation of a voluminous evidentiary record. Moreover, even after trial was concluded, there would likely be one or more lengthy appeals. The prospect of a lengthy, complicated trial and subsequent appeals make the Settlement all-the-more appropriate. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 269 (E.D. Pa. 2012) (finding settlement favorable where "considerable expenditures of financial resources and hours of attorney time relating to discovery for liability and damages" would be required for trial); *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); *Ikon Office Solutions*, 194 F.R.D. at 179 ("Finally, the extremely large sums of money at issue

almost guarantee that any outcome, whether by summary judgment or trial, would be appealed. This factor thus weighs in favor of the proposed settlement.").

This case has already spanned more than five years and, had the parties not settled, and if summary judgment were to be denied, would invariably have entailed extensive pretrial motion practice, a complicated trial, and numerous post-trial motions and appeals. The parties' Settlement grants Class members relief immediately. The first *Girsh* factor thus "weighs strongly in favor of the Settlement." *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 145 (D.N.J. 2013) (citing *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535-36 (3d Cir. 2004)).

b. The Reaction of the Class to the Settlement

The second *Girsh* factor also favors final approval. Each Class Representative, all of whom monitored this case closely and reviewed the terms of the Settlement, supports final approval of what each believes to be an "excellent" Settlement.[21]

All indications are that Class members agree with the Class Representatives, as they have responded in an unambiguously positive fashion: (1) no Class member has objected to the Settlement; (2) a mere 16 out of nearly 30,000 Class members has opted out; and (3) the Settlement has obtained the express, unanimous, and enthusiastic support of three of the largest, most sophisticated Class members (the National Wholesalers), collectively constituting approximately 30% of Sanofi's sales of Menactra to the Class.[22]

As noted above, the absence of any objections and a handful of opt-outs from a class "is a rare phenomenon," particularly where, as here, there are sophisticated Class members. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005); *In re Cendant Corp. Litig.*, 264 F.3d

[21] Castro Decl. ¶ 5 (Cramer Co-Lead Decl. Ex. A); Giangiulio Decl. ¶ 5(Cramer Co-Lead Decl. Ex. B); Marquez-Brito Decl. ¶ 5 (Cramer Co-Lead Decl. Ex. C).

[22] *See* Cramer Co-Lead Decl. Exs. D to F.

201, 235 (3d Cir. 2001) ("The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement"); *Dartell*, 2017 WL 2815073, at *5 ("the lack of objectors weighs in favor of approving the settlement"). Class members' approval thus strongly favors a finding that the Settlement is fair, reasonable, and adequate. *See In re Schering-Plough Corp. Enhance Sec. Litig.,* No. CIV.A. 08-2177, 2013 WL 5505744, at *2 (D.N.J. Oct. 1, 2013) (the reaction of the class "is perhaps the most significant factor to be weighed in considering [a settlement's] adequacy"); *In re Fasteners Antitrust Litig.*, No. 08-MD-1912, 2014 WL 285076, at *9 (E.D. Pa. Jan. 24, 2014) (finding that second *Girsh* factor "weighs strongly in favor of finding the settlements fair, reasonable, and adequate" where no class member objected).

c. The Stage of the Proceedings and the Amount of Discovery Completed

The third *Girsh* factor likewise weighs in favor of final approval. Courts use the procedural stage of a case at the time of settlement as a "lens" through which to assess whether counsel had "adequate appreciation of the merits of the case before negotiating" the settlement. *Warfarin,* 391 F.3d at 537 (quoting *Cendant*, 264 F.3d at 235). "[C]ourts generally recognize that a proposed class action settlement is presumptively valid where . . . the parties engaged in arm's length negotiations after meaningful discovery." *Cullen v. Whitman Med Corp.*, 197 F.R.D. 136, 144-45 (E.D. Pa. 2000); *see also In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 630 (E.D. Pa. 2004). Settlements reached after discovery "are more likely to reflect the true value of the claim." *Boone v. City of Phila.*, 668 F. Supp. 2d 693, 712 (E.D. Pa. 2009) (citing *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 (3d Cir. 1993)).

Here, the parties agreed to settle after discovery was concluded, Sanofi's *Daubert* motion against Prof. Elhauge at class was denied, class certification was granted, and defendant Sanofi

had filed motions for summary judgment and a *Daubert* motion to exclude the merits opinions of Plaintiffs' expert Prof. Elhauge. As noted above, the parties took over 30 depositions and reviewed millions of pages of party and third-party documents. Four different experts submitted extensive reports and were deposed for a total of roughly ten days. The parties settled before Sanofi's reply submissions in support of its motion for summary judgment, the record for which had already entailed extensive briefing and voluminous evidentiary support detailing Plaintiffs' case. When they agreed to the Settlement, Plaintiffs had "a full appreciation of the merits of the case as well as the legal theories and risks." *Pet Food*, 629 F.3d at 351; *see also Sheinberg v. Sorensen*, No. 00-6041, 2016 WL 3381242, at *7 (D.N.J. June 14, 2016) (recognizing the role of "meaningful discovery" in evaluating and arriving at a proper settlement amount) (quoting *In re Elec. Carbon Prods. Antitrust Litig.,* 447 F. Supp. 2d 389, 400 (D.N.J. 2006)). The third *Girsh* factor thus also weighs heavily in favor of final approval.

d. The Risks of Establishing Liability and Damages

The fourth and fifth *Girsh* factors also favor finding that the Settlement was fair, reasonable, and adequate. The fourth factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *Gen. Motors*, 55 F.3d 768, 814 (3d Cir. 1995). The fifth factor, like the fourth, "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Cendant*, 264 F.3d at 238-39 (*quoting Gen. Motors*, 55 F.3d at 816). In assessing these factors, however, the "court should not conduct a mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel." *Yedlowski v. Roka Bioscience, Inc.*, No. 14-cv-8020, 2016 WL 6661336, at *14 (D.N.J. Nov. 10, 2016) (quoting *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 644-45 (D.N.J. 2004)).

"In complex cases, the risks surrounding a trial on the merits are always considerable." *Id.* at *14 (quoting *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995)).

Proving liability here would by no means have been a certainty. 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.* While Co-Lead Counsel believe that they would have prevailed on summary judgment and again at trial and on appeal in showing that Sanofi was liable, based on the extensive evidentiary record, they recognize that class action cases, like all complex litigation against large companies with teams of highly talented defense counsel, have inherent risks.[23] "Here, as in every case, Plaintiffs face the general risk that they may lose at trial, since no one can predict the way in which a jury will resolve disputed issues." *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997). Thus, courts in this Circuit have granted final approval to antitrust class action settlements "[a]s in any antitrust case, [there are] substantial risks of non-recovery, even after preliminary victories were achieved." *In re Elec. Carbon Prods.*, 447 F. Supp. 2d at 400; *see also Remeron*, 2005 WL 2230314, at *24 (stating

[23] Even in cases where liability is established, there is no certainty that a jury will award the total amount of damages sought by the Class. *See, e.g., United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"), *aff'd.*, 842 F.2d 1335 (2d Cir. 1988); *MCI Commc'ns. Corp. v. AT&T Co.*, 708 F.2d 1081, 1166-67 (7th Cir. 1983) (remanding antitrust judgment for new trial on damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vac'd*, 417 U.S. 156 (1974) (after two trips to the Second Circuit and one to the Supreme Court, plaintiff and the putative class recovered nothing).

that, in light of risks of no recovery, antitrust class settlement "may be approved even if the settlement amounts to a small percentage of the single damages sought").

With respect to proving damages, although similarly confident, Co-Lead Counsel recognized the genuine risk of no recovery or only a limited recovery. *See, e.g.*, *In re Elec. Carbon Prods*., 447 F. Supp. 2d at 401 (noting risks in proving antitrust damages at trial, which depends on "a battle of experts addressing the measurement of . . . overcharges, which can become an esoteric exercise with unpredictable results"); *Sutton v. Med. Serv. Ass'n*, No. CIV. A. 92-4787, 1994 WL 246166, at *7 (E.D. Pa. June 8, 1994) (granting final approval, noting that "even assuming that plaintiffs ultimately would have prevailed on liability, they faced the risk that they could not establish damages or obtain the other prospective relief that is achieved by this Settlement Agreement"). 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.* 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.*

The Settlement therefore provides Class members with certain and immediate benefits instead of serious risk of receiving nothing if the litigation continues.

e. The Risks of Maintaining the Class Action through Trial

The sixth *Girsh* factor also favors the Settlement. While this Court has already certified a Class, and the Court of Appeals for the Third Circuit denied Sanofi's petition under Federal Rule 23(f) for leave to appeal the class certification order, decertification/modification risks always remain. *See Prudential*, 148 F.3d at 321 (noting that "a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable"). Because of this ever-present risk, courts have generally found the sixth *Girsh* factor to favor final approval of settlements. *Dartell*, 2017 WL 2815073, at *10 (finding sixth *Girsh* factor favored settlement where class had been certified but was and remained subject to subsequent challenge); *see also Egg. Prods.*, 284 F.R.D. at 273 ("The Court of Appeals for the Third Circuit has recognized: There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement.") (internal quotation marks omitted).

f. The Ability of Defendant to Withstand a Greater Judgment

The seventh *Girsh* factor, concerned with "whether defendant[] could withstand a judgment for an amount significantly greater than the settlement," *Dartell*, 2017 WL 2815073, at *7 (quoting *Cendant*, 264 F.3d at 240), is neutral here. The ability of a defendant to withstand a greater judgment is most relevant in cases where the amount of the settlement is less than might ordinarily be agreed upon by the plaintiffs because the defendant's financial circumstances cannot accommodate a higher payment. *Reibstein v. Rite Aid Corp.,* 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011). Such circumstances may not exist here.

Moreover, courts have recognized that whether the defendant would have had the resources to pay more in settlement is not relevant where considered only in a vacuum, divorced from considerations of whether the settlement is fair in light of the legal issues and circumstances involved in the case. *See Warfarin*, 391 F.3d at 538. This case involved difficult legal issues and substantial risks, and Plaintiffs would be required to spend substantial additional time and expenses pursuing the case to its ultimate end. The theoretical ability of Defendant to pay more, considered absent this context, is not relevant to determining the reasonableness of this Settlement. *See id*; *see also Halley v. Honeywell Int'l*, No. 10-3345, 2016 WL 1682943, at *14 (D.N.J. Apr. 26, 2016) ("Even if [defendant] could afford a greater amount than the Settlement would require, that doesn't support rejecting an otherwise reasonable settlement . . . this factor is not relevant to the Court's evaluation"); *Lazy Oil*, 95 F. Supp. 2d at 318 ("The Court presumes that Defendants have the financial resources to pay a larger judgment. However, in light of the risks that Plaintiffs would not be able to achieve any greater recovery at trial, the Court accords this factor little weight in deciding whether to approve the proposed Settlement.").

g. <u>The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation</u>

In combination, the final two *Girsh* factors assess "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Warfarin,* 391 F.3d at 538. They "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Id.* (citing *Prudential*, 148 F. 3d at 322). Assessment of a settlement, however, need not be tied to an exact formula. *See Prudential*, 148 F.3d at 322. The Third Circuit has cautioned against demands that a settlement approach the maximum possible recovery, noting that a settlement is, after all, a compromise. *Id.* at 316-17. Accordingly, a settlement may still be within a reasonable range,

even though it represents only a fraction of the potential recovery. *Cullen,* 197 F.R.D. at 144; *Linerboard,* 321 F. Supp. 2d at 632; *see also Fisher Bros.,* 604 F. Supp. 446, 451 (E.D. Pa. 1985) ("The court must review a settlement to determine whether it falls within a 'range of reasonableness,' not whether it is the most favorable possible result of litigation.").

In terms of absolute dollar value, this Settlement achieves for the Class a dollar value higher than what Plaintiffs believe are the most closely analogous healthcare-related antitrust bundling cases—brought by some of the same Class Counsel as here, working with some of the same expert economists and consultants, and including some of the same Class members (including, *e.g.*, the National Wholesalers).

The $61.5 million Settlement achieved in this case is the largest by a significant margin:

Case / Year of Settlement	**Settlement Result (ordered by size of settlement)**
***Castro v. Sanofi* (2017)**	**$61.5M**
Norvir[24]	$52M
Hypodermic Products (2013)[25]	$45M
Sharps Containers (2010)[26]	$32.5M (at trial)
Endosurgical (2008)[27]	$13M (for Direct & Indirect classes combined; some injunctive relief was also obtained)
Pulse Oximetry Devices (2009)[28]	$0 (summary judgment granted)
Catheters (2009)[29]	$0 (summary judgment granted)

[24] *Meijer, Inc. v. Abbott Labs.*, No. 07-cv-05985 (N.D. Cal.).
[25] *In re Hypodermic Products Antitrust Litig.*, MDL No. 1730, No. 05-cv-1602 (D.N.J.).
[26] *Natchitoches Parish Hosp. Svc. Dist. v. Tyco*, No. 05-12024-PBS (D. Mass.).
[27] *In Re Endosurgical Prods. Direct Purchaser Antitrust Litig.*, No. 05-cv-08809 (C.D. Cal.).
[28] *Allied Orthopedic Appliances Inc. v. Tyco*, No. 08-56317 (C.D. Cal.).
[29] *St. Francis Medical Center v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069 (E.D. Mo.).

These are among the real world results that experienced Class Counsel considered in agreeing to the Settlement.

While Plaintiffs' expert's analyses indicated that the potential recovery on behalf of the Class, assuming Plaintiffs had prevailed at trial, could be substantially higher than the Settlement amount, that fact is virtually always true in settled cases. Sanofi's merits expert, Dr. Rubinfeld, by contrast, proffered damages measurements that returned much lower results than the amount in the Settlement. Dr. Rubinfeld used a "yardstick" approach to measure the potential overcharge here by looking at what occurred in different vaccine markets, and non-vaccine biologics markets, when a new entrant entered a market featuring a 100% monopolist. Dr. Rubinfeld, when looking at specific market examples, and when averaging the prices from the examples he selected in the vaccine and non-vaccine biologics markets, arrived at damages estimates well below the amount in the Settlement, including some yielding *negative* damages. Dr. Rubinfeld also used a conjectural variation model to rebut Professor Elhauge's damages model; under Dr. Rubinfeld's models, this lawsuit would return zero damages. ECF No. 469-12 at 249-66.

Put simply, when weighed against the time, expense, and potential risk of further litigation, including an adverse ruling on summary judgment, *Daubert*, or at trial, the Settlement is a reasonable compromise that gives Class members certain recovery. *In re Cendant Sec. Litig.*, 109 F. Supp. 2d 235, 263 (quoting *In re Warner Communications Securities Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985).

Here, the Settlement of $61.5 million represents approximately 14% of the Class' pre-trebling Menactra overcharge damages of $439 million; as a percentage, this dollar value falls within, or even outperforms, the range of permissible settlements. *See Nichols v. Smithkline Beecham Corp.,* No. CIV. A. 00-6222, 2005 WL 950616, at *20 (E.D. Pa. Apr. 22, 2005)

(approving settlement between 9.3% and 13.9% of alleged damages as consistent with those approved in other complex class action cases) (citing *In re Cendant*, 264 F.3d at 241); *see also In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 257-58 (D. Del. 2002) ("The standard for evaluating settlement involves a comparison of . . . single damages, not treble damages.") (citations omitted); *Sullivan*, 667 F.3d at 324 ("we know of no authority that *requires* a district court to assess the fairness of a settlement in light of the potential for trebled damages") (emphasis in original).

2. The Relevant *Prudential* Factors Likewise Favor Final Approval

a. Factors That Bear on the Maturity of the Underlying Substantive Issues

As discussed above, this case was settled after the completion of the discovery, after the parties' completed briefing on their respective legal positions, and after hard-fought settlement negotiations. That the underlying substantive issues were well-developed further supports approval of this settlement. *See Chakejian v. Equifax Info. Servs.*, 275 F.R.D. 201, 215 (E.D. Pa. 2011) (finding that where the underlying substantive issues were "mature in light of the experience of the attorneys, extent of discovery, posture of the case, and mediation efforts undertaken," this factor supported approval of the settlement); *In re Fasteners*, 2014 WL 285076, at *11 ("A substantial amount of information has been provided to Settlement Class Counsel such that counsel are capable of making an informed decision about the merits of the case if it were to proceed to trial, and about the fairness of the settlement terms.").

b. Whether Class or Subclass Members Are Accorded the Right to Opt Out of the Settlement

As discussed above, members of the Class were given the opportunity to opt out of the Class, and despite a class comprised of many thousands of sophisticated pediatricians, medical practices, and other healthcare providers a mere 16 out of nearly 30,000 Class members

requested exclusion (collectively reflecting a miniscule amount of Class purchases). This also heavily favors final approval. *See In re Fasteners*, 2014 WL 285076, at *11 (finding it "significant" that, despite being given the opportunity to opt out, only one class member did so).

c. Whether Any Provisions for Attorneys' Fees Are Reasonable

Plaintiffs seek one-third of the $61.5 million cash value of the Settlement as attorneys' fees ($20,500,000 plus accrued interest)), $7,199,310.00 as reimbursement for litigation expenses, and $100,000 in incentive awards for each of the Class Representatives. *See* Fee Petition, ECF 513 at 1. "A one-third fee is consistent with fee awards in non-class cases" and is therefore reasonable to approve. *Dartell*, 2017 WL 2815073, at *11. With respect to the reasonableness of these requests, Plaintiffs incorporate by reference their Fee Petition and supporting submissions, all filed on June 23, 2017. ECF 513. For the reasons set forth therein, the attorneys' fees and expenses sought by counsel are within accepted ranges and reasonable.

d. Whether the Procedure for Processing Individual Claims under the Settlement Is Fair and Reasonable

Routine, standardized claims processing practices and procedures are being used in this case. As provided by the Court-approved notices, Class members were notified on or about May 17, 2017 that they had until July 10, 2017 to either opt-out of, or object to, the Settlement and were provided with instructions relevant to effectuate either course of action. Those notices also advised that: (i) this Court at or after the Final Fairness Hearing (currently scheduled for October 3, 2017) will approve a Claim Form and set a deadline for Class members to submit claims; (ii) the Court-approved Claim Form will be sent directly to Class members who do not opt-out and will also be made available on the litigation-dedicated website and may also be requested through a toll-free telephone call; and (iii) Class members will be provided an opportunity to dispute their total qualified Menactra purchases (*i.e.*, the basis for each Class Member's *pro rata*

share of the Net Settlement Fund). Courts generally accept such routine claims administration processes as fair and reasonable. *See, e.g.*, *P. Van Hove BVBA v. Universal Travel Grp., Inc.*, No. CV 11-2164, 2017 WL 2734714, at *9 (D.N.J. Jun. 26, 2017) (Vazquez, J.).

B. Plaintiffs' Proposed Distribution Plan Is Fair, Reasonable, and Adequate

Like approval of the amount of the settlement, the proposed distribution plan must be fair, reasonable, and adequate. *Mehling v. N.Y. Life Ins. Co.*, 248 F.R.D. 455, 463 (E.D. Pa. 2008) (citing *Ikon Office Solutions*, 194 F.R.D. at 184). "In determining whether a Plan of Allocation is fair, reasonable, and adequate, courts give great weight to the opinion of qualified counsel." *In re Schering-Plough Corp.*, 2012 WL 1964451, at *6 (D.N.J. May 31, 2012). Generally, a distribution plan is reasonable if it reimburses class members based on the type and extent of their injuries. *Lucent Tech., Inc. Sec. Litig.*, 307 F. Supp. 2d at 649.

Plaintiffs' proposed Plan of Distribution, which is being submitted to the Court concurrently with this brief, is fair, reasonable, and adequate because it will pay Class members who submit valid Claim Forms a *pro rata* share of the Net Settlement Fund[30] based on each Claimant's total Menactra purchases over the Class Period. Each Claimant's *pro rata* share will be calculated using transactional data provided by Sanofi, which has at least two advantages. First, because all of the data will come from the same source rather than hundreds or thousands of different sources all sorted and presented differently, the opportunities for error will be substantially reduced. Second, the burdens on the Claimants are substantially ameliorated as Claimants need not search old computers or paper files for transaction records in order to submit a valid claim.

[30] The Net Settlement Fund consists of the Settlement proceeds, inclusive of any interest and net of Court-approved attorneys' fees, Class Representative service awards, costs of litigation and settlement administration, and any applicable taxes.

Each Claimant's *pro rata* share will be determined based on each Claimant's total Menactra purchases relative to the total purchases of all valid claims filed and the total money available to pay all valid claims. If less than 100% of the Class submits valid Claim Forms, each Claimant's relative share will be larger because *none* of the Net Settlement Fund reverts to Sanofi. After the total universe of timely, valid Claim Forms has been determined, Plaintiffs' expert, Dr. Jeffrey Leitzinger, will calculate each Claimant's *pro rata* distribution from the Net Settlement Fund based on the total amount of Menactra each Claimant purchased over the Class Period relative to the total Menactra purchases reported in all the other timely, valid Claim Forms submitted.

For illustrative purposes, assume a Claimant purchased 2,000 doses of Menactra during the Class Period and total purchases of Menactra for all Claimants during the Class Period was 10 million doses. That Claimant's *pro rata* distribution share would be 0.02% (2,000/10,000,000). To arrive at the total distribution amount in dollars for this hypothetical Claimant, the Claimant's share would be multiplied by the total dollar amount of the Net Settlement Fund. If the Net Settlement Fund amounted to $28 million, then this Claimant would receive 0.02% (its *pro rata* share) of $28 million or $5,600.00.

Because the proposed Plan of Distribution provides Class members with timely, valid claims a *pro rata* share of the Net Settlement Fund based on their respective total Menactra vaccines purchases over the Class Period, it is fair, reasonable, and adequate. *See Sullivan v. De Beers*, 667 F.3d 273, 328 (3d Cir. 2010) (*en banc*) ("Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable"); *Halley*, 2016 WL 1682943, at *20 (approving settlement distribution plan as fair, reasonable, and adequate because it allocated funds to class members *pro rata*); *In re Ocean*

Power Techs., Inc., No. 14-cv-3799, 2016 WL 6778218, at *23 (D.N.J. Nov. 15, 2016) ("pro rata distributions are consistently upheld"). Not a single Class member objected to the proposed *pro rata* distribution. The Plan of Distribution should therefore be approved.

C. Adequate Notice Was Provided to the Class Consistent With the Court's Preliminary Approval Order

The due process requirements of the Fifth Amendment and the Federal Rules of Civil Procedure require that adequate notice of a proposed settlement be given to the Class members. *Nichols*, 2005 WL 950616, at *9; Fed. R. Civ. P. 23(e). "The Rule 23(e) notice is designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." *Prudential*, 148 F.3d at 327 (citation, internal quotation marks omitted). The Fifth Amendment's due process requirements are satisfied by the "combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class." *Id.* at 306.

Here, the Court ordered a notice plan that employed notice by direct first-class mail and publication notice, along with a website and toll-free telephone number through which Class members could obtain additional and updated information. Preliminary Approval Order at ¶¶6-10. The Court found this plan "satif[ied] the requirements under Rule 23 of the Federal Rules of Civil Procedure and due process." *Id.* at ¶4. Rust, at Co-Lead Counsel's direction, implemented the Court-approved notice plan, thereby satisfying due process and Rule 23(e).[31] *See Chakejian,* 275 F.R.D. at 221; *see also In re Processed Egg Prod. Antitrust Litig.*, 302 F.R.D. 339, 354 (E.D. Pa. 2014).

[31] As explained above, Rust caused the short form notice to be published in the American Academy of Pediatrics' official news magazine *AAP News*, which, like the American Academy of Pediatrics' medical journal *Pediatrics*, is a widely circulated publication that is read by pediatricians and other direct purchasers of MCV4 vaccines. *See* Jenkins Decl. at ¶¶11-12.

The content of the Court-approved notices was sufficiently clear, detailed, and instructive to satisfy due process. Among other things, the notices informed Class members of the claims involved in this case; the terms of the Settlement; the definition of the Class and Class Period; the requests for attorneys' fees, reimbursement of costs, and service awards;[32] the date and location of the final fairness hearing; the opportunity to attend and speak at the hearing; the opportunity to object; the role of Co-Lead Counsel; and how to obtain additional information. *See Prudential,* 148 F.3d at 328; *Nichols,* 2005 WL 950616, at *9. With respect to direct mail notices that were initially returned as undeliverable, Rust took reasonable steps to obtain updated addresses for those Class members and promptly re-mailed Notices to those Class members for whom addresses were available. *See* Jenkins Decl. at ¶¶4-10.

D. The Notice Requirements Of The Class Action Fairness Act Have Been Satisfied

The Class Action Fairness Act, 28 U.S.C. § 1715, *et seq.* ("CAFA"), required Sanofi to notify appropriate regulators of the proposed Settlement ("CAFA Notice"). A court may only enter an order granting approval of a settlement 90 days after notification. 28 U.S.C. § 1715(d).

[32] The amounts of attorneys' fees, costs, and service awards requested is consistent with the amounts stated in the long form notice. *Compare* Fee Petition, ECF 513 at 1 (requesting one-third of the $61.5 million cash value of the Settlement as fees ($20,500,000) (plus interest), $7,199,310.00 as reimbursement for litigation expenses, and $100,000 in incentive awards) *with* Jenkins Decl. Ex. A (long form notice) at 8 ("If the Court grants final approval to the Settlement, then the Court will be asked to approve a fee to Class Counsel of one-third (i.e., thirty-three and one third percent) of the Settlement Fund (including accrued interest) plus reimbursement of their expenses they have paid. If the Court approves Class Counsel's requests, these amounts would be deducted from the Settlement Fund. Class Counsel also will apply for service awards to the Class Representatives for their services to the Class of up to $100,000 to each of Adriana M. Castro, M.D., P.A., Sugartown Pediatrics, LLC, and Marquez and Bengochea, M.D., P.A."); *see also* Ex. B (short form notice) ("Class Counsel will seek attorneys' fees not to exceed one-third of the Settlement Fund to compensate all of the lawyers and their law firms that have worked on the class action since it was filed in 2011. Class Counsel will also seek reimbursement of litigation expenses advanced on behalf of the Class, and up to $100,00 for each of the three Class Representatives as service awards for their efforts on behalf of the Class."). Co-Lead Counsel instructed Rust to place the Fee Petition on the case-specific website on the day it was filed.

Here, Sanofi provided the CAFA Notice to the appropriate officials on February 3, 2017. The 90 day period has thus run and the Settlement can be approved.

IV. CONCLUSION

For the reasons detailed above and in other supporting documents, including the Declaration of Eric L. Cramer, the Declaration of Jessica Jenkins, the declarations of each of the Class Representatives, and the letters from the National Wholesalers, Plaintiffs respectfully request that the Court enter the [Joint Proposed] Order Granting Final Approval of Class Action Settlement, Approving Plan of Distribution, and Final Judgment and Order of Dismissal, which, among other things, grants final approval to the Settlement pursuant to Federal Rule of Civil Procedure 23(e) and dismisses the claims with prejudice against Sanofi.

Dated: August 2, 2017

Respectfully submitted,

s/ Peter S. Pearlman
Peter S. Pearlman
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Park 80 West – Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, NJ 07663
Tel: (201) 845-9600
Fax: (201) 845-9423
psp@njlawfirm.com

s/ James E. Cecchi
James E. Cecchi
CARELLA, BYRNE, CECCHI, OLSTEIN
BRODY & AGNELLO, P.C.
5 Becker Farm Road
Roseland, NJ 07068
Tel: (973) 994-1700
Fax: (973) 994-1744
jcecchi@carellabyrne.com

Co-Liaison Counsel for Plaintiffs and the Class

Eric L. Cramer
Michael J. Kane
Zachary D. Caplan
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604
ecramer@bm.net
mkane@bm.net
zcaplan@bm.net

Linda P. Nussbaum
Bradley J. Demuth
Hugh D. Sandler
NUSSBAUM LAW GROUP, P.C.
1211 Avenue of the Americas, 40th Floor
New York, NY 10036
Tel: (212) 702-7053
lnussbaum@nusspaumpc.com
bdemuth@nussbaumpc.com
hsandler@nussbaumpc.com

Co-Lead Counsel for Plaintiffs and the Class