UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Rules

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

I. INTRODUCTION

Class Counsel and plaintiffs respectfully move the Court to award Class Counsel attorneys' fees of one-third of the common fund ($40 million), with any accrued interest thereon, and reimbursement expenses of $2,269,268.79; and to award Nashville General Hospital and DC 37 $200,000 each for representing the Class and investing hundreds of hours of their employees' time in prosecuting this action. These are significant numbers. They are justified by the result in this case—and the law.

First, the requested fee passes with flying colors all of the factors articulated by the Sixth Circuit in *Ramey v. Cincinnati Enquirer, Inc.*[1] It compensates an extraordinary result: the second largest class recovery ever in an indirect purchaser pharmaceutical case. Furthermore, society has a major interest in promoting cases of this sort, which seek to both redress and deter antitrust violations in the crucial market for prescription pharmaceuticals. Counsel invested tens of thousands of hours of time and millions of dollars of cash completely on contingency, with the risk of total loss. They drove the case past setback after setback to an ultimate victory for the Class. In antitrust class actions courts regularly award a one-third fee for less impressive results on less risky claims. While such a fee is at the high end of the spectrum, this case supports it.

Second, should the Court elect the optional lodestar cross-check, the effort in this case validates the requested fee. Counsel put in a total of 26,143.5 hours totaling $12,838,694 in attorney time. This implies a "multiplier" on a one-third fee of 3.12, which falls within the regularly accepted range (in the Sixth Circuit and elsewhere) of 1.01 to 4.0. The above-average multiplier simply reflects that Class Counsel litigated this case to the eve of trial with tremendous efficiency compared to other, similar cases.

[1] 508 F.2d 1188, 1196 (6th Cir. 1974).

Third, the requested expense reimbursement of $2,269,268.79 is entirely reasonable. The bulk of it—more than $1,650,000—consists of costs for retaining the six experts who supported class certification and who were poised to testify at trial when the case settled.

Fourth, the requested service awards to Nashville General and DC 37 ($200,000 each) are justified by the same factors as the proposed fee. Nashville General and DC 37 took up this fight not for service awards, but because the high cost of prescription drugs is an existential threat to both of them. That said, just as antitrust enforcement depends on counsel being willing to make enormous investments on a contingent basis, it also depends on encouraging victims to accept the burden of representing a much larger class, and compensating them when they do. And, both DC 37 and Nashville General invested significant time and resources in supervising and prosecuting this action—a service award to each of them is no mere "bounty."

As discussed in the motion to direct notice to the class, America, unlike other countries, has chosen to rely mainly on private enforcement to enforce the rules of the market, both to compensate victims and deter future misconduct. Private enforcers—private plaintiffs and their attorneys—do not depend on a budget competing with other priorities for taxpayer dollars; they do not care who gave how much to someone's political campaign; and, given the right incentives, they are willing and able to take on the biggest offenders and the most egregious violations of the law. Thus, while the Justice Department's Antitrust Division has recovered billions in civil penalties for the Treasury, the deterrent value of private enforcement dwarfs that work by more than a factor of *four*—and represents, almost always, the *only* compensation for victims.[2] Indeed, in the early 1980s several economists set out to show the effect of increased

[2] Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle L. Rev. 1269, 1276-78 (2013) (finding that while DOJ recovered $8.18 billion from 1990 to 1997, private enforcers recovered between $34 billion and

Footnote continued on next page

DOJ enforcement on price-fixing in the bread industry: what they found instead was that that it was the development of the private antitrust class action lawsuit that deterred violations.[3]

If the antitrust laws depend on the engine of private class actions, the expectation that counsel will receive a percentage of what they recover for the class is the fuel powering that engine. The hope of sharing the reward motivates lawyers to bring the hardest cases and prosecute them to the last dollar available. Thus, under the correct circumstances courts nationwide do not hesitate to award fees of a third of the recovery generated. The result in this case and the effort and risk required to generate it justify such an amount here.

II. BACKGROUND

A. The Pleadings

In 2015, Nashville General solicited competitive bids to represent the hospital against alleged antitrust violators. As Nashville General's General Counsel explains, the safety-net hospital did so to fight back against the exploding costs for critical, life-saving drugs.[4] That process resulted in the retention of Lieff Cabraser. Lieff Cabraser agreed to work only on contingency and advance all costs associated with any litigation.

As the Court learned at the hearings, enoxaparin is a staple drug for hospitals, including Nashville General. Following revelations of anticompetitive conduct by the defendants, this case was filed in October 2015, with Nashville General as the sole plaintiff, asserting claims under the federal Sherman Act. The initial complaint overcame serious challenges on the pleadings, including arguments that Defendants' conduct was immune from suit under the *Noerr*-

---

Footnote continued from previous page
$36 billion).

[3] Michael Block, Frederick Nold & Joseph Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 *J. of Pol. Econ.* 429, 429-445 (1981).

[4] Overlock Decl. ¶¶ 3, 7.

Pennington doctrine and that the case did not belong in Nashville. However, Nashville General's damages claims were dismissed for lack of standing. Plaintiffs re-pled the case as an indirect purchaser action under the laws of 31 jurisdictions, adding DC 37 as a plaintiff. Defendants then challenged the Plaintiffs' ability to represent a class asserting claims under the various state laws, on both standing and personal jurisdiction grounds. They also moved to dismiss the injunctive relief claim. Class Counsel again largely overcame those challenges, losing only the injunctive relief and Alabama claims in December 2018. Dkt. 254. While the pleadings were resolved, Class Counsel also dedicated significant time and resources to class certification briefing, discovery and expert work. Dkts. 270 & 271.

B. Discovery

Beginning in January 2019, the parties launched into concentrated merits discovery on a compressed time schedule: Plaintiffs negotiated with Defendants for production of relevant documents from a total of 32 current and former employees, and served six third-party document subpoenas to the United States Pharmacopeia, distributors, and other enoxaparin manufacturers.[5] In total, Defendants and third parties produced over half a million documents (more than 2.6 million pages) to Plaintiffs. Class Counsel took a total of ten fact witness depositions of Defendants and third parties between May and October 2019. In addition to the documents, Class Counsel also analyzed more than 50 deposition transcripts from earlier related actions, and two weeks of testimony from the patent trial. At the same time, Class Counsel and Plaintiffs responded to voluminous discovery from Defendants addressing every aspect of their operations related to enoxaparin (and more), including a total of eleven depositions. Class Counsel also brought five discovery motions (and opposed several by Defendants), winning nearly every one.

[5] Glackin Decl. ¶ 45.

C. Class Certification

The Court heard Plaintiffs' first motion to certify the class on May 13 and 14, 2019. Defendants vigorously opposed class certification, asserting, *inter alia*, that the class was not ascertainable, Plaintiffs did not have standing to represent a single class of purchasers under the laws of 30 jurisdictions, Plaintiffs could not prove injury or pass-through, and the Class was riven with conflicts. At the outset of the second day of testimony, Plaintiffs proposed a change to the class definition in order to ameliorate Defendants' concerns about ascertainability; in response, the Court concluded the hearing and denied the motion to certify the class.

Plaintiffs moved to amend the class definition one week later, and, eleven days after that motion was granted, on June 18, 2019, Plaintiffs re-moved to certify the class (Dkt. 349). The motion again faced stiff opposition from Defendants, who repeated their arguments on standing, pass-through and injury, and conflicts. Defendants also submitted a brand-new 52-page supplemental expert report that raised new challenges with respect to injury; in particular, claiming that Nashville General was not injured by Defendants' conduct. Class Counsel and their expert, Dr. Lamb, responded to these new opinions, and Defendants' legal arguments based on them, in just 72 hours over July 4th.

One week later, on July 12, 2019, Class Counsel presented testimony from Dr. Lamb and Nashville General's billing manager in support of the class certification motion. On cross examination of Defendants' expert Dr. Cremieux, Class Counsel elicited a "fatal admission" undermining Dr. Cremieux's opinion that Nashville General had not been injured, which the Court observed precipitated "a significant negative change in Dr. Cremieux's demeanor."[6] This admission of "significant error" ultimately helped the Court to conclude that Dr. Cremieux was

[6] Dkt. 426 at 29.

"not credible" and to "ascribe little, if any, weight" to his opinions.[7] Closing argument briefs followed. On September 20, 2019, the Court certified the Class.[8]

D. Summary Judgment

While the Court considered class certification, Class Counsel also exchanged 26 merits expert reports with Defendants between May and July, and took and defended a total of thirteen expert depositions.[9] On September 20, 2019, Plaintiffs also opposed Defendants' summary judgment motion. In total, between January 12, 2019 and when the Class was certified on September 20, 2019, Lieff Cabraser attorneys dedicated 10,812.8 hours to the case, over 8% of all of Lieff Cabraser's attorney time during that same time period.[10]

E. Rule 23(f) Petition and Trial Preparation

Even with the Class certified, Class Counsel faced additional challenges as they prepared for trial. In the midst of pre-trial preparation, Defendants filed a Rule 23(f) petition with the Sixth Circuit and moved the Court to stay the proceedings. When this Court denied Defendants' motion to stay, Defendants made an emergency motion to the Sixth Circuit. In total, Class Counsel filed three briefs to the Sixth Circuit totaling 63 pages in a 17-day span to ensure the Class's claims would go to trial on January 7, 2020.

F. Settlement

In the midst of pre-trial exchanges, the parties mediated the case with the Honorable Edward Infante (Ret.) of JAMS on November 13, 2019. That night, the parties reached a settlement to resolve the litigation for cash payments by Defendants totaling $120 million. The settlement agreements were signed December 10, 2019, after nearly a month of intense

[7] *Id*. at 28, 32.
[8] Dkts. 427 & 464.
[9] Glackin Decl. ¶ 45.
[10] *Id.* ¶ 48.

negotiation of specific terms.[11] The Court preliminarily approved the settlement and directed notice to the class on January 3, 2020 (Dkt. 388, *as amended* Dkt. 492).

G. Nashville General and DC 37's Role in the Case

Both Plaintiffs were actively involved in the litigation, and undertook significant burden to comply with their duties as Class Representatives.[12] During discovery, both Plaintiffs searched for and produced large volumes of documents and data, and representatives and lay witnesses were deposed eleven separate times. Nashville General responded to 54 requests for production of documents and 18 interrogatories. The hospital searched for and produced a total of 14,071 documents (89,248 pages) as well as purchase and payment data from 2010 through 2018. DC 37 responded to 42 requests for production and 11 interrogatories, as well as searched for and produced 2,601 documents (24,727 pages). DC 37 also produced complete reimbursement data reflecting purchases of enoxaparin and Lovenox for the period 2011 through 2016. Representatives from Plaintiffs attended multiple hearings, gave live testimony, and played a critical role in the mediation. Nashville General employees spent (conservatively) hundreds of hours, and DC 37 invested 224.50 hours supporting the case.

III. ARGUMENT

A. The Requested Fees Are Reasonable.

When "awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved."[13] The well-established common benefit doctrine embodies the principle "that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants'

[11] Glackin Decl. ¶ 56.

[12] Overlock Decl. ¶¶ 5-6; Browne Decl. ¶¶ 6-7.

[13] *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)).

expense."[14] Jurisdiction "over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionally among those benefitted by the suit."[15]

Courts in this Circuit consider the "*Ramey* factors" to determine fair compensation: (a) the value of the benefits to the class; (b) society's stake in rewarding attorneys who produce such benefits to maintain an incentive to others; (c) whether the attorneys worked on a contingent fee basis; (d) the value of the services on an hourly basis; (e) the complexity of the litigation; and (f) the professional skill and standing of counsel.[16] None of the *Ramey* factors is dispositive, and this Court "enjoys wide discretion in assessing the[ir] weight and applicability."[17]

An expert in class actions and fees, Professor Brian T. Fitzpatrick of Vanderbilt Law School submits a declaration in support of Class Counsel's fee request. In 2010, Professor Fitzpatrick authored a comprehensive empirical examination of federal class action settlements and attorneys' fees requests entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) ("Fitzpatrick Study"). Professor Fitzpatrick concludes the requested fee is reasonable in light of other awards nationwide and the need to foster proper incentives in class litigation.[18] Sixth Circuit case law confirms this conclusion.

1. <u>Precedent Supports Fees of One-Third of the Fund.</u>

Courts in the Sixth Circuit have discretion to choose between the lodestar or percentage-

[14] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).
[15] *Id*; *see also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.").
[16] *See Ramey*, 508 F.2d at 1196.
[17] *Granada Invs. Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992).
[18] Fitzpatrick Decl. ¶¶ 4, 19-20, 28.

of-the-fund approach.[19] Where, as here, "a substantial common fund has been established for the benefit of class members," the "percentage-of-the-fund method is the more appropriate method."[20] The percentage is not only "easy to calculate,"[21] but also "directly aligns the interests of the class and its counsel[,] incentivizes lawyers to maximize the Class recovery, but in an efficient manner,"[22] and "is consistent with the private marketplace where contingent fee attorneys are routinely compensated on a percentage of recovery method."[23] Professor Fitzpatrick agrees.[24] The lodestar method, by contrast, "is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation, and creates inherent incentive[s] to prolong the litigation."[25] As a result, and under the influence of the conservative law-and-economics movement, it has largely been rejected in the modern era.[26] The Fitzpatrick Study revealed that the lodestar method is used only on a small percentage of cases, usually where the settlement calls for substantial non-monetary relief or fee-shifting (neither present here).[27]

---

[19] *E.g.*, *Rawlings*, 9 F.3d at 516.

[20] *In re Se. Milk Antitrust Litig.*, No. 07-208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013); *see also, e.g.*, *Salinas v. U.S. Xpress Enters., Inc.*, No. 13-245, 2018 WL 1477127, at *8 (E.D. Tenn. Mar. 8, 2018), *report and recommendation adopted* (E.D. Tenn. Mar. 26, 2018) (percentage of fund is the "favored method of calculating attorneys' fees in class action cases"); *Manners v. Am. Gen. Life Ins. Co.*, No. 98-266, 1999 WL 33581944, at *29 (M.D. Tenn. Aug. 11, 1999) ("The preferred approach to calculating attorneys' fees to be awarded in a common benefit case is as a percentage of the class benefit.").

[21] *Rawlings*, 9 F.3d at 516.

[22] *Gokare v. Fed. Exp. Corp.*, No. 11-2131, 2013 WL 12094887, at *3 (W.D. Tenn. Nov. 22, 2013) (internal quotation marks omitted).

[23] *Manners*, 1999 WL 33581944, at *29.

[24] Fitzpatrick Decl. ¶ 11.

[25] *Milk*, 2013 WL 2155387, at *2 (citation and internal quotation marks omitted).

[26] Monique Lapointe, *Attorney's Fees in Common Fund Actions*, 59 Fordham L. Rev. 843, 843, 847 (1991) ("Lodestar…is fast becoming a relic of common fund litigation.") (footnote omitted).

[27] Fitzpatrick Decl. ¶ 9. *See also* Theodore Eisenberg et al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) (finding lodestar method used only in 6.29% of cases between 2009-2014).

The requested fee of one-third of the fund is appropriate in light of the excellent result achieved through perseverance in the face of great risk, and "one third of the settlement fund . . . is certainly within the range often awarded in common fund cases, both nationwide and in the Sixth Circuit."[28] A one-third fee has been awarded in countless antitrust cases, including:[29]

In re Se. Milk Antitrust Litig., No. 07-208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013)	**33% of $158.6 million**
In re Titanium Dioxide Antitrust Litig., No. 10-cv-00318 (RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013)	**33% of $163.5 million**
In re Urethane Antitrust Litig., No. MDL 1616, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016)	**33% of $835 million**
In re Vitamins Antitrust Litig., No. MDL 1285, 2001 WL 34312839, at *9-10 (D.D.C. July 16, 2001)	**33%+ of $365 million**
In re Relafen Antitrust Litig., No. 01-12239, Dkt. 297 at 7-8 (D. Mass. Apr. 9, 2004)	**33% of $175 million**
In re Tricor Direct Purchaser Antitrust Litig., No. 05-340-SLR, Dkt. 543 at 9-10 (D. Del. Apr. 23, 2009)	**33% of $250 million**
In re Skelaxin (Metaxalone) Antitrust Litig., No. 2:12-CV-83, 2014 WL 2946459, at *3 (E.D. Tenn. June 30, 2014)	**33% of $73 million**
In re Flonase Antitrust Litig., 291 F.R.D. 93, 106 (E.D. Pa. 2013)	**33% of $35 million**
Seaman v. Duke Univ., No. 15-462, 2019 WL 4674758, at *1 (M.D.N.C. Sept. 25, 2019)	**33% of $54.5 million**

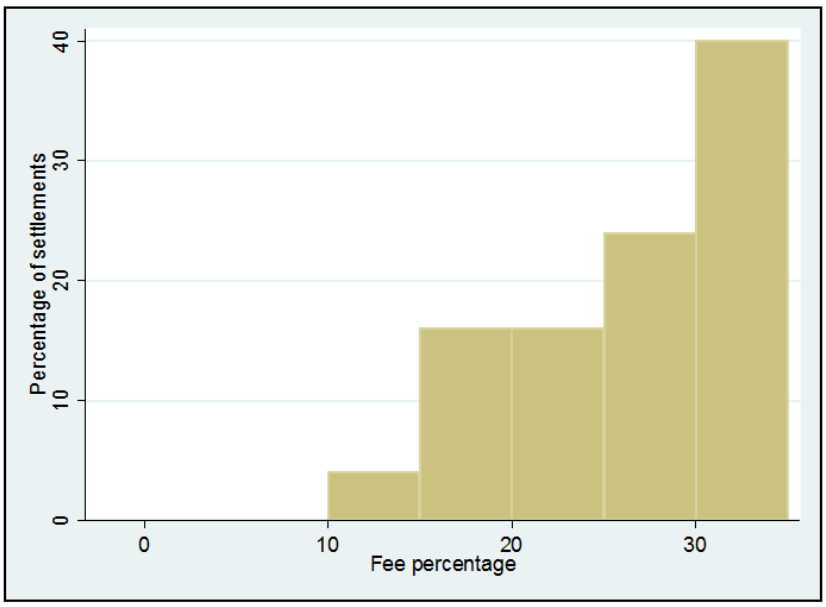
[28] *Milk*, 2013 WL 2155387, at *3 (awarding antitrust class counsel one-third of $159 million settlement fund).

[29] *See also, e.g.*, *Schuh v. HCA Holdings, Inc.*, No. 11-1033, Dkt. 563 (M.D. Tenn. Apr. 14, 2016) (awarding 30% of $215 million settlement fund); *Skelaxin*, 1014 WL 2946459, at *1 (awarding one-third of $73 million settlement fund); *Gokare*, 2013 WL 12094887, at *4 ("The requested attorneys' fee award of 30.9% from the common fund is appropriate; the percentage requested is similar to or lower than percentage-of-the-fund awards approved in numerous other common fund cases in this Circuit" and collecting cases between 30% and one-third); *Dallas v. Alcatel-Lucent USA, Inc.*, No. 09-14596, 2013 WL 2197624, at *12 (E.D. Mich. May 20, 2013) (preliminarily approving one-third fee and noting that "[v]arious courts have expressed approval of attorney fees in common fund cases at similar or higher percentage"); *Bessey v. Packerland Plainwell, Inc.*, No. 06-95, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) ("Empirical studies show that . . . fee awards in class actions average around one-third of the recovery.") (citation and internal quotation marks omitted); *In re Cardizem CD Antitrust Litig.*, No. 99-1278, Order No. 47 (E.D. Mich. Nov. 25, 2002) (awarding 30% of $110 million settlement).

In re Buspirone Antitrust Litig., No. 01-md-1413 (S.D.N.Y. Apr. 17, 2003)	**33% of $220 million**

Indeed, the Fitzpatrick Study revealed that nearly two-thirds of awards nationwide fall between 25 and 35%.[30] And, forty percent of the awards in the Sixth Circuit landed between 30 and 35%[31]; the most populous segment.

Figure 1: Percentage-method fee awards in the Sixth Circuit, 2006-2007



Here, the risk, result, and effort present in this case more than justify a fee in the upper segment.

It is true that larger settlements tend on average to result in lower fee percentages; the Fitzpatrick Study found that the average fee percentage for settlements ranging from $100 million to $250 million was less than 20%.[32] Some courts—but not the Sixth Circuit—have even

[30] Fitzpatrick Decl. ¶ 19, 23.

[31] Fitzpatrick Decl. ¶ 20.

[32] *See* Fizpatrick Decl. ¶¶ 21-23 (discussing findings in Fitzpatrick Study at 838, 842-44, and other studies).

suggested that as recoveries go up fees should go down.[33] That thinking misses the mark. First, on average fee percentages go down as settlements go up because the larger the settlement the less likely it is that a high-percentage fee will pass the lodestar cross-check. Imagine the prototypical securities stock-drop case that resolves on the pleadings for a nine-figure amount; counsel's work at that stage simply will not support a high percentage fee. As discussed below, that is not the case here. Second, as Judge Greer recognized in *Milk*, reducing the fee percentage as the fund increases creates the wrong incentives, encouraging lawyers to settle early "when the returns to effort are highest" rather than "investing additional time and maximizing plaintiffs' recovery."[34] In other words, it perversely reduces the award for prosecuting the case to the brink of trial to maximize recovery, as Class Counsel did here. Finally, as Judge Greer also explained, "it is not the size of the request, although a very large number, that is necessarily relevant but the size of the award when compared to the size of the risk taken."[35] Here, the risk could not have been greater, and Class Counsel poured enormous time and resources into this case at a high risk of total loss, and to the exclusion of other matters and opportunities,[36] to achieve this outstanding result.

2. Every *Ramey* Factor Supports the Requested Fee.

The result. First, Class Counsel's efforts resulted in an all-cash, non-reversionary recovery of $120 million. This recovery is excellent by any measure, but it stands apart when

[33] For example, in one 2015 antitrust case, a district court awarded a fee of 20% in part on this reasoning. *See In re Polyurethane Foam Antitrust Litig.*, 135 F. Supp. 3d 679, 689-94 (N.D. Ohio 2015). But there, the counsel had already received "substantial fee awards from prior settlements" in the same litigation and the court had serious concerns that counsel's lodestar was inflated, "doubt[ing] that all of that time was reasonably necessary to advance this case." *Id.* at 689, 693.

[34] 2013 WL 2155387, at *8 (internal quotation marks omitted). *See also* Fitzpartick Decl. ¶ 23.

[35] *Id.* at *8 n.7.

[36] Glackin Decl. ¶¶ 25-60.

compared to other pharmaceutical indirect purchaser cases, both in size and as a portion of total estimated damages. Research reveals that the $120 million recovered in this case represents the second largest settlement in a pharmaceutical indirect purchaser action ever. The biggest was *Cipro*—another case filed and led by Lieff Cabraser.[37] In fact, most settle for less than $100 million.[38] Further, the recovery represents ***half*** of Plaintiffs' estimated Class wide damages of $234 million (and 13 times Defendants' expert's damages figure of $9 million). In indirect purchaser pharmaceutical cases lesser recoveries are the norm.[39]

Society's interest. Second, "the Court must ensure that Class Counsel is fairly compensated in order to facilitate the goal of class actions—i.e., to provide a vehicle for collective action to pursue redress for tortious conduct that is not feasible for an individual litigant to pursue."[40] This case embodies society's interest in creating the incentives for proper enforcement of the law: it required a single law firm to commit more than $12.8 million in time and more than $2.2 million in out-of-pocket costs pursuing complex claims against deep-pocketed corporations with no guarantee of any recovery at all. Class Counsel's efforts,

---

[37] *Cipro Cases I and II*, JCCP Nos. 4154 and 4220 (Cal. Super. Ct.), recovered a total of $399 million for indirect purchasers in a case that lasted 17 years.

[38] *See, e.g., In re Lidoderm Antitrust Litig.*, 14-md-02521, 2018 WL 4620695, at *2 (N.D. Cal. Sep. 20, 2018) ($105 million); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003) ($80 million); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 74 (D. Mass. 2005) ($75 million); *In re Aggrenox Antitrust Litig.*, 14-md-2516, Dkt. 821 (D. Conn. July 19, 2018) ($54 million); *In re Solodyn Antitrust Litig.*, 14-md-02503, Dkt. 1175 (D. Mass. July 18, 2018) ($43 million); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 394 (D.D.C. 2002) ($35 million for end-payor third-party payors); *In re Wellbutrin XL Antitrust Litig.*, 2:08-cv-02433, Dkt. 473 (E.D. Pa. July 22, 2013) ($11.75 million); *In re Loestrin 23 Fe Antitrust Litig.*, No. 13-md-02472, Dkt. 1400 (D.R.I. Feb. 6, 2020) (settlement of $62.5 million, added to earlier settlement of $1 million, announced in January 2020).

[39] *See, e.g., Relafen*, 231 F.R.D. at 74 ($75 million settlement was 26% of damages estimate); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 258 (D. Del. 2002) ($44.5 million was 33% of maximum damages).

[40] *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 795 (N.D. Ohio 2010).

investment, and risk-taking resulted in compensation for the Class, punishment for the Defendants, and the deterrence of other potential violators. "[F]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases."[41]

Contingency. Third, Lieff Cabraser and Spragens Law took this case on contingency, litigating it for more than four years at the risk of total loss of the value of their time and investment in out-of-pocket costs.[42]

Investment. Fourth, in litigating this case over four-plus years, Class Counsel spent 26,143.5 hours and $12,838,694.00 in lodestar.[43] At times, Lieff Cabraser was devoting over 8% of its overall attorney resources to this case, just one of several hundred of the firm's active matters.[44] It is indisputable that the time-value of the services rendered was substantial.

Risk. Fifth, "[a]ntitrust class actions are inherently complex. The legal and factual issues are complicated and highly uncertain in outcome."[45] As with any indirect purchaser case, Plaintiffs and Class Counsel took on the "immensely difficult"[46] challenge of proving pass-through, and "this extraordinarily complex case raised a multitude of difficult issues in the areas of antitrust law, patent law, and the laws governing pharmaceutical drugs."[47]

---

[41] *Milk*, 2013 WL 2155387, at *5; *see also Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 324 (1955) (noting the "public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action").

[42] Glackin Decl. ¶¶ 25-30. *See Lonardo*, 706 F. Supp. 2d at 796 (this factor "accounts for the substantial risk an attorney takes when he or she devotes substantial time and energy to a class action despite the fact that it will be uncompensated if the case does not settle and is dismissed.").

[43] Glackin Decl. ¶ 31-32; Exhibits B & C.

[44] *Id*. ¶ 48.

[45] *Skelaxin*, 2014 WL 2946459, at *3.

[46] Dkt. 363 at 2.

[47] *Cardizem*, 218 F.R.D. at 533.

This case in particular presented more complexity—and more risk—than even most pharmaceutical indirect purchaser cases. In Defendants' own words, "[t]his case is different from all other pharmaceutical cases" because while "[m]ost pharmaceutical cases deal with simple, oral-prescription drugs distributed by chain pharmacies in the 'retail' channel," "enoxaparin distribution is far more complex and includes distribution in multiple channels."[48] As Defendants put it: "this case is the first of its kind."[49] Additionally, Defendants again correctly pointed out that while "most delayed-entry cases concern delay of a first generic product, which makes some sense from an antitrust perspective because the brand manufacturer controls 100% of the molecule before generic entry," this case concerned "delay of a second—or more accurately, third—generic."[50] This theory of harm was, like the Class itself, unprecedented. And the proposed theory of liability—manipulation of a standard-setting organization to unlawfully exclude a competitor—is, at best, a highly unusual claim in the pharmaceutical context.[51] Further, the facts presented obvious questions concerning causation and damages, in particular given that Amphastar was excluded from the market for just 117 days, requiring plaintiffs to advance and support the proposition that this delay had long-term effects in the market (as it did).

In addition to these risks, the case presented complex issues at every turn—as the thirty-

[48] Dkt. 273 at 2-3 (emphasis excluded) ("hospitals (which are not traditional 'end payors') are never in the same class as end-payor consumers and patients that pay hospital bills.").
[49] Dkt. 363, at 1 (emphasis added) (citing *See Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 2010 U.S. Dist. LEXIS 105646, at *69 (E.D. Pa. Sep. 30, 2010) ("It is undisputed that 'it is immensely difficult to determine class-wide economic impact in indirect purchaser cases.'").) *See also* Dkt. 273 at 1.
[50] Dkt. 273 at 2 n.4.
[51] Glackin Decl. ¶¶ 25-30.

one Rule 26 expert disclosures illustrate.[52] In total, the parties marshalled 14 expert witnesses—six for Plaintiffs and eight for Defendants—to address issues such as hospital and insurer economics and damages, substitutability of other drugs, patent infringement, FDA and USP rules and procedures, and hospital billing practices. And these challenges to class certification and liability came only after years of litigation on the pleadings over issues such as the applicability of *Noerr-Pennington* immunity, statutes of limitation, and personal jurisdiction.[53]

The Quality of Counsel. Sixth, as this Court has already twice affirmed in appointing interim class counsel (Dkt. 90) and in certifying the Class (Dkt. 426), Class Counsel are among the most experienced, committed and successful practitioners in class actions and antitrust cases in the nation.[54] The firm, founded in 1972 with offices in San Francisco, New York, and Nashville, is known for taking on the most challenging cases on behalf of victims, regardless of the risks and ultimate rewards. The Glackin Declaration details several of Lieff Cabraser's most significant success stories in antitrust, including several that, like this case, the firm took to the verge of—and in some instances through—trial. In *In re High-Tech Employee Antitrust Litigation*[55], Lieff Cabraser served as co-lead counsel and recovered a total of $435 million on behalf of employees of several technology firms under a novel theory of antitrust liability in the employment context. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*[56], the firm obtained a total of $470 million in recovery for the class, including a plaintiff's jury verdict against one

[52] Glackin Decl. ¶¶ 41, 45.

[53] Defendants maintained the personal jurisdiction challenges through summary judgment (Dkt. 408 at 21-23) and were expected to present evidence on the issue at trial.

[54] Glackin Decl. ¶¶ 3-8.

[55] No. 11-cv-02509-LHK (N.D. Cal.).

[56] No. 07-1827 (N.D. Cal.).

defendant. In the pharmaceutical space, Lieff Cabraser was co-lead counsel in *In re Cipro*,[57] which recovered $399 million for indirect generic drug purchasers, including consumers and payors. The firm's roots in Nashville also run deep: In the 1990s, Lieff Cabraser represented a certified class of over 800 pregnant women and their children who were who were intentionally fed radioactive iron isotopes without consent while receiving prenatal care at the Vanderbilt University hospital. Lieff Cabraser recovered $10.2 million for the victims along with a formal apology from Vanderbilt read to them in open court.[58] The Vanderbilt case, and others like it—such as Lieff Cabraser's *pro bono* work recovering $1.25 billion for Holocaust survivors and their families—reflect the firm's commitment to broadly serve victims everywhere.

3. A Lodestar Cross-Check Confirms the Requested Fees.

The Sixth Circuit has stated that when the Court calculates a fee using one of the two permissible options, a cross-check using the other method is "optional."[59] The lodestar calculation is simple: reasonable rates multiplied by reasonable hours.[60] The "sum may then be increased by a 'multiplier' to account for the costs and risks involved in the litigation, as well as the complexities of the case and the size of the recovery."[61] The purpose of a multiplier is "to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work

[57] JCCP Proceedings Nos. 4154 & 4220 (San Diego Super. Ct.).

[58] *Craft v. Vanderbilt University*, Civ. No. 3-94-0090 (M.D. Tenn.).

[59] *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 501 (6th Cir. 2011) (emphasis removed); *see also, e.g.*, *Schuh v. HCA Holdings, Inc.*, No. 11-1033, Dkt. 563 (M.D. Tenn. Apr. 14, 2016) (awarding fee of 30% of $215 million with no lodestar cross-check). *Cf. Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779-81 (6th Cir. 1996) (affirming percentage fee award without reviewing district court's lodestar analysis).

[60] *Gascho*, 822 F.3d at 279.

[61] *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 922 (N.D. Ohio 2003).

product, and the public benefit achieved."[62] It is appropriate to use current (2020) rates to "compensate for the delay in payment during the pendency of the litigation."[63] Given counsel's lodestar of $12,838,694.00, the cross-check implies a multiplier of 3.12, which is within the routinely accepted range of 1.0 to 4.0 (higher multipliers are also sometimes approved).

a. Class Counsel's Hourly Rates Are Reasonable.

Counsel's attorney billing rates range from $415 to $1,100 and are set forth in the Glackin Declaration, along with descriptions of the primary timekeepers' qualifications and contributions.[64]

Typically, the lodestar calculation looks to "the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record."[65] Counsel's rates meet that criterion. Recent class actions in this District have awarded percentage-based fees where the lodestar cross-check reflected rates up to $1,050 an hour for non-local firms[66] and up to $770 per hour for Nashville-based firms.[67] Indeed, this Court recently approved a rate of $1,060 per hour for a non-local firm.[68] Here, Mr. Glackin and Ms. Benson, the partners in charge of the day-to-day efforts in this case from the very beginning, have billing rates of $800 and $585, respectively.[69] 99.6% of the attorney

---

[62] *Rawlings*, 9 F.3d at 515-17.

[63] *In re UnumProvident Corp. Deriv. Litig.*, No. 02-386, 2010 WL 289179, at *9 (E.D. Tenn. Jan. 20, 2010); *see also, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005) ("current market rate" appropriate where "the litigation had been ongoing for nearly six years").

[64] Glackin Decl. ¶¶ 9-22, 32 & Exs. B & C.

[65] *Gonter v. Hunt Valve Co., Inc.*, 510 F.3d 610, 618 (6th Cir. 2007) (citation omitted).

[66] *See Ajose v. Interline Brands*, No. 14-1707, Dkt. 269 (M.D. Tenn. Oct. 23, 2018); *see also id.* at Dkt. 259-3, Ex. 2 (declaration detailing rates).

[67] *See id.* at Dkt. 259-9, Ex. 2 (declaration); *Skeete v. Republic Sch. Nashville*, No. 16-43, Dkt. 112 (M.D. Tenn. Feb. 25, 2018) (Crenshaw, C.J.); *see also id.* at Dkt. 106, Ex. 2 (declaration).

[68] *See Cassell v. Vanderbilt Univ.*, No. 16-2086, Dkt. 174, at 3 (M.D. Tenn. Oct. 22, 2019).

[69] Ms. Benson became a partner in 2017. Her prior time is billed at her highest associate rate.

time in the matter was at $800 (Mr. Glackin's rate) or below.[70] As another metric, Class Counsel's blended rate is only $491, below the blended rates of $572 and $659 submitted on cross-check to support percentage-based fees in this District,[71] and substantially below the $686 blended rate this Court approved in *Cassell*.[72]

Counsel's lodestar can therefore be fully justified as reasonable in comparison to Nashville rates. That said, it would also be appropriate for the Court to look to rates charged for work of this nature nationally.[73] Pharmaceutical antitrust class actions are by definition national in scope and, wherever they are litigated, require the expertise of a relatively small group of specialized practitioners. No firm other than Lieff Cabraser was willing to take the risk of pursuing this matter, which featured both a "national scope" and "highly-specialized and talented opposing counsel," circumstances in which courts have found "national hourly rates" appropriate.[74] Defendants also engaged out-of-town antitrust specialists, further validating the use of national rates.[75] Nationally, Lieff Cabraser's rates have been approved in scores and scores of cases, including many antitrust cases, and by courts in this Circuit.[76]

---

[70] Glackin Decl. at Exs. B & C. Only 93.2 hours were billed above Mr. Glackin's rate. Exhibit B.

[71] *See Ajose*, Dkt. 258, at 2 (fee memorandum) ($3,563,200.50 / 6,224 hours); *Skeete*, Dkt. 105 at 13 (fee memorandum) ($550,000 / 835 hours).

[72] *See Cassell*, Dkt. 174, at 3 ($3,447,826 / 5,029 hours).

[73] *See Adcock-Ladd v. Sec. of Treasury*, 227 F.3d 343, 350-51 (6th Cir. 2000) explaining that where a party was required to employ out-of-market counsel, the relevant legal market was the attorney's local market, not the court venue).

[74] *In re Ford Motor Co. Spark Plug and 3-Valve Engine Prods. Liab. Litig.*, No. 12-2316, 2016 WL 6909078, at*10 n.3 (N.D. Ohio Jan. 26, 2016).

[75] *See UnumProvident*, 2010 WL 289179, at *6 ("That the defendants were represented by skilled attorneys at large New York firms also supports Plaintiffs' judgment in selecting highly-qualified attorneys from outside this district.").

[76] Glackin Decl. ¶¶ 61-63; *see also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 08-65000, 2016 WL 5338012, at *22-24 (N.D. Ohio Sept. 23, 2016) (approving Lieff Cabraser rates); *Lonardo*, 706 F. Supp. 2d at 793-94 (same).

b. Class Counsel Worked Efficiently.

When the lodestar is employed as the *primary* method of calculating fees, the proponent must provide documentation "of sufficient detail and probative value to enable to court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation," though "counsel need not record in great detail each minute he or she spent on an item."[77] A lodestar *cross-check* is simpler: "Unlike the situation when the Court employs the lodestar method in full, the hours documented by counsel need not be exhaustively scrutinized[.]"[78]

The Glackin Declaration contains summary data by timekeeper printed from Lieff Cabraser's accounting system, as well as a summary of the time invested by Spragens Law.[79] After careful, line-by-line audit that removed any time that was even arguably unnecessary, Class Counsel submit 26,143.5 hours of time as the basis for a cross-check. That time was reasonable. As detailed above and in the Glackin Declaration, Class Counsel, working without any co-counsel assistance, brought this case through class certification and summary judgment and to the eve of trial. In total, 73 individuals *from a single firm* contributed over 26,000 hours through February 25, 2020 to an effort that resulted in $120 million for the Class. To validate the reasonableness and efficiency of this massive effort, the Court need look no further than similar cases with less remarkable results. For example, in *In re Lidoderm*,[80] 23 different law firms representing end-payors logged over 51,000 hours of work and over $25 million in lodestar for a $105 million cash fund. In *In re Aggrenox*, 25 law firms logged over 40,000 hours

---

[77] *Gascho*, 822 F.3d at 281 (citation omitted).

[78] *Milk*, 2013 WL 2155387, at *2 n.3.

[79] Glackin Decl. ¶¶ 31-32 & Exs. B & C. As noted above, Mr. Spragens' time from after he left Lieff Cabraser is included in Class Counsel's lodestar.

[80] *In re Lidoderm Antitrust Litig.*, 14-md-02521, Dkt. 1030, at *2 (N.D. Cal. Jul. 31, 2018).

representing end-payors to reach a $54 million settlement.[81]

c. The Cross-Check Results in a Reasonable Multiplier of 3.12.

Here, the requested fee of $40 million and lodestar of $12,838,694.00 result in a multiplier of 3.12. Multipliers of 1.01-4.0 are routinely awarded in common fund cases, including in the Sixth Circuit.[82] As Judge Greer of the Eastern District of Tennessee recently explained in awarding a one-third fee on a $159 million settlement fund in an antitrust case, the resulting "lodestar multiplier of 1.90" was "clearly within, *but in the bottom half of*, the range of typical lodestar multipliers."[83] Similarly, Judge Collier in *Skelaxin* observed that "[m]ultipliers much higher than the one requested here [2.1-2.5] are also commonplace in complex pharmaceutical antitrust class actions."[84] Furthermore, as Professor Fitzpatrick explains, larger settlements tend to result in larger multipliers: his empirical study shows that settlements of

[81] *In re Aggrenox Antitrust Litig.*, 14-md-02516, Dkt. 786-1 at 5 & Dkt. 788 (D. Conn. Apr. 13, 2018).

[82] *See, e.g.*, William Rubenstein et al., *Newberg on Class Actions* § 14:03 (5th ed.); *In re Prandin Direct Purchaser Antitrust Litig.*, No., 10-12141, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) ("A one-third fee recovery in this matter would equate to a multiplier of 3.01 . . . . This level multiplier is reasonable in light of what has been routinely accepted as fair and reasonable in complex matters such as this one. Multipliers much higher than the one requested here are also commonplace in complex pharmaceutical antitrust class actions."); *Cardizem*, 218 F.R.D. at 533 (noting that direct purchaser class plaintiffs received a fee award that equated to a lodestar multiplier of 3.7); *In re Cardinal Health Inc. Sec. Litigs.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (awarding multiplier of 5.9, and noting that typical multipliers ranged from 1.3 to 4.5); *Lowther v. AK Steel Corp.*, No. 1:11-CV-877, 2012 WL 6676131, at *5 (S.D. Ohio Dec. 21, 2012) (finding 3.06 multiplier "very acceptable" and citing cases awarding multipliers of 4.5 and up); *Meijer, Inc. v. 3M*, No. CIV.A. 04-5871, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (approving 4.77 multiplier); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, Dkt. 543 at 9-10 (D. Del. 2009) (multiplier of 3.93 "well within the acceptable range" for "class actions similarly alleging impeded generic competition").

[83] *Milk*, 2013 WL 2155387, at *4 (emphasis added); *see also, e.g.*, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-1720, 2019 WL 6888488, at *22 (E.D.N.Y. Dec. 16, 2019) (noting that "proposed multiplier of 2.5 . . . falls well within a range of multipliers that have been deemed acceptable, especially in complex actions," and collecting cases); *Lonardo*, 706 F. Supp. 2d at796 (citing study finding "the average effective multiplier across 1,120 cases was 3.89); *Lowther*, 2012 WL 6676131, at *5.

[84] 2014 WL 2946459, at *2 (approving multiplier of 2.1 to 2.5).

$100-$250 million had an average multiplier of 3.47 with a median of 2.20.[85] The multiplier here is more than reasonable, especially in light of the risks associated with this case detailed above.

B. The Requested Expenses Are Supported and Reasonable.

It is well-established that "[e]xpense awards are customary when litigants have created common settlement fund for the benefits of a class."[86] Class Counsel "is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses."[87]

Here, Class Counsel request reimbursement for $2,269,268.79 of costs paid out-of-pocket for the benefit of the Class. These costs include (1) filing fees; (2) copying, mailing, and serving documents; (3) computer research; (4) travel; (5) notice to the certified the ligation class; and (6) (the largest component) expert fees.[88] These "categories of expenses . . . are the type routinely charged to . . . hourly fee-paying clients and thus should be reimbursed out of the settlement fund."[89] Class Counsel spent more than $1,650,000 retaining experts, one of whom, Dr. Lamb, prepared a total of five reports in the case and testified on the stand twice. And, at 1.89% of the Settlement Fund, the reimbursement request is significantly less than the average costs award,

---

[85] Fitzpatrick Decl. ¶ 27.

[86] *Cardizem*, 218 F.R.D. at 534-35 (citation omitted); *see also* Newberg § 16:1.

[87] *Allan v. Realcomp II, Ltd.*, No. 10-14046, 2014 WL 12656718, at *2 (E.D. Mich. Sept. 4, 2014) (citation omitted).

[88] Glackin Decl. ¶¶ 65-66 & Exs. D-F.

[89] *New England Health Care Emps. Pension Fund*, 234 F.R.D. 627, 634-35 (W.D. Ky. 2006); *accord Cardizem*, 218 F.R.D. at 534-35 (same). Indeed, Lieff Cabraser maintains dedicated word processing, research, and litigation support departments that allow the firm to perform certain kinds of work in-house, at zero additional cost to the Class. Glackin Decl. ¶ 23.

usually around "4 percent of the relief for the class."[90] Moreover, "the fact that Class Counsel does not seek interest as compensation for the time value of money or costs associated with advancing these expenses to the Class makes this fee request all the more reasonable."[91]

C. The Court Should Allow Service Awards of $200,000 for Each Plaintiff.

Courts regularly award service awards "to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function."[92] Service awards help motivate class representatives to pursue relief on behalf of the class even though their own individual recoveries may be too small to justify the investment. Indeed, a core "function[] of the class action is to incentivize private parties to enforce certain laws such that the government is not required to undertake all law enforcement alone."[93] Thus, "courts have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives"[94] and "recognize their willingness to act as a private attorney general."[95] And "because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit."[96]

Here, but for the service of the Class Representatives, the misconduct would have gone unpunished (other than the smaller Amphastar settlement), future antitrust violations undeterred, and the Class uncompensated.[97] Furthermore, substantial service awards are entirely fair and

---

[90] *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011).

[91] *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014).

[92] Newberg § 17:1.

[93] Newberg § 17:3.

[94] *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003)

[95] *Rodriguez v. West Pub'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009).

[96] *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

[97] *See In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004) (nothing that incentive payments were "particularly appropriate in this case because there

Footnote continued on next page

appropriate, given that some absent class members (large insurers and hospital systems) have hundreds of millions of dollars in claims and stand to recoup millions from the fund at no cost or effort whatsoever. These recoveries will dwarf those of Nashville General and DC 37.[98]

The Sixth Circuit has neither approved nor disapproved service awards as a general matter,[99] but has recognized that "there may be circumstances where incentive awards are appropriate."[100] The court has also articulated a "sensibl[e] fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain,"[101] and therefore requires that representatives demonstrate that the service awards reflect a class representative's "extensive involvement in a class action litigation."[102] Thus, district courts in this Circuit regularly grant incentive awards upon a showing that the representative plaintiff actively committed "time and effort [] pursuing the litigation"[103] and conferred a benefit on the class.

Nashville General and DC 37's extensive contributions to the case are detailed in declarations from Marc Overlock, General Counsel at Nashville General Hospital ("Overlock Declaration") and Audrey Browne, former Associate Administrator at DC 37 ("Browne

---

Footnote continued from previous page
was no preceding governmental action alleging a conspiracy").

[98] Overlock Decl. ¶ 6; Browne Decl. ¶ 7.

[99] *See Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 310-11 (6th Cir. 2016).

[100] *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013) (citation omitted).

[101] *Shane*, 825 F.3d at 310 (quoting *Hadix*, 322 F.3d at 897). Unlike *Shane*, the record is not silent as to the contributions the class representatives made to the litigation. *Id.* at 311. Similarly, in *Dry Max* the Sixth Circuit cautioned against payments that make the class representatives whole, while leaving absent class members with "nearly worthless" injunctive relief. *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 715, 722 (6th Cir. 2013).

[102] *Lonardo*, 706 F. Supp. 2d at 787.

[103] *UnumProvident*, 2010 WL 289179, at *9; *see also, e.g.*, *Milk*, 2013 WL 2155387, at *8-9.

Declaration").[104] During discovery, Nashville General responded to 54 requests for production, 18 interrogatories, and 229 requests for admission; DC 37 responded to 42 requests for production, 11 interrogatories, and 76 requests for admission. Both Plaintiffs searched for and produced large volumes of documents and data, which required significant time. Representatives and lay witnesses endured eleven separate depositions. In total, seven current and former employees of Nashville General contributed significant time to the litigation effort. Plaintiffs also routinely attended hearings (including both class certification hearings), gave live testimony on crucial issues, and traveled to San Francisco for two days of mediation. Plaintiffs' contributions to the case were particularly critical at class certification, given the Plaintiffs themselves haled from both the retail channel (DC 37) and the non-retail channel (Nashville General).

The requested service awards of $200,000 each for NGH and DC 37 are more than justified by their extraordinary and crucial contributions to this case, and consistent with those awarded in other complex antitrust class actions.[105]

IV. CONCLUSION

Plaintiffs respectfully request that the Court award $40 million in attorneys' fees, together with a proportional share of interest earned on the Settlement Fund (subject to proportional reduction in the event Momenta fails to make the Second Payment), $2,269,268.79 in costs, and $200,000 in service awards to each of the two Class Representatives.

---

[104] Overlock Decl. ¶¶ 5-6; Browne Decl. ¶¶ 6-7.

[105] *See, e.g.*, *Seaman*, 2019 WL 4674758, at *7 ($125,000 service award to a single individual); *In re High-Tech Emp. Antitrust Litig.*, No. 11-2509, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) ($100,000 service awards to each individual); *In re Titanium Dioxide Antitrust Litig.*, No. 10-318, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (approving $125,000 service award to a small business).

Dated: March 2, 2020

Respectfully submitted,

/s/ *Brendan P. Glackin*

Brendan P. Glackin (*pro hac vice*)
Dean M. Harvey (*pro hac vice*)
Bruce W. Leppla (*pro hac vice*)
Katherine Lubin Benson (*pro hac vice*)
David T. Rudolph (*pro hac vice*)
Adam Gitlin (*pro hac vice*)
Michelle A. Lamy (*pro hac vice*)
Jeremy J. Pilaar (*pro hac vice*)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 946111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Mark P. Chalos (TN State Bar No. 19328)
Andrew R. Kaufman (TN State Bar No. 33864)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
222 Second Avenue, Suite 1640
Nashville, TN 37201
Telephone: (615) 313-9000
Facsimile: (615) 313-9965

Counsel for Nashville General and DC 37 and the Class

John T. Spragens (TN State Bar No. 31445)
SPRAGENS LAW PLC
1200 16th Ave. S.
Nashville, TN 37212
Telephone: (615) 983-8900
Facsimile: (615) 682-8533

Additional Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 2020, the foregoing document was filed electronically with the U.S. District Court for the Middle District of Tennessee. Notice of this filing was served via the court's electronic filing system on counsel listed below:

Timothy L. Warnock (TN Bar No. 12844)
Stuart A. Burkhalter (TN Bar No. 29078)
RILEY WARNOCK & JACOBSON, PLC
1906 West End Avenue
Nashville, TN 37203
Telephone: (615) 320-3700
Facsimile: (615) 320-3737

Matthew D. Kent (*pro hac vice*)
Liz Brodway Brown (*pro hac vice*)
D. Andrew Hatchett (*pro hac vice*)
Michael P. Kenny (*pro hac vice*)
Anthony Thomas Greene (*pro hac vice*)
Kara F. Kennedy (*pro hac vice*)
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
Telephone: (404) 881-7000
Facsimile: (404) 881-7777

Teresa T. Bonder (*pro hac vice*)
Nell G. Moley (*pro hac vice*)
Jean E. Richmann (*pro hac vice*)
ALSTON & BIRD LLP
560 Mission Street, Suite 2100
San Francisco, CA 94105
Telephone: (415) 243-1000
Facsimile: (415) 243-1001

Attorneys for Sandoz Inc.

R. Dale Grimes (TN Bar No. 6223)
Virginia M. Yetter (TN Bar No. 31471)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
Telephone: (615) 742-6200

Jason T. Murata (*pro hac vice*)
Brooke Jones Oppenheimer (*pro hac vice*)
Thomas G. Rohback (*pro hac vice*)
AXINN, VELTROP & HARKRIDER LLP
90 State House Square
Hartford, CT 06103
Telephone: (860) 275-8100
Facsimile: (860) 275-8101

Carmel Rana Arikat (*pro hac vice*)
Richard B. Dagen (*pro hac vice*)
Bradley D. Justus (*pro hac vice*)
Michael L. Keeley (*pro hac vice*)
Daniel K. Oakes (*pro hac vice*)
Jetta C. Sandin (*pro hac vice*)
AXINN, VELTROP & HARKRIDER LLP
950 F Street, NW
Washington, DC 20004
Telephone: (202) 912-4700
Facsimile: (202) 912-4701

Carol Xianxiao Liu (*pro hac vice*)
Varnitha Siva (*pro hac vice*)
AXINN, VELTROP & HARKRIDER LLP
114 West 47th Street
New York, NY 10036
Telephone: (212) 728-2200
Facsimile: (212) 728-2201

Juanita R. Brooks (*pro hac vice*)
Roger Alen Denning (*pro hac vice*)
Tucker N. Terhufen
FISH & RICHARDSON, P.C.
12390 El Camino Real
San Diego, CA 92130
Telephone: (858) 678-5070
Facsimile: (858) 678-5099

Attorneys for Momenta Pharmaceuticals, Inc.

/s/Katherine Lubin Benson
Katherine Lubin Benson

1924870.19