IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

In re EPIPEN (EPINEPHRINE INJECTION, USP) MARKETING, SALES PRACTICES AND ANTITRUST LITIGATION This Document Relates To: CONSUMER CLASS CASES.	Civil Action No. 2:17-md-02785-DDC-TJJ (MDL No. 2785)

MEMORANDUM OF LAW IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT, APPROVAL OF PLAN OF ALLOCATION, AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL BACKGROUND 5

I. EPIPEN LITIGATION 5

II. TERMS OF THE SETTLEMENT 10

III. PRELIMINARY APPROVAL AND CLASS NOTICE 11

IV. CAFA NOTICE 12

V. RESPONSE OF THE CLASS TO DATE 12

VI. PROSECUTION OF THIS CASE REQUIRED AN ENORMOUS AND RISKY INVESTMENT OF RESOURCES AND LABOR 13

VII. THE CLASS REPRESENTATIVES PROVIDED SIGNIFICANT HELP 14

VIII. PROFESSOR GENSLER SUPPORTS THE REQUESTS 15

ARGUMENT 16

I. PLAINTIFFS PROVIDED SUFFICIENT NOTICE TO THE CLASS IN COMPLIANCE WITH RULE 23 AND DUE PROCESS. 16

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND MERITS FINAL APPROVAL 17

A. The Settlement Satisfies the Rule 23(e)(2) Factors. 19

1. Class Plaintiffs and Co-Lead Counsel Have Adequately Represented the Class. 19

2. The Settlement Was Fairly Negotiated at Arm's Length. 21

3. The Settlement is Adequate Considering the Costs, Risks, and Delay of Trial and Appeal. 22

4. The Method for Distributing Relief Is Effective. 25

5. Attorneys' Fees and Expenses. 26

6. The Settling Parties Have No Additional Agreement. 28

7. Class Members Are Treated Equitably 28

B. The Settlement Satisfies the Remaining Factor Considered by Courts in the Tenth Circuit. 28

III. THE PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE 29

IV. THE REQUESTED COMMON FUND FEE IS REASONABLE AND SHOULD BE APPROVED. 30

A. The Requested Fee is a Reasonable Percentage of the Common Fund. 31

B. The *Johnson* Factors Support the Reasonableness of Co-Lead Counsel's Fee Request 33

1. The significant monetary award obtained for the Class supports the reasonableness of the fee award. (Factor 8) 34

2. The requested fee is consistent with fees awarded in similar cases. (Factor 12) 36

3. The requested fee is consistent with a customary fee. (Factor 5) 37

4. This case presented difficult factual issues and raised novel and complex questions of law. (Factor 2) 38

5. Plaintiffs' team of attorneys have substantial experience in prosecuting high-stakes, complex litigation and pursued the case with extraordinary skill, zeal, and expertise. (Factors 3 & 9) 39

6. The fee being contingent on obtaining relief for the class and the significant risk undertaken by counsel justifies the fee request. (Factor 6) 40

7. Co-Lead Counsel's expended time and labor were enormous. (Factor 1) 42

8. Given the enormous time and resource commitments, and the significant risk to develop and litigate this case, few attorneys would have been willing to take it on. (Factor 10) 43

9. The demands of this case precluded Co-Lead Counsel from other employment. (Factor 4) 44

V. THE COURT SHOULD AWARD CO-LEAD COUNSEL'S EXPENSES. 45

VI. THE PROPOSED SERVICE AWARDS FOR CLASS REPRESENTATIVE PLAINTIFFS ARE WELL DESERVED. 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Merit Energy Co.,
07-CV-00916-LTB-BNB, 2009 WL 3378526 (D. Colo. Oct. 20, 2009) 34

Amoco Prod. Co. v. Fed. Power Comm'n,
465 F.2d 1350 (10th Cir. 1972) 17

In re Auto. Refinishing Paint Antitrust Litig.,
MDL No. 1426, 2008 WL 63269 42

In re Bank of Am. Wage & Hour Emp. Litig., 10-MD-2138-JWL,
2013 WL 6670602 (D. Kan. Dec. 18, 2013) 46

Been v. O.K. Indus., Inc.,
CIV-02-285-RAW, 2011 WL 4478766 (E.D. Okla. Aug. 16, 2011) 38

Big O Tires, Inc. v. Bigfoot 4x4, Inc.,
167 F. Supp. 2d 1216 (D. Colo. 2001) 18

Blum v. Stenson,
465 U.S. 886 (1984) 31

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980) 30

Brown v. Phillips Petroleum Co.,
838 F.2d 451 ..... *passim*

Bussie v. Allmerica Fin. Corp.,
No. 97-40204-NMG, 1999 WL 342042 (D. Mass. May 19, 1999) 32

Case v. Unified Sch. Dist. No. 233,
157 F.3d 1243 (10th Cir. 1998) 46

Camden I Cond. Ass'n v. Dunkle,
946 F.2d 768 (11th Cir. 1991) 35

Chavez Rodriguez v. Hermes Landscaping, Inc.,
No. 17-2142-JWB-KGG, 2020 WL 3288059 (D. Kan. June 18, 2020) ..... *passim*

Chieftain Royalty Co. v. XTO Energy, Inc.,
No. CIV-11-29-KEW, 2018 WL 2296588 (E.D. Okla. Mar. 27, 2018) 32, 39

Childs v. Unified Life Ins. Co.,
No. 10-CV-23-PJC, 2011 WL 6016486, (N.D. Okla. Dec. 2, 2011) 32

Cecil v. BP Am. Prod. Co., 16-CV-410-KEW,
2018 WL 8367957 (E.D. Okla. Nov. 19, 2018) 35, 40, 47, 48

Columbus Drywall & Insulation v. Masco Corp.,
No. 1:04-cv-3066-JEC, 2012 WL 12540344 (N.D. Ga. Oct. 26, 2012) 38

Cotton v. Hinton,
559 F.2d 1326 (5th Cir. 1977) 38

In re Crocs, Inc. Sec. Litig.,
306 F.R.D. 672 (D. Colo. 2014) 25

In re Domestic Air Transp. Antitrust Litig.,
148 F.R.D. 297 (N.D. Ga. 1993) 40

Edmonds v. United States,
658 F. Supp. 1126 (D.S.C. 1987) 38

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 16

In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices, and Antitrust Litig.,
No. 17-md-2785-DDC-TJJ, 2021 WL 5369798 (D. Kan. Nov. 17, 2021) 19, 31

Freebird, Inc. v. Merit Energy Co.,
No. 10-1154-KHV, 2013 WL 1151264 (D. Kan. Mar. 19, 2013) 41

Gottlieb v. Barry,
43 F.3d 474 (10th Cir. 1994) 31

Gudenkauf v. Stauffer Commc'ns, Inc.,
158 F.3d 1074 (10th Cir. 1998) 34

Hapka v. CareCentrix, Inc.,
No. 2:16-cv-02372-KGG, 2018 WL 1871449 (D. Kan. Feb. 15, 2018) 29

Harlow v. Sprint Nextel Corp.,
No. 08-2222-KHV, 2018 WL 2568044 (D. Kan. June 4, 2018) 46, 47

Harris v. Chevron U.S.A., Inc.,
No. 6:19-cv-00355-SPS, 2020 WL 8187464 (E.D. Okla. Feb. 27, 2020) 20

Hershey v. ExxonMobil Oil Corp.,
No. 07–1300–JTM, 2012 WL 5306260 (D. Kan. Oct. 26, 2012) 47, 49

In re High-Tech Employee Antitrust Litig.,
No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015) 49

In re Hill's Pet Nutrition, Inc. Dog Food Prods. Liab. Litig.,
No. 19-MD-2887, ECF No. 132 36

Johnson v. Georgia Highway Express, Inc.,
488 F.2d 714 (5th Cir. 1974) ..... *passim*

Jones v. Diamond,
636 F.2d 1364 (5th Cir. 1981) 41

Kjessler v. Zaappaaz, Inc.,
No. 4:18-cv-430, 2018 WL 8755737 (S.D. Tex. Aug. 31, 2018) 21

In re King Res. Co. Sec. Litig.,
420 F. Supp. 610 (D. Colo. Aug. 10, 1976) 25

Koehler v. Freightquote.com, Inc., 12-2505-DDC-GLR,
No. 12-2505-DDC-GLR, 2016 WL 3743098 (D. Kan. July 13, 2016) 35, 36

In re Linerboard Antitrust Litig.,
No. 98-5055, 2004 WL 1221350 (E.D. Pa. June 2, 2004) 42

Lucas v. Kmart Corp.,
234 F.R.D. 688 (D. Colo. 2006) 23, 25, 29

Lucken Family Ltd. P'ship v. Ultra Res., Inc.,
No. 09–cv–01543–REB–KMT, 2010 WL 5387559 (D. Colo. Dec. 22, 2010) 47

Lunsford v. Woodforest Nat'l Bank,
No. 1:12-CV-103-CAP, 2014 WL 12740375 (N.D. Ga. May 19, 2014) 39

Marcus v. Kansas Dep't of Revenue,
209 F. Supp. 2d 1179 (D. Kan. 2002) 21, 29

McNeely v. Nat'l Mobile Health Care, LLC,
No. CIV-07-933-M, 2008 WL 4816510 (W.D. Okla. Oct. 27, 2008) 23, 25

In re Miniscribe Corp.,
309 F.3d 1234 (10th Cir. 2002) 33

In re Motor Fuel Temperature Sales Practices Litig.,
271 F.R.D. 221 (D. Kan. 2010) 19

In re Motor Fuel Temperature Sales Practices Litig.,
07-MD-1840-KHV, 2016 WL 4445438 (D. Kan. Aug. 24, 2016) 34

In re Motorsports Merch. Antitrust Litig.,
112 F. Supp. 2d 1329 (N.D. Ga. 2000) 38

Nakamura v. Wells Fargo Bank, N.A.,
No. 17-4029-DDC-GEB, 2019 WL 2185081 (D. Kan. May 21, 2019) ..... *passim*

In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.,
No. 4:14-md-2541-CW, 2017 WL 6040065 (N.D. Cal. Dec. 6, 2017) 21

Nieberding v. Barrette Outdoor Living, Inc.,
129 F. Supp. 3d 1236 (D. Kan. 2015) 37, 46

O'Dowd v. Anthem, Inc.,
No. 14-cv-02787-KLM-NYW, 2019 WL 4279123 (D. Colo. Sept. 9, 2019) 29

Oppenlander v. Standard Oil Co.,
64 F.R.D. 597 (D. Colo. 1974) 35

Pelzer v. Vassalle,
655 F. App'x 352 (6th Cir. 2016) 27

Ponca Tribe of Indians of Oklahoma v. Continental Carbon Co.,
No. 05–445 (C), 2009 WL 2836508 (W.D. Okla. July 30, 2009) 47

In re Qwest Commc'ns Int'l, Inc. Sec. Litig.,
625 F. Supp. 2d 1133 (D. Colo. 2009) 23

Ressler v. Jacobson,
822 F. Supp. 1551 (M.D. Fla. 1992) 36

Reynolds v. Beneficial Nat'l Bank,
288 F.3d 277 (7th Cir. 2002) 24

Rosenbaum v. MacAllister,
64 F.3d 1439 (10th Cir. 1995) 31

Rothe v. Battelle Mem'l Inst.,
No. 1:18-cv-03179-RBJ, 2021 WL 2588873 (D. Colo. June 24, 2021) 33

Rutter & Wilbanks Corp. v. Shell Oil Co.,
314 F.3d 1180 (10th Cir. 2002) 18, 21

In re SandRidge Energy, Inc. Sec. Litig.,
No. CIV-12-1341-G, 2019 WL 4752268 (W.D. Okla. Sept. 30, 2019) 20

Sears v. Atchison, Topeka & Santa Fe Ry., Co.,
749 F.2d 1451 (10th Cir. 1984) 17

Shaw v. Interthinx, Inc.,
No. 13-CV-01229-REB-NYW, 2015 WL 1867861 (D. Colo. Apr. 22, 2015) 32

In re Syngenta AG MIR 162 Corn Litig.,
357 F. Supp. 3d 1094 (D. Kan. Dec. 7, 2018) ..... *passim*

In re Syngenta AG MIR 162 Corn Litig.,
No. 14-MD-2591-JWL, 2018 WL 6839380 (D. Kan. Dec. 31, 2018) 48

In re Syngenta AG. MIR 162 Corn Litig.,
No. 14-MD-2591-JWL, 2018 WL 1726345 (D. Kan. Apr. 10, 2018) ..... *passim*

In re Syngenta AG. MIR 162 Corn Litig.,
No. 14-MD-2591-JWL, 2021 WL 102819 (D. Kan. Jan. 12, 2021) 27

In re Sprint Corp. ERISA Litig.,
443 F. Supp. 2d 1249 (D. Kan. 2006) 31

In re TFT-LCD (Flat Panel) [Indirect Purchaser] Antitrust Litig.,
MDL No. 1827, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013) 42

Tennille v. W. Union Co.,
785 F.3d 422 (10th Cir. 2015) 16, 18, 23

In re Thornburg Mortg., Inc. Sec. Litig.,
912 F. Supp. 2d 1178 (D.N.M. 2012) 24

In re Titanium Dioxide Antitrust Litig.,
No. 10-CV-00318-RDB, 2013 WL 6577029 (D. Md. Dec. 13, 2013) 49

Trujillo v. State of Colo.,
649 F.2d 823 (10th Cir. 1981) 17

Tuten v. United Airlines, Inc.,
41 F. Supp. 3d 1003 (D. Colo. 2014) 47

UFCW Local 880-Retail Food Emp'r Joint Pension Fund v. Newmont Min. Corp.,
352 F. App'x 232 (10th Cir. 2009) 46, 47

In re Urethane Antitrust Litig.,
No. 04–md–1616–JWL, 2008 WL 696244 (D. Kan. Mar. 13, 2008) 48

In re Urethane Antitrust Litig.,
No. 04–md–1616–JWL, 2016 WL 4060156 (D. Kan. July 29, 2016) ..... *passim*

Vaszlavik v. Storage Tech. Corp.,
2000 WL 1268824 (D. Colo. Mar. 9, 2000) 45

In re Vitamins Antitrust Litig.,
MDL No. 1285, 2001 WL 34312839 (D.D.C. July 16, 2001) 42

Wal-Mart Stores, Inc. v. Visa, U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005) 38

In re Whirlpool Corp. Front-loading Washer Prods. Liab. Litig.,
No. 1:08-WP-6500, 2016 WL 5338012 (N.D. Ohio Sept. 23, 2016) 27

Wiggins v. Roberts,
551 F. Supp. 57 (N.D. Ala. 1982) 44

In re WorldCom, Inc. ERISA Litig.,
2 No. Civ. 02-4816 (DLC), 004 WL 2338151 (S.D.N.Y. 2004) 20

In re WorldCom, Inc. Sec. Litig.,
388 F. Supp. 2d 319 (S.D.N.Y. 2005) 32

Statutes

28 U.S.C. § 1715 12

Rules

Fed. R. Civ. P. 23 28

Fed. R. Civ. P. 23(c) 16, 17, 29

Fed. R. Civ. P. 23(e) ..... *passim*

Fed. R. Civ. P. 23(h) 30, 33, 34, 45

Fed. R. Civ. P. 23(f) 20

Fed. R. Civ. P. 54(b) 8

Other Authorities

William B. Rubenstein, *Newberg on Class Actions* § 15:77 (5th ed. 2021) 34

William B. Rubenstein, *Newberg on Class Actions* § 17:1 (5th ed. 2021) 46, 47

Manual For Complex Litigation, § 14 (4th ed. 2004) 34

Manual For Complex Litigation, § 14.121(4th ed. 2004) 31

INTRODUCTION

After five years of hard-fought litigation in this Action,[1] and just weeks before the start of trial, Class Plaintiffs[2] and the Mylan Defendants[3] (together, the "Settling Parties") reached a Settlement that resolves Class Plaintiffs' claims in the Action and Other Actions[4] against the Mylan Defendants and creates a non-reversionary common fund of $264 million for the Class (in addition to the $345 million common fund created by the Pfizer Settlement), bringing the total recovery for the Class to $609 million. The Settlement resulted from well-informed and arm's-length negotiations between highly experienced counsel possessing a thorough understanding of the strengths and weaknesses of the claims due to detailed investigation, substantial discovery, many rulings from the Court, expert analysis, and extensive trial preparation.

---

[1] All capitalized terms not otherwise defined herein shall have the meaning given to them in the February 27, 2022, Stipulation of Class Action Settlement ("Settlement Agreement"). ECF No. 2590-2. All emphasis is added, and all citations are omitted, unless otherwise noted.

[2] "Class Plaintiffs" or "Plaintiffs" refers collectively to the appointed representatives of the certified Class: Shannon Clements; Lesley Huston; Rosetta Serrano; Kenneth Evans; Elizabeth Williamson; Vishal Aggarwal; Teia Amell; Todd Beaulieu; Carly Bowerstock; Raymond Butcha III; Laura Chapin; Heather Destefano; Donna Anne Dvorak; Michael Gill; Suzanne Harwood; Elizabeth Huelsman; Landon Ipson; Anastasia Johnston; Mark Kovarik; Meredith Krimmel; Nikitia Marshall; Angie Nordstrum; Sonya North; Christopher Rippy; Lee Seltzer; Joy Shepard; Kenneth Steinhauser; April Sumner; Annette Sutorik; Stacee Svites; Linda Wagner; Jennifer Walton; Donna Wemple; Lorraine Wright; and Local 282 Welfare Trust Fund.

[3] "Mylan" refers collectively to Mylan N.V., Mylan Specialty L.P., Mylan Pharmaceuticals Inc., and Heather Bresch. "Mylan Defendants" refers collectively to Mylan and Viatris Inc.

[4] As defined in the Settlement Agreement, the "Other Actions" include additional actions pending before this Court, entitled *Ipson v. Viatris Inc.*, No. 2:21-cv-02556-DDC-TJJ (D. Kan.); *Gill v. Viatris Inc.*, No. 2:21-cv-02534-DDC-TJJ (D. Kan.); *Dvorak v. Viatris Inc.*, No. 2:21-cv-02561-DDC-TJJ (D. Kan.); and *Sumner v. Viatris Inc.*, No. 2:21-cv-02555-DDC-TJJ (D. Kan.). Although settlement of the Other Actions is not subject to court approval, the Settling Parties have agreed that Plaintiffs will dismiss the Other Actions with prejudice as a condition of the Settlement.

As Class Plaintiffs stated in their preliminary approval papers, the Mylan Settlement is substantially similar to the Court-approved Pfizer Settlement. Thus, in many respects, the arguments supporting final approval of the Settlement, approval of the Plan of Allocation, and awards of attorneys' fees, expenses, and service awards here echo those in Plaintiffs' papers seeking the same orders related to the Pfizer Settlement. The Mylan Settlement satisfies the standards for final approval under Rule 23 for the same reasons as the Pfizer Settlement.

The Court granted preliminary approval of the Mylan Settlement on March 11, 2022 and directed that notice be disseminated to the Class. The Court held that the Settlement appeared fair, reasonable, and adequate, subject to further consideration at the Fairness Hearing. Order, ECF No. 2594, ¶¶ 1, 10-11. The Court's assessment of the Settlement at preliminary approval was correct and should be extended to final approval. Co-Lead Counsel have ensured that the Notice and Notice Package the Court ordered distributed in accordance with the Notice Plan were timely implemented by the Notice and Settlement Administrator, A.B. Data, Ltd.[5]

The Notice and Notice Package also set forth the Plan of Allocation that governs how claims will be considered and how the net settlement proceeds will be allocated to Class Members who submit timely and valid claim forms to the Settlement Administrator—and the Notice explained that any Class Member who already submitted a claim under the Pfizer Settlement will automatically be eligible to receive a payment from the Mylan Settlement without the need to file another claim form.[6] The Plan of Allocation for the Mylan Settlement is substantially similar to

---

[5] *See* Declaration of Eric Schachter of A.B. Data, Ltd. In Support of Class Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation ("Schachter Decl."), *generally*, attached as Exhibit A-1 to Co-Lead Joint Declaration.

[6] Any Class Member who submits a new claim in the Mylan Settlement and did not submit a claim in connection with the Pfizer Settlement will receive their *pro rata* payment from the proceeds of the Mylan Settlement only.

the Plan of Allocation the Court approved for the Pfizer Settlement and was prepared based on information provided by Plaintiffs' experts and in consultation with A.B. Data. The plan allocates funds between two pools based on relative damages allegedly suffered by individual consumers and third-party payors ("TPPs") as calculated in the Rebuttal Merits Expert Report of Professor Meredith Rosenthal (ECF No. 2216-2). Within each pool, funds will be distributed on a *pro rata* basis to all eligible Class Members. Funds remaining in one pool will spill over to the other pool in certain circumstances. Plaintiffs expect that all funds will be distributed to Class Members under the Plan of Allocation.[7] There is no right of reversion under the Settlement and in no case will any portion of the Settlement Amount be returned to the Mylan Defendants once the Settlement becomes final.

Co-Lead Counsel have concluded that the Settlement and Plan of Allocation are fair, reasonable, and adequate, and in the best interest of the Settlement Class. Joint Decl. at ¶¶ 40-53.[8] Professor Steven S. Gensler, having analyzed the Settlement, supports it as being fair, reasonable, and adequate. *See* Gensler Decl. at ¶¶ 15-41.[9] The Settlement and Plan of Allocation warrant the Court's final approval. Indeed, to date, no one has submitted a proper objection to either the

---

[7] Class Counsel expect that, under the Plan of Allocation's distribution terms, there will be no remaining funds for *cy pres* distribution. If there is any remaining balance in the Net Settlement Fund after the initial distribution—*e.g.* due to uncashed checks—the Settlement Administrator will reallocate such balance among Class Members pursuant to the terms of the Plan of Allocation. Any funds remaining for *cy pres* distribution should therefore be *de minimis*, existing only if a Class Member does not cash their check or otherwise deposit or accept their distribution after submitting a claim, *and* after additional distributions to qualifying claimants.

[8] Joint Declaration of Co-Lead Counsel in Support of Class Plaintiffs' Motion for Final Approval of Settlement, Approval of Plan of Allocation, and Award of Attorneys' Fees, Expenses, and Service Awards ("Joint Decl."), attached as Exhibit A.

[9] Declaration of Professor Steven S. Gensler in Support of the Settlement Agreement, Award of Attorney's Fees, and Class Representative Incentive Award ("Gensler Decl."), attached as Exhibit B.

Settlement or the Plan of Allocation. Accordingly, Class Plaintiffs request that the Court grant final approval of the Settlement and the Plan of Allocation as fair, reasonable, and adequate.

The Settlement was neither foreordained nor easily obtained, as the Court is aware from its active involvement and frequent rulings in this complex multidistrict litigation ("MDL") over the last five years. Rather, the Settlement resulted only after the sustained effort of Plaintiffs' counsel—on a fully contingent basis with substantial risk and out-of-pocket expenses—including, but not limited to: surviving Mylan's and Pfizer's[10] motions to dismiss; analyzing over 11 million pages of documents; taking and defending 158 depositions; briefing and arguing numerous discovery disputes; certification of a nationwide RICO class and multi-state antitrust class; extensively briefing *Daubert* class certification challenges; defending the class certification decision at the Tenth Circuit against Defendants' request for interlocutory appeal; surviving, in part, Defendants' motions for summary judgment and *Daubert* merits challenges; surviving Mylan's motion to decertify the Class (and defending against a motion to reconsider the decertification ruling that was pending as of Settlement); completing the majority of pre-trial deadlines and submissions; and extensively preparing for trial. All this effort not only advanced the Action, but it laid the foundation for Plaintiffs and the Mylan Defendants to negotiate, and ultimately reach, the Settlement.

As compensation for their persistent and effective advocacy in the face of considerable opposition and risk, Co-Lead Counsel respectfully request an award of the standard one-third fee of the $264 million Settlement Amount. Co-Lead Counsel also request the Court award their incurred expenses and charges in the amount of $1,426,642.93. And finally, Co-Lead Counsel request the Court award service awards between $3,160 and $5,000 from the Settlement Fund to

[10] Pfizer, Inc., Meridian Medical Technologies, Inc., and King Pharmaceuticals, Inc. (n/k/a King Pharmaceuticals LLC) (collectively, "Pfizer" or the "Pfizer Defendants" and together with Mylan, the "Defendants").

each of the class representatives, who all actively contributed to the case, each of them reviewing and providing input for pleadings, gathering information and documents to complete discovery responses, preparing for and sitting for their depositions, communicating with counsel and staying abreast of the status of the case, aiding in trial preparation, and evaluating and approving the Settlement. As shown below, these attorneys' fee, expenses, and service award requests are eminently justifiable under the facts and circumstances of this case, application of the *Johnson* factors, and the law and precedent in this District and the Tenth Circuit. *See Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974). For all the reasons set forth below and in the accompanying declarations, Co-Lead Counsel respectfully submit that the requested attorneys' fees, expenses, and service awards are fair and reasonable under the applicable legal standards and should be awarded by the Court.

FACTUAL BACKGROUND[11]

I. EPIPEN LITIGATION

A. Procedural Background

In 2016, Co-Lead Counsel and many other law firms filed numerous putative class action lawsuits against both Mylan and Pfizer "involv[ing] allegations of anticompetitive conduct or unfair methods of competition" regarding the EpiPen. Joint Decl. at ¶ 6. The cases were centralized by the Judicial Panel on Multidistrict Litigation ("JPML") into this MDL and transferred to this Court on August 4, 2017. *Id*.

On September 12, 2017, the Court appointed Co-Lead Counsel and approved an organizational structure for Plaintiffs' Counsel, including Liaison Counsel and a Steering

[11] The facts summarized throughout this memorandum are generally set forth, and sometimes in more detail, in the accompanying Joint Declaration of Co-Lead Counsel, Exhibit A.

Committee. *Id.* at ¶ 7. Thereafter, on October 17, 2017, Plaintiffs filed a 400-page Consolidated Class Action Complaint ("Complaint") alleging claims for violations of the federal Racketeer Influenced and Corrupt Organizations ("RICO") Act, certain state antitrust laws, and other causes of action. *Id.* at ¶ 8. Defendants then filed motions to dismiss the Complaint, contending that none of Plaintiffs' claims had merit. Following extensive briefing, the Court granted in part and denied in part the motions to dismiss on August 20, 2018. *Id.* at ¶ 9.

Plaintiffs moved for class certification under Rule 23(b)(3) on December 7, 2018. *Id.* at ¶ 10. Plaintiffs supported the motion with extensive evidence obtained from discovery, depositions, and multiple expert reports. Defendants fiercely opposed class certification, submitted multiple opposing expert reports, and moved to strike Plaintiffs' expert reports. Following extensive briefing on the class certification issues, the Court conducted a two-day class certification hearing on June 11-12, 2019. On February 27, 2020, the Court granted in part and denied in part Plaintiffs' motion for class certification and the parties' motions to strike certain class certification expert reports. *Id*. at ¶ 11. The Court certified a nationwide RICO Class and a State Antitrust Class under Rule 23(b)(3) (collectively, the "Class") and appointed Warren T. Burns, Paul J. Geller, Elizabeth Pritzker, Lynn Lincoln Sarko, and Rex A. Sharp as Co-Lead Counsel for the certified Class. *Id*. On March 12, 2020, Defendants filed a Rule 23(f) petition for review of that decision, but The Tenth Circuit denied Rule 23(f) review on May 26, 2020. *Id*. at ¶ 12.

B. The Parties Engaged in Extensive Discovery

During the Action, Plaintiffs engaged in substantial fact discovery that resulted in the production of over 1.75 million documents (totaling over 11 million pages) from Defendants and third parties, which Plaintiffs then carefully reviewed, analyzed, and organized according to their case theories. There was extensive discovery motion practice, including with respect to some of the

subpoenaed third parties. Many of the third parties objected to producing documents and only complied after Plaintiffs filed motions to compel responses to their subpoenas and prevailed on those motions. Joint Decl. at ¶ 13.

Plaintiffs also prepared for and took or defended 158 depositions, including those of Defendants' employees, all named Plaintiffs (many of whom traveled from their homes to Kansas City for their depositions), many third parties, and the numerous experts for all parties. Plaintiffs engaged in additional substantial expert discovery work, including consulting with and preparing expert witnesses, preparing expert reports for class certification and summary judgment, and vigorously defending many *Daubert* motions against their experts. From October 2019 to February 2020, the parties served over a dozen expert reports on the merits of their claims and defenses. *Id.* at ¶¶ 14-15.

C. Class Notice and Related Discovery

In addition to fact and expert discovery, Plaintiffs also separately conducted discovery needed to provide notice of the Action to members of the certified Class. Despite Defendants' opposition to Plaintiffs' notice plan, Plaintiffs obtained the appointment of A.B. Data as the notice administrator and Court approval of stage one of Plaintiffs' notice plan, which authorized Plaintiffs to issue subpoenas to the largest pharmacy benefit managers and pharmacy chains in the United States and obtain Class Member contact information. Joint Decl. at ¶ 16.

Having issued the class notice subpoenas and obtained Class Member contact information, on August 31, 2020, Plaintiffs moved for Court approval of stage two of Plaintiffs' notice plan, which sought approval of both the form and manner of providing notice to the certified Class. *Id.* at ¶ 17. Again, Defendants opposed the motion, but the Court granted Plaintiffs' motion and

approved the form and manner of class notice, which began on November 1, 2020, and ended on January 15, 2021. *Id*.

D. Dispositive Motions, Pfizer Settlement, and Motion for Decertification

On July 15, 2020, Defendants moved for summary judgment and filed a series of *Daubert* motions to strike nearly all of Plaintiffs' experts. The parties extensively briefed the summary judgment and *Daubert* motions (Plaintiffs filed a targeted *Daubert* motion regarding one of Defendants' key experts). Joint Decl. at ¶ 18. On June 10, 2021, while Defendants' motions for summary judgment were pending, Plaintiffs and Pfizer agreed to settle the claims against Pfizer in the Action (the "Pfizer Settlement"). On November 17, 2021, the Court granted final approval of the Pfizer Settlement and entered a Final Judgment and Order of Dismissal with Prejudice Under Fed. R. Civ. P. 54(b) for the Pfizer Defendants Only. *Id.* at ¶ 19.

On June 23, 2021, the Court entered Memoranda and Orders resolving the motions for summary judgment and *Daubert* motions as to Mylan. The Court denied Mylan's motion for summary judgment as to Plaintiffs' generic delay state antitrust claims but granted Mylan's motion for summary judgment as to Plaintiffs' branded exclusion antitrust claims and RICO claims. The Court also granted in part and denied in part Mylan's *Daubert* motions. *Id.* at ¶ 20. The summary judgment order dismissed the claims of plaintiffs Landon Ipson, Michael Gill, Donna Dvorak, and April Sumner, who then sued the Mylan Defendants in the Other Actions for allegedly violating certain state antitrust laws and other federal and state laws, as delineated in their complaints, which were centralized into this MDL. *Id*. at 21.

Following the summary judgment decision, Mylan moved to decertify the state antitrust Class on July 8, 2021 and Plaintiffs moved for reconsideration and 1292(b) certification of the grant of summary judgment on Plaintiffs' RICO claim. *Id.* Upon extensive briefing of the motions, the

Court denied both except in two limited respects related to Mylan's motion for decertification. *Id.* at 22. Mylan then moved for reconsideration of the Court's decertification order. *Id*. The Court heard argument on that reconsideration motion on January 10, 2022. *Id*.

E. Trial Preparation

Trial was rescheduled multiple times because of COVID-19-related and other concerns. Before the Pfizer Settlement, Plaintiffs expended significant time and effort preparing for the then September 7, 2021 trial date. Joint Decl. at ¶ 23. That work involved meeting and conferring on preparation of a detailed proposed pretrial order, which served as the foundation for the Court's Pretrial Order entered July 17, 2020, drafting jury instructions, preparing a proposed jury questionnaire, putting together witness and exhibit lists, preparing witness deposition testimony designations, and completing other work tasks necessary to ready the Action for trial. *Id.* The September 7, 2021 trial date was continued to allow for approval proceedings for the Pfizer Settlement. *Id.* at ¶ 24. Trial was then continued to January 24, 2022, and later rescheduled again to commence on February 22, 2022. ECF No. 2562. Plaintiffs once again prepared extensively for trial by preparing revised exhibit and witness lists, designating extensive deposition excerpts, drafting jury instructions, finalizing a jury questionnaire with the Court, filing and arguing motions *in limine* in a full-day hearing, preparing voir dire questions, and many other necessary trial-related tasks. Plaintiffs also engaged several jury consultants and conducted multiple full-day mock jury proceedings in Kansas City. *Id.* ¶ 25.

F. Settlement Negotiations with the Mylan Defendants

As the rescheduled trial date approached, Plaintiffs and the Mylan Defendants engaged in direct settlement discussions. Joint Decl. at ¶ 26. Plaintiffs subsequently agreed to a term sheet to settle all claims brought in or related to the Action and Other Actions against the Mylan Defendants

in return for a non-reversionary cash payment of $264 million (inclusive of all fees and costs). On February 4, 2022, the Settling Parties informed the Court that they had agreed on the term sheet to settle all claims asserted in the Action and Other Actions. *Id.* at ¶ 27. Plaintiffs and the Mylan Defendants then extensively negotiated and drafted the Settlement Agreement and its related documents, which included the form of judgment, the proposed preliminary approval order, the claim form, the plan of allocation, and the forms of notice to the Class of the Settlement. *Id.* at ¶ 28. Plaintiffs and the Mylan Defendants completed their negotiations over the Settlement Agreement and its related documents on February 27, 2022 and executed the Settlement Agreement that day. *Id*. at ¶ 29. All Class representatives approve and support the Settlement. *Id.*

II. TERMS OF THE SETTLEMENT

The Settlement Agreement provides that Plaintiffs and the certified Class will settle and release their claims against the Mylan Defendants in exchange for a non-reversionary $264 million cash payment from the Mylan Defendants (the "Settlement Amount"). *See generally*, Settlement Agreement, ECF No. 2590-2. Five million dollars of the Settlement Amount was deposited into an Escrow Account within five days from the Court's preliminary approval order (ECF No. 2594). *Id.* at ¶ 2.1. The remainder will be deposited by the later of July 1, 2022 or five calendar days before the Fairness Hearing, which is currently scheduled for July 6, 2022. *Id.*

The Settlement Fund, which consists of the Settlement Amount and all interest and accretions thereto, will be used to pay costs of settlement administration (including the costs of notice to the Class, taxes, and tax expenses), Plaintiffs' attorneys' fees and litigation expenses, and service awards to the class representatives, as allowed by the Court. *Id.* at ¶¶ 1.38, 2.7, 2.8. The balance of the Settlement Fund (the "Net Settlement Fund") will be distributed under the Plan of Allocation to Class Members who submit, or who previously submitted in the Pfizer Settlement, timely and valid claim forms to the Settlement Administrator. Joint Decl. at ¶ 32.

The Plan of Allocation (ECF No. 2393-9) is substantially similar to the Plan of Allocation the Court approved in the Pfizer Settlement[12] and creates two pools of funds from the Net Settlement Fund, one for individual consumers and one for third-party payors, to protect the interests of all Class Members. The allocation of funds between the two pools is based on the work done by Plaintiffs' experts and tracks, as a percentage, to the relative damages allegedly suffered by individual consumers and third-party payors as calculated in the Rebuttal Merits Expert Report of Professor Meredith Rosenthal (ECF No. 2216-2). Within each pool, funds will be distributed on a *pro rata* basis to all eligible Class Members who file (or previously filed) a timely and valid Proof of Claim. Funds remaining in one pool will spill-over to the other pool in certain circumstances. Plaintiffs expect that all funds will be distributed to Class Members under the Plan of Allocation.[13] There is no right of reversion under the Settlement and under no circumstances will any portion of the Settlement Amount be returned to the Mylan Defendants once the Settlement becomes final.

III. PRELIMINARY APPROVAL AND CLASS NOTICE

Plaintiffs moved for preliminary approval of the Settlement on February 28, 2022, which the Court granted on March 11, 2022. ECF Nos. 2590, 2594. In the order granting preliminary approval, the Court also appointed A.B. Data as the Settlement Administrator and approved the

---

[12] The only difference is that Class Members who filed a valid Proof of Claim in the Pfizer Settlement will receive their *pro rata* share of Net Settlement Funds in both the Pfizer and Mylan Settlements, while Class Members who only file a Proof of Claim in the Mylan Settlement will share in the Net Settlement Fund in the Mylan Settlement only.

[13] Class Counsel expect that, under the Plan of Allocation's distribution terms, there will be no remaining funds for *cy pres* distribution. If there is any remaining balance in the Net Settlement Fund after the initial distribution—*e.g.* due to uncashed checks—the Settlement Administrator will reallocate such balance among Class Members pursuant to the terms of the Plan of Allocation. Any funds remaining for *cy pres* distribution should therefore be *de minimis*, existing only if a Class Member does not cash their check or otherwise deposit or accept their distribution after submitting a claim, *and* after additional distributions to qualifying claimants.

form and manner of notice to Class Members. ECF No. 2594. The notice program approved by the Court has been implemented by A.B. Data. Since entry of the preliminary approval order, A.B. Data has (i) mailed 6,486,674 copies of the summary notice to Class Members, (ii) emailed 1,790,695 copies (of which 1,378,488 were successfully delivered) of the summary notice to Class Members, (iii) implemented the media plan to publish notice of the Settlement on certain websites and in *People* magazine, and (iv) updated and managed the Settlement website, *EpipenClassAction.com*. *See* Schachter Decl. at ¶¶ 5-7, 9.

The Settlement website provides information to Class Members about the Action and the Settlement, contains links to important case and Settlement documents, and allows Class Members to file a claim electronically. To date, there have been over 481,013 users visit the Settlement website. *See* Schachter Decl. at ¶ 12. The internet banner ad notices also have resulted in more than 359 million impressions served. *Id*. at ¶ 8.

IV. CAFA NOTICE

On March 24, 2022, the Mylan Defendants filed a CAFA Proof of Service exhibiting compliance with the notice requirements of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715. ECF No. 2596. CAFA Notice was sent to 60 officials, including the Attorney General of the United States, the Attorneys General for each of the 50 states, the Attorney General for the District of Columbia, and the Attorneys General for Chuuk, Kosrae, Phnpei, American Somoa, Northern Mariana Islands, Puerto Rico, Guam, and the Virgin Islands. *Id.* To date, no recipient of the CAFA Notice has objected to the settlement.

V. RESPONSE OF THE CLASS TO DATE

The deadline for Class Members to object to the Settlement is June 8, 2022 and the deadline for Class Members to file a claim is July 25, 2022. As of May 20, 2022, 402,602 consumer claims and 3,351 third-party payor claims have been filed, many carried over as claims in the prior Pfizer

Settlement. *See* Schachter Decl. at ¶ 13. As more claims typically are filed closer to the claims filing deadline, A.B. Data (and Co-Lead Counsel) expects the claims rate will increase by the July 25, 2022 deadline. *Id*.

Co-Lead Counsel will provide the Court with a final update on the response of the Class in their June 27, 2022 filing, well before the July 6, 2022 final approval hearing.

VI. PROSECUTION OF THIS CASE REQUIRED AN ENORMOUS AND RISKY INVESTMENT OF RESOURCES AND LABOR

As described above and as reflected in the Court docket, for five years Plaintiffs' counsel have devoted an enormous amount of time, energy, and resources prosecuting this Action on a completely contingent basis to a successful resolution with the Mylan Defendants. Joint Decl. at ¶ 57. They did so knowing the case would require years of discovery, extensive motion practice, a contentious class certification process, appeal, a substantial dispositive motion challenge, and a difficult and lengthy trial on the merits—all with a substantial risk of no recovery. And they pursued this difficult antitrust and RICO case even though there was no assistance from any parallel government matter. *Id.*

Plaintiffs' counsel performed substantial work at the outset of the litigation, including researching and drafting the original complaints, organizing counsel from across the country to work together as a team, drafting and filing motions with the JPML to have the various cases against Defendants consolidated and sent to this Court, and arguing before the JPML. These efforts were successful and resulted in the cases being consolidated before this Court. *Id.* at ¶ 58.

Once the Action was before this Court, Plaintiffs' counsel researched and drafted a 400-page consolidated amended complaint, defeated in part lengthy motions to dismiss, prevailed in part on their motion for class certification (and successfully defended against a petition for interlocutory appeal at the Tenth Circuit), carried out the notice program for the certified Class,

oversaw and conducted extensive discovery throughout the United States (including written discovery, document review, data review, depositions, interviews, and non-party subpoenas), and worked with multiple experts for class certification and the merits. Plaintiffs' counsel also successfully opposed in part Mylan's summary judgment and *Daubert* motions, successfully opposed in part Mylan's motion for decertification of the Class, and had completed almost all work to ready the case for trial when the Settlement was reached. *Id.* at ¶ 59.

As for the Settlement, Plaintiffs' counsel successfully negotiated the Settlement, drafted the Settlement Agreement with the Mylan Defendants' counsel, sought and obtained preliminary approval of the Settlement, retained and oversaw the Settlement Administrator and notice program, and prepared the pending motion for final approval of the Settlement. Plaintiffs' counsel have also been communicating with Class Members about the Settlement since the notice was distributed. And Plaintiffs' counsel will continue to ensure proper distribution of the settlement proceeds and address any issues that arise after final approval of the Settlement. *Id.* at ¶ 60.

Through April 30, 2022, Plaintiffs' counsel have incurred expenses of $1,426,642.93 and invested a collective total of more than 163,000 hours of time, with a lodestar of over $103 million, in the prosecution of this Action. *Id.* at ¶¶ 61, 66. In addition to Co-Lead Counsel, the collective lodestar includes time for a dozen other law firms representing certain Plaintiffs that did work at various points in the litigation at the request and under the supervision of Co-Lead Counsel. *Id.* at ¶ 63. All firms that did work at the request of Co-Lead Counsel agreed in advance to adhere to a time and expense reporting protocol that required detailed monthly time and expense reporting throughout the Action. *Id.*

VII. THE CLASS REPRESENTATIVES PROVIDED SIGNIFICANT HELP

It cannot be overstated that the 34 individual and one third-party payor Class representatives have made significant contributions that inured to the benefit of the Class. Joint Decl. at ¶ 69. They

all gathered information, produced responsive documents, and worked with counsel to provide written responses to Defendants' discovery requests. They all also expended significant time and effort in preparing for and attending their depositions, which included reviewing their documents, written discovery responses, preparing with counsel before the deposition, and, in many instances, traveling to Kansas City for the deposition. And the Class representatives stayed informed of case developments and procedural matters over the course of the case and reviewed and approved the settlement with the Mylan Defendants. *Id.* at ¶ 70. They performed their class representative duties willingly and ably for the benefit of Class Members, and they did so without guarantee of reimbursement or compensation for the work they performed on behalf of the Class. *Id.* at ¶ 71.

VIII. PROFESSOR GENSLER SUPPORTS THE REQUESTS

Professor Steven S. Gensler is the Gene and Elaine Edwards Family Chair at the University of Oklahoma College of Law where he has taught Civil Procedure, Complex Litigation, Federal Courts, Electronic Discovery, Alternative Dispute Resolution, and related courses. Gensler Decl. at ¶ 1 and Ex. B-1. He graduated first in his class from the University of Illinois College of Law and clerked for the Honorable Deanell Reece Tacha on the United States Court of Appeals for the Tenth Circuit and the Honorable Kathryn H. Vratil in this Court. *Id.*, Ex. 1. He spent four years in private practice before entering academia in 1998. *Id.* In 2005, Chief Justice William H. Rehnquist appointed him to the United States Judicial Conference Advisory Committee on Civil Rules, and Chief Justice John G. Roberts, Jr. reappointed him in 2008 (he served two, three-year terms). Since 2017, he has served as the lead consultant to the United States Judicial Conference Federal-State Jurisdiction Committee. *Id.* For the past 14 years, Professor Gensler has been the principal author of a leading treatise on federal procedure, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY (West), which he revises and updates annually with his co-author Prof. Lumen N. Mulligan, University of Kansas School of Law. *Id.* at ¶ 2.

Professor Gensler has extensively reviewed the record and issued a declaration of his opinions and sub-opinions related to the Final Approval Motion. In summary, he concludes that (i) the Settlement Agreement is fair, reasonable, and adequate; (ii) Co-Lead Counsel's fee request of one-third of the Settlement Amount is appropriate under federal law and fair and reasonable under the circumstances; and (iii) the proposed formula for service awards for the Class representatives is appropriate under federal law and fair and reasonable under the circumstances. *Id.* at ¶ 8.

ARGUMENT

I. PLAINTIFFS PROVIDED SUFFICIENT NOTICE TO THE CLASS IN COMPLIANCE WITH RULE 23 AND DUE PROCESS.

Under Rule 23(e)(1), a district court approving a class action settlement "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(c)(2)(B) also provides notice of a class settlement must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (class notice designed to fulfill due process requirements). Notice "must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Tennille v. W. Union Co*., 785 F.3d 422, 436 (10th Cir. 2015).

As explained in Plaintiffs' memorandum of law in support of preliminary approval (ECF No. 2590-1 at § V), the Court-approved Notice, Summary Notice, and Proof of Claim Form (the latter two together, the "Notice Package") satisfy these standards and have informed Class Members of all relevant case and settlement-related information. For these reasons, the Court's Preliminary Approval Order found that the form and content of the notice program here, as well as the methods for notifying the Class upon preliminary approval, "constitute the best notice to Class Members

practicable under the circumstances" and "satisfy all applicable requirements of the Federal Rules of Civil Procedure (including Rule 23(c)-(e)), the United States Constitution (including the Due Process Clause), the Rules of this Court, and other applicable law." ECF No. 2594, ¶ 8.

Here, the combination of: (i) individual mailing of more than 6,486,674 copies of the Notice Package to Class Members who could be identified with reasonable effort; (ii) emailing 1,790,695 copies (of which 1,378,488 were successfully delivered) of the Summary Notice to Class Members; (iii) implementing the media plan to publish notice of the Settlement on certain websites, social media platforms, and in *People* magazine; (iv) disseminating the summary notice as a news release via PR Newswire to about 10,000 newsrooms; and (v) updating and managing the settlement website, *EpipenClassAction.com*,[14] is typical of notice plans approved in class action settlements, and likewise, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

In sum, the form, manner, and content of the Notice and Notice Package were the best practicable notice. Their contents were reasonably calculated to, and did, apprise Class Members of the pendency and nature of the settlement and gave them a chance to object.

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND MERITS FINAL APPROVAL.

Settlement is strongly favored as a method for resolving disputes. *See Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1455 (10th Cir. 1984); *see also Trujillo v. State of Colo.*, 649 F.2d 823, 826 (10th Cir. 1981) (citing "important public policy concerns that support voluntary settlements"); *Amoco Prod. Co. v. Fed. Power Comm'n*, 465 F.2d 1350, 1354 (10th Cir. 1972); *see also* Gensler Decl. at ¶¶ 15-41. This is particularly true in large, complex class actions

[14] Schachter Decl., ¶¶ 4-12.

such as the current case. *See Big O Tires, Inc. v. Bigfoot 4x4, Inc.*, 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001).

Fed. R. Civ. P. 23(e)(2) provides that a class action settlement may be approved by the court "only after a hearing and only on finding that it is fair, reasonable, and adequate," and identifies the following factors to be considered by courts at final approval:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Additionally, in deciding whether a settlement is "fair, reasonable, and adequate," courts in the Tenth Circuit traditionally consider whether:

> (1) the settlement was fairly and honestly negotiated, (2) serious legal and factual questions placed the litigation's outcome in doubt, (3) the immediate recovery was more valuable than the mere possibility of a more favorable outcome after further litigation, and (4) the parties believed the settlement was fair and reasonable.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002); *see also In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1101 (D. Kan. Dec. 7, 2018) (citing *Tennille*, 785 F.3d at 434). Because the Tenth Circuit's additional factors "largely overlap" with the Rule 23(e)(2) factors, "with only the fourth factor not being subsumed" into it, courts in this district now "consider[] the Rule 23(e)(2) factors as the main tool in evaluating the propriety of [a]

settlement," while still addressing the Tenth Circuit's factors. *Chavez Rodriguez v. Hermes Landscaping, Inc*., No. 17-2142-JWB-KGG, 2020 WL 3288059, at *2 (D. Kan. June 18, 2020).

The Court preliminarily determined that the $264 million cash Settlement meets these standards and is fair, reasonable, and adequate. ECF No. 2594, ¶ 1. As discussed below, the Court's initial disposition was correct, as the Settlement easily satisfies each of the Rule 23(e)(2) and Tenth Circuit factors. *See* Gensler Decl. at ¶¶ 15-41. Accordingly, Plaintiffs request the Court now grant final approval of the Settlement.

A. The Settlement Satisfies the Rule 23(e)(2) Factors.

1. Class Plaintiffs and Co-Lead Counsel Have Adequately Represented the Class.

The adequacy of representation requirement is met when the representative plaintiffs' "interests do not conflict with those of the class members" and the representatives and their counsel "prosecute the action vigorously." *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 221, 231 (D. Kan. 2010) (citations omitted). As the Court found in its order granting final approval of the Pfizer Settlement, Class Plaintiffs share the same interests as the absent Class Members. *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices, and Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2021 WL 5369798, at *2 (D. Kan. Nov. 17, 2021); *see also* Joint Decl. at ¶ 40. They have participated in extensive discovery, kept informed of developments of the case, and adequately represented and protected the interests of the Class. Joint Decl. at ¶ 40; *see also* Gensler Decl. at ¶ 19.

Co-Lead Counsel have adequately represented the Class as required by Rule 23(e)(2)(A). Before reaching the Settlement, Co-Lead Counsel conducted extensive investigation and research into the asserted claims, reviewed extensive data, and consulted numerous experts. Co-Lead Counsel vigorously prosecuted the Action by, among other activities: (i) investigating the relevant

factual events; (ii) drafting the detailed, 400-page Complaint; (iii) successfully opposing in part Defendants' motions to dismiss; (iv) engaging in extensive document and written discovery, through both coordinated and non-coordinated phases, including reviewing over 11 million pages of documents produced by Defendants and third parties; (v) taking or defending 158 depositions; (vi) successfully, in part, moving for class certification supported by four expert reports; (vii) successfully opposing Defendants' petition to appeal the same under Rule 23(f); (viii) vigorously opposing summary judgment and *Daubert* motions, and achieving partial victories; (ix) successfully opposing in part Mylan's motion to decertify the Class; (x); preparing for a month-long trial; and (xi) at the same time, engaging in settlement negotiations with the Mylan Defendants' counsel. As a result of these extensive efforts, spanning thousands of hours of work and several years, Co-Lead Counsel have achieved a significant all-cash Settlement of $264 million with the Mylan Defendants, which will provide immediate relief to the Class. Joint Decl. at ¶ 43.

Each of the Co-Lead Counsel has significant experience prosecuting complex antitrust and RICO class actions. Courts around the country and in this Circuit recognize the expertise and ability of Co-Lead Counsel to effectively litigate complex class actions.[15] And in its order approving the

[15] *See, e.g., Harris v. Chevron U.S.A., Inc.*, No. 6:19-cv-00355-SPS, 2020 WL 8187464, at *4 (E.D. Okla. Feb. 27, 2020) (noting that Sharp Law LLP is among the "[f]ew law firms [who] are willing to litigate cases requiring review of tens of thousands of pages of detailed contracts and accounting records, advance payment of hundreds of thousands of dollars in consultants and expert witness fees, and investment of substantial time, effort, and other expenses throughout an unknown number of years to prosecute a case with high risk, both at the trial and appellate levels"); *In re SandRidge Energy, Inc. Sec. Litig.*, No. CIV-12-1341-G, 2019 WL 4752268, at *9 (W.D. Okla. Sept. 30, 2019) ("the attorneys of Robbins Geller are experienced class-action litigators and are sufficiently committed to this litigation"); *In re WorldCom, Inc. ERISA Litig.*, No. Civ. 02-4816 (DLC), 2004 WL 2338151 at *10 (S.D.N.Y. 2004) (regarding Lynn Sarko's work as lead counsel, Judge Cote stated, "Lead Counsel has performed an important public service in this action and has done so efficiently and with integrity . . . [Keller Rohrback] has also worked creatively and diligently to obtain a settlement from WorldCom in the context of complex and difficult legal questions"); The Hon. H. Russel Holland, D. Alaska, Presentation to Alaska Chapter of the Federal Bar Association, Nov. 12, 2015 (regarding Lynn Sarko's administration of two court-supervised

Pfizer Settlement, this Court noted Co-Lead Counsel's skill, experience, and zeal in prosecuting this case. ECF No. 2506, ¶ 11; *see also* Gensler Decl. at ¶ 20.

To support a finding of adequate representation, the parties must "[b]alanc[e] the entirety of the case with the ultimate resolution." *Chavez Rodriguez*, 2020 WL 3288059, at *3. Here, the collective tenacity and sophistication of Class Counsel was vital to achieving the substantial $264 million Settlement, which will now provide significant relief to the Class.

2. The Settlement Was Fairly Negotiated at Arm's Length.

The second factor under Rule 23(e)(2)(B) overlaps with the first factor considered by courts in the Tenth Circuit and assesses "whether the proposed settlement was fairly and honestly negotiated." *Rutter*, 314 F.3d at 1188. Settlements are fairly and honestly negotiated when reached after arm's-length negotiations by experienced counsel. *See In re Urethane Antitrust Litig.*, No. 04-1616-JWL, Order and Judgment Approving Settlement and Dismissing with Prejudice the Dow Chemical Company at 2 (D. Kan. July 29, 2016), ECF No. 3274 (settlement is "fairly and honestly negotiated" when it results from "negotiations which were undertaken in good faith by counsel with significant experience litigating antitrust class actions"); *Marcus v. Kansas Dep't of Revenue*, 209

$1.128 billion *Exxon* settlement funds, Judge Holland observed: "[T]he money . . . went into the Exxon Qualified Settlement Fund that was administered by Lynn Sarko and his law firm in Seattle. Those guys did a superb job. And it was a huge effort to notify all potential claimants, to get the claims documented, to evaluate the documentation, and then to apply the sharing concepts to the individual losses. . . . I can't imagine that they could possibly have done a better job."); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-2541-CW, 2017 WL 6040065, at *10 (N.D. Cal. Dec. 6, 2017), *aff'd*, 768 F. App'x 651 (9th Cir. 2019) (noting that Pritzker Levine, as one of three firms representing the certified student-athlete class, is "among the most well-respected class action litigation firms in the country, as this Court has witnessed in numerous cases. And the efficiency with which plaintiffs' counsel achieved such exceptional results is laudable because it benefits the classes.") (footnote omitted); *Kjessler v. Zaappaaz, Inc.*, No. 4:18-cv-430, 2018 WL 8755737, at *5–6 (S.D. Tex. Aug. 31, 2018) (appointing Burns Charest as sole interim lead class counsel based on the firm's "significant experience" in class action litigation).

F. Supp. 2d 1179, 1182 (D. Kan. 2002) (finding this factor satisfied where the settlement was reached "by experienced counsel for the class").

Here, the Settlement is the product of vigorous arm's-length negotiations between the Settling Parties, advised by their sophisticated counsel, who possessed sufficient evidence and knowledge to allow them to make informed decisions about the strengths and weaknesses of their cases. Counsel participated in many meetings and phone calls where they exchanged their opposing views on the merits of Plaintiffs' claims, issues for appeal, and the terms of the Settlement. Throughout, the Mylan Defendants maintained that Plaintiffs' claims were without merit and denied all allegations of wrongdoing whatsoever with respect to the subject matter of the Action. The relevant legal issues were fully developed and ready for trial. And Plaintiffs had worked before with a mediator to settle similar claims with the Pfizer Defendants, which provided valuable insight into the value of the claims and the strengths and weaknesses of their case. As a result, the Settling Parties were well prepared for the serious negotiations that led to the Settlement and were well-informed of the parties' arguments. Joint Decl. at ¶ 44; *see also* Gensler Decl. at ¶¶ 21-22. And the $264 million settlement amount ($609 million total when combined with the $345 million Pfizer Settlement), by any measure, is an outstanding result.

In sum, the parties' negotiations and the Settlement's terms show that the Settlement was fairly and honestly negotiated.

3. The Settlement is Adequate Considering the Costs, Risks, and Delay of Trial and Appeal.

In assessing the Settlement, the Court should also balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the significant costs, risks, and delay of proceeding with the Action. *See* Rule 23(e)(2)(C)(i). This third factor is based on the premise that the Class "is better off receiving compensation now as opposed to being compensated, if at all,

several years down the line, after the matter is certified, tried, and all appeals are exhausted." *See McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 WL 4816510, at *13 (W.D. Okla. Oct. 27, 2008). This consideration largely overlaps with the second ("'whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt'") and third factors ("'whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation'") traditionally considered within the Tenth Circuit. *Chavez Rodriguez*, 2020 WL 3288059, at *2-3. Thus, courts consider these factors to be "subsumed under Rule 23's requirement." *Id*.

a. Serious Legal and Factual Questions Placed the Action's Outcome in Doubt.

The presence of serious legal and factual questions about the outcome of the Action weighs heavily in favor of settlement, "because settlement creates a certainty of some recovery, and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation." *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 625 F. Supp. 2d 1133, 1138 (D. Colo. 2009). "Although it is not the role of the Court at this stage of the litigation to evaluate the merits, it is clear that the parties could reasonably conclude that there are serious questions of law and fact that exist such that they could significantly impact the case if it were litigated." *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693-94 (D. Colo. 2006). The presence of questions of law and fact "tips the balance in favor of settlement." *McNeely*, *LLC*, 2008 WL 4816510, at *13; *see also Tennille*, 785 F.3d at 435 (affirming final approval of settlement where "serious disputed legal issues" rendered "the outcome of th[e] litigation . . . uncertain and further litigation would have been costly").

The Settlement notwithstanding, there remain many factual and legal issues on which the Settling Parties intensely disagree. The Mylan Defendants deny that they have engaged in any wrongdoing as alleged by Plaintiffs, deny any liability whatsoever for any of the claims alleged by

Plaintiffs, and deny that Plaintiffs have suffered any injuries or damages. Conversely, Plaintiffs have advanced many complex legal and factual issues under federal and state antitrust and federal RICO statutes. The issues on which the Settling Parties disagree are many, but include: (1) whether any of the Mylan Defendants engaged in conduct that would give rise to any liability to Plaintiffs under the RICO statute or certain state antitrust laws; (2) whether the Mylan Defendants have valid defenses to any such claims of liability; (3) the amount of damages Plaintiffs purportedly suffered because of the Mylan Defendants' alleged wrongdoing, as well as the methodology for estimating any such damages; (4) whether the Court properly certified the Class; and (5) whether the Mylan Defendants had other meritorious defenses to the alleged claims. Had the parties not settled this Action, the Court or a jury would eventually have to decide these issues, placing the outcome in doubt. While Plaintiffs believe their claims would be borne out by the evidence presented at trial, they recognize that there are significant hurdles to proving liability or winning at trial. Joint Decl. at ¶ 45. No doubt, any trial would be followed by one or more appeals, further delaying any outcome and creating additional risk and uncertainty.

b. Immediate Recovery Is More Valuable than the Mere Possibility of a More Favorable Outcome After Further Litigation.

Considering the risks associated with continued litigation, as discussed above, the immediate, substantial relief offered by the Settlement outweighs the "mere possibility of a more favorable outcome after protracted and expensive litigation over many years in the future." *Syngenta*, 2018 WL 1726345, at *2; *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1244 (D.N.M. 2012) ("'[t]o most people, a dollar today is worth a great deal more than a dollar ten years from now'") (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002)).

Further, this Action has already been pending for over five years, and the Settling Parties and the Court would expend significant additional time, resources, and costs to proceed to trial,

with the inevitable appeals likely extending years into the future. *Chavez Rodriguez*, 2020 WL 3288059, at *3 (observing that "the costs and time of moving forward in litigation would be substantial"); *Lucas*, 234 F.R.D. at 694 ("If this case were to be litigated, in all probability it would be many years before it was resolved."). Considering the complex legal and factual issues associated with continued litigation, there is an undeniable and substantial risk that, after years of continued litigation, Plaintiffs could receive an amount significantly less than the Settlement Amount, or nothing for their claims against Mylan.

"By contrast, the proposed settlement agreement provides the class with substantial, guaranteed relief" now. *Lucas*, 234 F.R.D. at 694; *see also McNeely*, 2008 WL 4816510, at *13 ("The class . . . is better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted."). "[The] immediate recovery in this case outweighs the time and costs inherent in complex securities litigation, especially when the prospect is some recovery versus no recovery." *In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 691 (D. Colo. 2014); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 625 (D. Colo. Aug. 10, 1976) ("In this respect, '[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.'"); *accord Tennille v. W. Union Co.*, No. 09-cv-00938-JLK-KMT, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014), *appeal dismissed*, 809 F.3d 555 (10th Cir. 2015). Thus, the $264 million immediate recovery, particularly when viewed in the context of the risks, costs, delay, and the uncertainties of further proceedings, weighs in favor of final approval of the Settlement.

4. The Method for Distributing Relief Is Effective.

As shown in Section I above and detailed in the Schachter Declaration, the notice program and claims administration process have been and are effective. Plaintiffs and Co-Lead Counsel provided the best notice practicable under the circumstances in accordance with the Preliminary

Approval Order (ECF No. 2594) and the requirements of Rule 23 and due process. The settlement notice program approved by the Court includes individual notice by email or First-Class Mail to all Class Members who can be identified with reasonable effort, supplemented by various forms of internet and publication notice, targeted to reach likely EpiPen purchasers. In addition, a case-designated website has been created where settlement-related and other key documents have been posted, including the Settlement Agreement, Notices, Plan of Allocation, Proofs of Claim (Claim Forms), and Preliminary Approval Order. The Settlement website allows for Proof of Claim forms to be filed electronically. The claims process is streamlined even further because Class Members who already submitted claims in the Pfizer Settlement will automatically be eligible to receive payments from the Mylan Settlement without the need to file another claim form. Joint Decl. at ¶ 48.

Plaintiffs have proposed a fair and orderly claims administration process in which Class Members who wish to participate in the Settlement will complete and submit Proofs of Claim, either by mail or online, in accordance with the instructions contained therein. ECF No. 2594. The Settlement Administrator will distribute the Net Settlement Fund to eligible Class Members on a value paid basis under a Court-approved Plan of Allocation. ECF No. 2590-9. As shown in Section III below, the Plan of Allocation proposed here was prepared with information provided by Plaintiffs' experts and in consultation with A.B. Data and is designed to fairly allocate the Net Settlement Fund to Eligible Claimants. *Id.* at ¶ 49; *see also* Gensler Decl. at ¶¶ 32-36. The notice program, claims administration process, and Plan of Allocation are a thorough and effective method of distributing relief and further support final approval.

5. Attorneys' Fees and Expenses.

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Plaintiffs' counsel seek an award of

attorneys' fees of a standard one-third of the Settlement Amount, plus payment of Plaintiffs' counsel's expenses incurred in connection with this Action, plus interest earned on these amounts at the same rate as earned by the Settlement Fund.

As detailed in Section IV below, the fee request is in line with fee awards that other courts in this district and the Tenth Circuit have approved in complex class actions. Further, this is an all-cash, non-reversionary settlement and the entire Net Settlement Fund will be distributed to Class Members until it is no longer economically feasible to do so.

As for the timing of payment, the Settlement Agreement provides that any Plaintiffs' attorneys' fees and expenses, as awarded by the Court, will be paid to Plaintiffs' counsel within ten days of the Court executing the Judgment and an order awarding such fees and expenses, subject to Plaintiffs' counsel's several obligations to make appropriate refunds or repayments to the Settlement Fund if, and when, as a result of any appeal or further proceedings the fee or expense award is lowered or the Settlement is disapproved by a final order not subject to final review. Settlement Agreement at ¶¶ 6.1-6.3; *see Syngenta*, 2021 WL 102819, at *4 (D. Kan. Jan. 12, 2021) (approving immediate payment of plaintiff counsel attorneys' fees and costs) (citing *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices and Prods. Liab. Litig.*, 952 F.3d 471, 487 (4th Cir. 2020) (finding immediate payment provisions have generally been approved by federal courts)); *see also Pelzer v. Vassalle*, 655 F. App'x 352, 365 (6th Cir. 2016) ("The quick-pay provision does not harm the class members in any discernible way, as the size of the settlement fund available to the class will be the same regardless of when the attorneys get paid."); *In re Whirlpool Corp. Front-loading Washer Prods. Liab. Litig.*, No. 1:08-WP-6500, 2016 WL 5338012, at *21 (N.D. Ohio Sept. 23, 2016) ("[q]uick-pay clauses substantially reduce the leverage a professional objector can wield"); Bolch Jud. Inst., Guidelines and Best Practices:

Implementing 2018 Amendments to Rule 23 Class Action Settlement Provisions 21 (2018), (suggesting that the parties' efforts to discourage bad-faith objectors "include a 'quick-pay clause'").[16]

6. The Settling Parties Have No Additional Agreement.

Rule 23(e)(2)(C)(iv) requires the disclosure of any other agreements. The Settling Parties have no additional agreements. Joint Decl. at ¶ 52.

7. Class Members Are Treated Equitably.

The final factor, Rule 23(e)(2)(D), looks at whether Class Members are treated equitably. As discussed below in Section III and reflected in the Plan of Allocation (ECF No. 2590-9), Class Members are treated equitably here. The Plan of Allocation is substantively the same as the one approved by the Court in the Pfizer Settlement. The Net Settlement Fund will be allocated based on estimated damages as calculated in the Rebuttal Merits Expert Report of Professor Meredith Rosenthal (ECF No. 2216-2) and then distributed on a *pro rata* basis to Class Members based on total amounts paid for EpiPens during the Class Period. Two separate pools are established for TPPs and individual consumers because of their differing claim rates. The Plan of Allocation provides for a spill-over from one pool to the other if one pool exhausts but the other does not. Therefore, all Class Members are treated alike in receiving their *pro rata* share of the Settlement. This factor supports granting final approval of the Settlement. *See* Gensler Decl. at ¶¶ 39-40.

B. The Settlement Satisfies the Remaining Factor Considered by Courts in the Tenth Circuit.

The final, additional factor courts in the Tenth Circuit consider is "the judgment of the parties that the settlement is fair and reasonable." *Chavez Rodriguez*, 2020 WL 3288059, at *2. In

[16] *Available at:* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1003&context=bolch.

analyzing this factor, courts recognize that "the recommendation of a settlement by experienced plaintiff[s'] counsel is entitled to great weight." *O'Dowd v. Anthem, Inc*., No. 14-cv-02787-KLM-NYW, 2019 WL 4279123, at *14 (D. Colo. Sept. 9, 2019); *Hapka v. CareCentrix, Inc*., No. 2:16-cv-02372-KGG, 2018 WL 1871449, at *5 (D. Kan. Feb. 15, 2018); *Marcus v. Kansas Dept. of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002) ("Counsels' judgment as to the fairness of the agreement is entitled to considerable weight.").

Co-Lead Counsel—all senior attorneys at law firms with considerable experience in complex antitrust and civil RICO class actions—only agreed to settle this Action after extensive investigation, written discovery, motion practice, deposition testimony, data analyses, and rigorous arm's-length negotiations. Joint Decl. at ¶ 40. And, as noted above, Plaintiffs and their Counsel have compared the substantial recovery the Class will receive from the Settlement against the risks, delays, and uncertainties of continued litigation and appeals. Plaintiffs and their Counsel believe the Settlement is fair, adequate, and reasonable, meets all the standards for approval under Rule 23(c) and Tenth Circuit law, and should be finally approved. *Id*. at ¶ 41-42. The Mylan Defendants likewise believe the Settlement should be finally approved. Because the above factors weigh in favor of the Settlement, Plaintiffs ask the Court to grant final approval of the Settlement.

III. THE PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE.

The proposed Plan of Allocation (ECF No. 2590-9) details how the Net Settlement Fund is to be allocated among eligible Class Members who file timely and valid claims. The standard for approval of a plan of allocation is the same as the standard for approving a settlement: whether it is "fair, reasonable, and adequate." *See Lucas*, 234 F.R.D. at 695. In making this determination, courts give great weight to the recommendation of experienced counsel. *See id*. ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel.").

Here, the Plan of Allocation, just as with the court-approved Plan of Allocation in the Pfizer Settlement, creates two pools of funds from the Net Settlement Fund, one for individual consumers and one for third-party payors. The allocation of funds as between the two pools is based on the work done by Plaintiffs' experts and tracks, as a percentage, the relative damages allegedly suffered by individual consumers and third-party payors as calculated in the Rebuttal Merits Expert Report of Professor Meredith Rosenthal (ECF No. 2216-2). Within each pool, funds will be distributed on a *pro rata* basis to all eligible Class Members who file (or previously filed in connection with the Pfizer Settlement) a timely and valid Proof of Claim.[17] Funds remaining in one pool will spill-over to the other pool in certain circumstances. Plaintiffs expect that all funds will be distributed to Class Members under the Plan of Allocation. There is no right of reversion under the Settlement and in no case will any portion of the Settlement Amount be returned to the Mylan Defendants once the Settlement becomes final. Joint Decl. at ¶ 32.

Co-Lead Counsel submit that this method of distributing settlement funds is fair, reasonable, and adequate, and warrants this Court's final approval.

IV. THE REQUESTED COMMON FUND FEE IS REASONABLE AND SHOULD BE APPROVED.

Rule 23 provides that "[i]n 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." Fed. R. Civ. P. 23(h). The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The

[17] As noted above, Class Members who did not file a Proof of Claim in the Pfizer Settlement but file one in connection with the Mylan Settlement will only be entitled to their share of the Net Settlement Fund in the Mylan Settlement.

purpose of the common fund doctrine is to compensate class counsel fairly and adequately for services rendered on the theory "that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994) (quoting *Boeing*, 444 U.S. at 478). And here, the Settlement Agreement expressly provides for an award of attorneys' fees and expenses to be paid from the Settlement Fund to Co-Lead Counsel for work performed benefiting the Class Members. *See* Settlement Agreement at ¶¶ 6.1, 6.4. Accordingly, the Court has authority by law and the parties' agreement to award attorneys' fees and expenses from the Settlement Fund in this case.

A. The Requested Fee is a Reasonable Percentage of the Common Fund.

The prevailing method for determining attorneys' fees in common fund cases is awarding a percentage of the fund. *See* Manual for Complex Litigation, Fourth, § 14.121 ("The vast majority of courts . . . use the percentage-fee method in common-fund cases."). The Supreme Court has directed that "under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). And in this Circuit, a percentage-of-the-fund is the preferred method of awarding attorney fees in common fund cases. *See In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-MD-2785-DDC-TJJ, 2021 WL 5369798, at *4 (D. Kan. Nov. 17, 2021) ("The Tenth Circuit prefers the percentage-of-the-fund method when determining the award of attorneys' fees in common fund cases,"); *accord Nakamura v. Wells Fargo Bank, N.A.*, No. 17-4029-DDC-GEB, 2019 WL 2185081, at *1 (D. Kan. May 21, 2019) (same); *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d. 1094, 1113-14 (D. Kan. 2018) (same); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1269 (D. Kan. 2006) (same); *see also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995); *Gottlieb*, 43 F.3d at 482-83. "The Tenth Circuit favors the common fund approach, as opposed to the lodestar method, because a percentage of the common fund is less subjective than

the lodestar plus multiplier approach, matches the marketplace most closely, and is the better-suited approach when class counsel were retained on a contingent fee basis, as in this case." *Shaw v. Interthinx, Inc.*, No. 13-CV-01229-REB-NYW, 2015 WL 1867861, at *5 (D. Colo. Apr. 22, 2015) (internal quotations, citation omitted). And in making a "percentage-fee determination, the court need not conduct a lodestar analysis to assess reasonableness." *Nakamura*, 2019 WL 2185081, at *3 (citing *Brown v. Phillips Petroleum Co*., 838 F.2d 451, 456, 456 n.3 (10th Cir. 1988); *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. CIV-11-29-KEW, 2018 WL 2296588, at *3 (E.D. Okla. Mar. 27, 2018) (neither lodestar analysis nor lodestar cross-check is required); *Childs v. Unified Life Ins. Co*., No. 10-CV-23-PJC, 2011 WL 6016486, at *15 n.10 (N.D. Okla. Dec. 2, 2011) ("Because the other *Johnson* factors, combined, warrant approval of the common fund fee sought by Plaintiff's Counsel, the Court need not engage in a detailed, lodestar-type analysis of the 'time and labor required' factor.")).

The percentage method provides "appropriate financial incentives" necessary to "attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005). From a policy standpoint, "the [percentage] method of calculating fees more appropriately aligns the interests of the class with the interests of class counsel—the larger the value of the settlement, the larger the value of the fee award." *Bussie v. Allmerica Fin. Corp.*, No. 97-40204-NMG, 1999 WL 342042, at *2 (D. Mass. May 19, 1999) (internal quotation, citation omitted).

An award of attorneys' fees of one-third of the $264 million Settlement Fund amounts to $88 million and is consistent with this District's law and the Tenth Circuit's requirement that the fee is reasonable under review of the 12 *Johnson* factors.[18]

B. The *Johnson* Factors Support the Reasonableness of Co-Lead Counsel's Fee Request.

Courts in this jurisdiction analyze the reasonableness of fee awards under Rule 23(h) using the well-known factors originally set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974), and approved by the Tenth Circuit:

(1) the time and labor involved;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal services properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) any prearranged fee—this is helpful but not determinative;
(7) time limitations imposed by the client or other circumstances;
(8) the amount involved and results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the undesirability of the case;
(11) the nature and length of professional relationship with the client; and
(12) awards in similar cases.

Brown, 838 F.2d at 454-55 (10th Cir. 1988) (citing *Johnson*, 488 F.2d 717-19, and noting that "federal courts have relied heavily on the [*Johnson*] factors . . . in calculating and reviewing

[18] The percentage-of-the-fund Class Counsel requests equates to a 1.97 multiplier to their $103 million of collective lodestar in the combined Mylan and Pfizer Settlements ($88 million and $115 million respectively for total fees of $203 million), which is eminently reasonable. *See In re: Urethane Antitrust Litig*., No. 04-1616-JWL, 2016 WL 4060156, at *7 (D. Kan. July 29, 2016) (awarding a one-third fee yielding a 3.2 multiplier of approximately $100 million total lodestar and finding "even if the Court were to reduce the lodestar a small amount, such that the multiplier here increased to 4 or 5, that multiplier would fall within the range of multipliers accepted by a number courts"); *see also In re Miniscribe Corp.*, 309 F.3d 1234, 1245 (10th Cir. 2002) (noting that "[t]he 2.57 multiplier . . . finds some support in other lodestar multiplier cases."); *Rothe v. Battelle Mem'l Inst.*, 2021 WL 2588873, at *11 (D. Colo. June 24, 2021) (awarding fee equating to a "3.61 multiplier on counsel's lodestar amount."); *see also* Gensler Decl. at ¶¶ 42-63 (noting that the applicable *Johnson* factors fully support the standard one-third fee usually awarded in this District).

attorneys' fees awards"). The weight to be given to each of the *Johnson* factors varies from case to case, and each factor is not always applicable. *See id.* at 456 ("rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation"); *see also Gudenkauf v. Stauffer Commc'ns, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998) ("We have never held that a district court abuses its discretion by failing to specifically address each *Johnson* factor."). The relevant *Johnson* factors show that a one-third fee award is appropriate here.[19]

1. The significant monetary award obtained for the Class supports the reasonableness of the fee award. (Factor 8)

Here, the result obtained for the Class is the most important factor in determining an appropriate fee. *See Brown*, 838 F.2d at 456 ("the amount involved and the results obtained may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class"); *Nakamura*, 2019 WL 2185081, at *2 ("the result obtained deserves greater weight than the other *Johnson* factors.") (citing *Brown*, 838 F.2d at 456); *In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *4 (quoting *Brown*, 838 F.2d at 456). In common fund cases, the factor "given the greatest emphasis is the size of the fund created, because a common fund is itself the measure of success and represents the benchmark from which a reasonable fee will be awarded." Manual For Complex Litigation 4th § 14:121 (2004) (internal quotation marks and citation omitted); *see also*

[19] The following factors are not applicable to this litigation: (7) time limitations imposed by the client or the circumstances, and (11) the nature and length of the professional relationship with the client. Thus, Co-Lead Counsel does not analyze these factors. *See* 5 Newberg on Class Actions § 15:77 n.15 (5th ed. 2015) (relationship with client "has little relevance in the class setting given that the 'client' is the class."); *In re Motor Fuel Temperature Sales Practices Litig.*, 07-MD-1840-KHV, 2016 WL 4445438, at *9 (D. Kan. Aug. 24, 2016) (noting that in the class action context, nature and length of the professional relationship with the client did not apply); *In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *4 (noting that in evaluating class action settlement approval, the seventh and eleventh *Johnson* factors did not apply).

Fed. R. Civ. P. 23(h) Adv. Comm. Note (explaining for a "percentage" or contingency-based approach to class action fee awards, "results achieved is the basic starting point"). "Numerous courts have recognized that in evaluating the various *Johnson* factors, the greatest weight should be given to the monetary results achieved for the benefits of the class." *Anderson v. Merit Energy Co.*, 07-CV-00916-LTB-BNB, 2009 WL 3378526, at *4 (D. Colo. Oct. 20, 2009) (citing *Brown*, 838 F.2d at 456).[20]

The result obtained by the Settlement fully supports the requested fee. First, the Settlement avoids future uncertainties as to the claims against the Mylan Defendants and provides a guaranteed, non-reversionary $264 million cash recovery that when added to the $345 million non-reversionary Pfizer Settlement results in a total recovery of $609 million. *See Koehler v. Freightquote.com, Inc.*, No. 12-2505-DDC-GLR, 2016 WL 3743098, at *7 (D. Kan. July 13, 2016) (settlement "avoids the uncertainty and rigors of trial and produces a favorable result for plaintiffs. This factor favors approval of the fee award."). Second, the Net Settlement Fund of around $174,421,773.07 (assuming approval of the fee, expense, and service awards) will be distributed to the Class upon the Effective Date of the Settlement, with no funds reverting to the Mylan Defendants. Joint Decl. at ¶¶ 30-31, 73. In this antitrust and RICO class action—as in every antitrust and RICO action—there was a significant risk that Plaintiffs would not be able to establish the elements of their claims,

[20] *See also Cecil v. BP Am. Prods. Co.*, No. 16-CV-410-KEW, 2018 WL 8367957, at *4 (E.D. Okla. Nov. 19, 2018) ("[T]he eighth *Johnson* factor—the amount involved in the case and the results obtained—is the most important and weighs most heavily in support of the requested fee.") (citations omitted); *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 605 (D. Colo. 1974) ("While other criteria in determining reasonable attorney fees are legitimate considerations, the amount of the recovery, and end result achieved, is of primary importance."); *Camden I Cond. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (in a common fund analysis, "monetary results achieved predominate over other criteria"); Gensler Decl. at ¶¶ 49-51 (noting that "'results achieved is the basic starting point'" when evaluating a common fund settlement (citing FED. R. CIV. P. 23(h) advisory committee's note (2003)).

prove damages, or protect any award on appeal. Additionally, the fact that the Class was able to avoid the considerable uncertainty that any "battle of experts" at trial would inevitably have introduced further supports the reasonableness of the proposed fee award. *See Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) (observing that, '[i]n the 'battle of experts,' it is impossible to predict with any certainty which arguments would find favor with the jury"). Furthermore, the Mylan Defendants had a strong belief in the merits of their arguments and pressed them at every available turn. They filed motions to dismiss arguing all of Plaintiffs' claims lacked merit. Joint Decl. at ¶ 9. They petitioned the Tenth Circuit for review of the order granting class certification, *id.* at ¶ 12, and argued vigorously in their motions for summary judgment that none of Plaintiffs' claims should survive or proceed to trial. *Id.*, ¶ 18. Following the denial in part of their motion for summary judgment, the Mylan Defendants moved to decertify the state antitrust Class. *Id.*, ¶¶ 20, 22. That Co-Lead Counsel secured such a result in the face of the significant risks demonstrates that the requested fee of one-third is reasonable and fair.

2. The requested fee is consistent with fees awarded in similar cases. (Factor 12)

An attorney's fee award of one-third of the common fund is the same percentage as the fee the Court approved in the Pfizer settlement and is consistent with other fees awarded by this Court,[21] as well as others in this Circuit and across the country,[22] in comparably high-risk complex class actions resulting in creation of an exceptional common fund.[23] Professor Gensler has analyzed fee

---

[21] *See* Table 1: Fee Awards of 33.33% or Greater Within District of Kansas, Exhibit D hereto. *See also Koehler v. Freightquote.com, Inc.*, No. 12-2505-DDC-GLR, 2016 WL 3743098, at *7 (D. Kan. July 13, 2016) (one-third award is within "the customary percentage of the fund approved by this Court") (citation omitted).

[22] *See* Table 2: Fee Awards of 33.33% or Greater Within Tenth Circuit *and* Table 3: Fee Awards of 33.33% or Greater Outside Tenth Circuit, Exhibit D hereto.

[23] *See In re Hill's Pet Nutrition, Inc. Dog Food Prods. Liab. Litig.*, No. 19-MD-2887-JAR-TJJ (D. Kan. July 30, 2021) (ECF No. 132, at ¶ 9) ("In this Circuit and District, courts typically award

awards in similarly complex cases and has concluded that the fee request here falls comfortably within the range of percentage awards the courts in the Tenth Circuit have approved. Gensler Decl. at ¶ 60. This Court, in *Nakamura*, recognized that although a "fee award of one-third of the common fund" was "well within the range typically awarded in class actions," class actions have "become more complex and riskier" since 2015 and the "increased complexity and risk has led to requests for higher percentages" resulting in "some courts in the Tenth Circuit hav[ing] awarded fees based on 40% of the common fund." *Nakamura*, 2019 WL 2185081, at *2 (internal quotations and citations omitted). A one-third fee here is consistent with fees awarded in similar cases.

3. The requested fee is consistent with a customary fee. (Factor 5)

"Class actions typically involve a contingent fee arrangement because it insulates the class from the risk of incurring legal fees and shifts that risk to counsel." *Nakamura*, 2019 WL 2185081, at *2 (quoting *Nieberding v. Barrette Outdoor Living, Inc.*, 129 F. Supp. 3d 1236, 1250 (D. Kan. 2015)). In complex contingent fee cases, one-third of the recovery is par or lower than a standard fee arrangement. In fact, this Court has consistently found that "a one-third fee is customary in contingent-fee cases, and indeed that figure is often higher for complex cases or cases that proceed to trial." *Urethane Antitrust Litig.*, 2016 WL 4060156, at *5; *see also Syngenta* 357 F. Supp. 3d. at 1113-14 ("one-third fee is customary in contingent-fee cases (factor 5), or is even on the low side, as that figure is often higher in complex cases or cases that proceed to trial."); *Nakamura*, 2019 WL 2185081, at *3 ("33% is within the range of customary fees awarded in similar cases" and "some courts in the Tenth Circuit have awarded fees based on 40% of the common fund."); *Nieberding*, 129 F. Supp. 3d

---

one-third of the fund as payment for attorneys' fees in complex class action cases like this MDL.") (citations omitted); *see also* Exhibit A-37 to Joint Declaration of Co-Lead Counsel, Declaration of Layn R. Phillips, *Hitch Enters., Inc. v. Cimarex Energy Co.,* No. CIV-11-13-W, at ¶ 19 (W.D. Okla. Dec. 28, 2012) (opining an attorneys' fee in the range of 33.33% to 40% is in line with amounts approved by courts in the Tenth Circuit as fair and reasonable in contingent class action litigation).

at 1250 (recognizing a one-third fee of the common fund was "well within the range typically awarded in class actions."). That "a one-third fee is customary in contingent-fee cases" and even "higher for complex cases," supports the proposed fee award. *Syngenta*, 357 F. Supp. 3d. at 1113-14.

4. This case presented difficult factual issues and raised novel and complex questions of law. (Factor 2)

"Courts emphasize the risk undertaken by counsel" in awarding fees, with "complex cases justify[ing] higher fees, and simple cases lower fees." *Been v. O.K. Indus., Inc.*, CIV-02-285-RAW, 2011 WL 4478766, at *7 (E.D. Okla. Aug. 16, 2011), *report and recommendation adopted*, CIV-02-285-RAW, 2011 WL 4475291 (E.D. Okla. Sept. 26, 2011). "It is common knowledge that class action suits have a well-deserved reputation as being most complex." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). And while "'[t]he prosecution and management of a[ny] complex national class action requires unique legal skills and abilities,'" *Columbus Drywall & Insulation v. Masco Corp.*, No. 1:04-cv-3066-JEC, 2012 WL 12540344, at *4 (N.D. Ga. Oct. 26, 2012) (quoting *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987)), "[a]n antitrust class action is arguably the most complex action to prosecute." *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000). "The legal and factual issues involved are always numerous and uncertain in outcome." *Id.*; *see also Wal-Mart Stores, Inc. v. Visa, U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("antitrust cases are complicated, lengthy, and bitterly fought.")

In terms of complexity and difficulty, this antitrust and RICO nationwide MDL class action satisfies this *Johnson* factor. At its core, this case included two distinct antitrust claims (generic pay-for-delay and brand foreclosure) and a RICO claim based on the same alleged underlying facts as the two antitrust schemes plus the EpiPen 2-Pak hard switch scheme. Thus, the complexity was tripled, with each of the three claims on their own being very complex. In addition, this case was combined

with the *Sanofi* Track case for coordinated discovery, which required Co-Lead Counsel to negotiate and navigate certain issues with Sanofi's counsel during the coordinated phase.

The complexity of this case supports the requested fee award.

5. Plaintiffs' team of attorneys have substantial experience in prosecuting high-stakes, complex litigation and pursued the case with extraordinary skill, zeal, and expertise. (Factors 3 & 9)

As discussed, this complex antitrust and RICO matter raised exceptionally difficult factual and legal issues. Before the Settlement, Co-Lead Counsel had litigated this case aggressively for more five years, engaging in voluminous document and deposition discovery, as well as extensive motion practice and trial preparation. Guiding the case through years of intense litigation and then complex negotiation to a successful settlement with the Mylan Defendants required the sustained effort of many highly experienced and respected lawyers in antitrust, RICO, and class action litigation.

Plaintiffs have been represented by some of the nation's top law firms, including, but not limited to, Robbins Geller Rudman & Dowd LLP; Keller Rohrback L.L.P.; Sharp Law LLP; Burns Charest, LLP; Pritzker Levine LLP; Boies Schiller Flexner LLP; and The Lanier Law Firm. And Plaintiffs' team of attorneys were adeptly led by Paul J. Geller, Lynn L. Sarko, Rex A. Sharp, Warren T. Burns, and Elizabeth C. Pritzker, all highly experienced attorneys with stellar reputations earned over decades of legal practice.[24] *See* Joint Decl., ¶¶ 1-5.

Of course, it was not only Plaintiffs and the Class that have been well-represented in this litigation. "In evaluating the quality of representation by Class Counsel, the Court should also consider the quality of opposing counsel." *Lunsford v. Woodforest Nat'l Bank*, No. 1:12-CV-103-CAP, 2014 WL 12740375, at *13 (N.D. Ga. May 19, 2014). *See also Chieftain Royalty Co.*, 2018 WL 2296588, at *5 (E.D. Okla. Mar. 27, 2018) ("the fact that Class Counsel litigated such difficult

[24] *See* note 16, *supra*.

issues against the vigorous opposition of highly skilled defense counsel and obtained a significant recovery for the Settlement Class further supports the fee request in this case."); *In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *5 ("Litigation of this case required great skill in a highly specialized field (third factor), against highly skilled opposing counsel, and plaintiffs' attorneys, who had great experience and superior national reputations, demonstrated great skill throughout (ninth factor)."). Defendants have been vigorously represented throughout this litigation by some of the nation's most experienced litigators from several of the nation's top law firms, including, but not limited to: Hogan Lovells US LLP; Lathrop GPM LLP; and Robbins, Russell, Englert, Orseck & Untereiner LLP. This case demanded—and received—a team of experienced, diligent, highly skilled, and reputable attorneys to meet the challenges from Defendants' well-qualified and well-funded opposing counsel. *See* Gensler Decl. at ¶ 63(b). That Co-Lead Counsel obtained a favorable settlement against such well-represented defendants confirms the reasonableness of the requested fee award.

6. The fee being contingent on obtaining relief for the class and the significant risk undertaken by counsel justifies the fee request. (Factor 6)

Along with the results obtained, the degree of risk associated with the litigation of a complex contingent fee case is among the most significant of the *Johnson* factors. *See Cecil*, 2018 WL 8367957, at *8 ("risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees."). When Co-Lead Counsel brought this action, they knew, no matter how much they believed in the action's merits, "there would be no fee without a successful result and that such a result would be realized only after lengthy and difficult effort." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 356 (N.D. Ga. 1993). Thus, counsel assumed a very real risk that they would "advance all expenses and attorney time to litigate a hard-fought case against highly experienced counsel hired by [defendants] with ample resources," without ever receiving any compensation for

their time and expense. *Urethane*, 2016 WL 4060156, at *4. That risk deserves to be compensated. "Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc); *see also Freebird, Inc. v. Merit Energy Co.*, No. 10-1154-KHV, 2013 WL 1151264, at *4 (D. Kan. Mar. 19, 2013) ("The contingent fee nature of the representation . . . supports the requested award [because it] shifts the risk of loss from plaintiff to plaintiff's counsel.").

While Co-Lead Counsel have always believed in the importance and merit of the antitrust and RICO claims asserted, they had no illusions when they commenced this action that the trial would be either short or smooth. Co-Lead Counsel knew the claims they were asserting would be time-consuming and resource-intensive to develop and prove. Joint Decl. at ¶ 57. Counsel further knew the case would require years of discovery, extensive motion practice, a contentious class certification process, a substantial dispositive motion challenge, and a difficult and lengthy trial on the merits. *Id.* Counsel were well-aware, moreover, that their claims would have to survive difficult challenges at several different stages of the case—on a motion to dismiss, at the class certification phase, on a motion for summary judgment, at trial, or on appeal—and that there was thus "a substantial risk of no recovery." *Syngenta*, 357 F. Supp. 3d. at 1114. Counsel nevertheless devoted the enormous time and resources necessary to obtain the relief provided by the Settlement for the Class.

It is also important to note that Co-Lead Counsel pursued this case even though no federal or state enforcement agencies had chosen to initiate an action against the Defendants. Joint Decl. at ¶ 57. Co-Lead Counsel thus did not have the significant benefit, in developing a factual record and the legal terrain on which that record would be evaluated, of the fruits of the labor of government investigators. "The risk of nonpayment is even higher when a defendants' prima facie liability has

not been established by the government in a criminal action." *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *5; *see also Syngenta*, 357 F. Supp. 3d. at 1114 (recognizing risk when there is "no parallel government proceeding against the defendant on which plaintiffs could rely for investigation, discovery, or simple reassurance in the merits of the claims."); *Urethane*, 2016 WL 4060156, at *4 ("Counsel achieved this verdict and judgment without the benefit of a government investigation or prosecution of members of the alleged antitrust conspiracy."); *In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *11 (E.D. Pa. June 2, 2004) (observing that risk is greater where "petitioners did not benefit from the fruits of a prior government investigation or prosecution"). Many of the antitrust cases that have produced recoveries over $100 million were assisted substantially by government prosecution of criminal antitrust violations and guilty pleas. *See, e.g., In re Vitamins Antitrust Litig.*, MDL No. 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) ($365 million class recovery and 34.06% fee award in case supported by criminal prosecutions and guilty pleas); *In re TFT-LCD (Flat Panel) [Indirect Purchaser] Antitrust Litig.*, MDL No. 1827, 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013) (approving $1.08 billion class recovery and 28.6% fee to class counsel and state attorneys general in case supported by sweeping criminal prosecutions and guilty pleas). If related government proceedings make class actions less risky, then (other things being equal) fee awards should be higher in cases like this one, where Co-Lead Counsel initiated and, for five years, conducted the litigation without help from a regulator. Accordingly, this factor fully supports the requested fee award.

7. Co-Lead Counsel's expended time and labor were enormous. (Factor 1)

Given the important and complex factual and legal issues presented by this litigation, Co-Lead Counsel devoted an enormous amount of time and effort to their representation of the Class. Through April 30, 2022, Plaintiffs' counsel dedicated over 163,000 hours resulting in over $103

million of lodestar. Joint Decl. at ¶ 61. Co-Lead Counsel had to investigate and develop novel factual and legal theories, review and analyze over 11 million pages of documents, and conduct 158 depositions across the country. *Id.* at ¶¶ 13-14. Because there was no government prosecution of the defendants, Co-Lead Counsel had to undertake all the necessary investigation and discovery themselves. Both sides had numerous experts requiring Co-Lead Counsel to oversee principal and rebuttal expert reports, take and defend expert depositions, and brief *Daubert* motions at both the class certification and summary judgment stages. Motion practice has been extensive, including motions to dismiss, discovery disputes, class certification, summary judgment, and decertification. Co-Lead Counsel have carried out three class notice programs, at certification and following preliminary approval of both Settlements, that required extensive third-party discovery to obtain Class Members' contact information. And a vast majority of the work preparing for trial was completed when the Settlement was reached. *Id.* at ¶¶ 23, 25.

What's more, Co-Lead Counsel's lodestar does not include a substantial amount of time and effort they will continue to expend through the Settlement approval and claims process. And even if a lodestar cross-check were required or necessary to assess the time and labor in a common fund case, which it is not required in the Tenth Circuit, Plaintiffs' counsel's over $103 million in lodestar (yielding a 1.97 multiplier for the combined settlements) amply confirms that counsel's one-third fee request is reasonable. Gensler Decl. at ¶¶ 54-59. This factor, though of lesser importance in a common fund case, favors the requested fee.

8. Given the enormous time and resource commitments, and the significant risk to develop and litigate this case, few attorneys would have been willing to take it on. (Factor 10)

In *Syngenta*, this Court found litigation that required plaintiffs' counsel to "risk huge expenditures on a contingent basis, with a substantial risk of no recovery," and "no parallel government proceeding against the defendant on which plaintiffs could rely," "made the case less

than desirable." *Syngenta*, 357 F. Supp. 3d. at 1114; *see also Eatinger v. BP Am. Prod. Co.*, No. 07-cv-01266-EFM-KMH, at 13 (D. Kan. Sept. 17, 2012), ECF No. 375 ("The time, effort, and out-of-pocket investment makes a class action undesirable to most attorneys."). Here, this factor too weighs in support of the reasonableness of the proposed fee.

9. The demands of this case precluded Co-Lead Counsel from other employment. (Factor 4)

Lastly, a fee award is justified where the engagement "precluded or reduced [the attorneys'] opportunity for other employment." *Brown*, 838 F.2d at 455. "This guideline involves the dual consideration of otherwise available business which is foreclosed because of conflicts of interest which occur from the representation, and the fact that once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes." *Johnson*, 488 F.2d at 718. "It is, of course, always true that while an attorney is spending time on one case, he is not spending the same time on another case." *Wiggins v. Roberts*, 551 F. Supp. 57, 61 (N.D. Ala. 1982).

This action has involved years of nearly non-stop document discovery and scores of depositions and motions, punctuated by many contentious discovery and privilege disputes. Co-Lead Counsel expended enormous time and effort on drafting the consolidated complaint, opposing Defendants' motions to dismiss, successfully briefing and arguing the motion for class certification in part, successfully opposing summary judgment in part, successfully opposing the motion for class decertification in part, as well as completing most of the pretrial schedule and trial preparation work. Co-Lead Counsel worked diligently to negotiate the Settlement Agreement with the Mylan Defendants, an effort that required Co-Lead Counsel to address and resolve many legal, factual, and administrative questions that arose during the negotiation process.

For many of the firms—both small and large—representing the Class, the significant commitment of time and resources required to litigate this case has (of necessity) limited their ability

to pursue many other engagements. This significant opportunity cost has been incurred for five years, and will continue to be incurred beyond final approval, as Co-Lead Counsel fulfill their obligation to ensure proper distribution of the Settlement proceeds and address any issues that arise following final approval. Joint Decl. at ¶ 60; *see also* Gensler Decl. at ¶ 63(c). This factor no doubt supports the requested fee. *See, e.g., Syngenta*, 357 F. Supp. 3d. at 1113 ("plaintiffs' counsel have confirmed that the demands of this litigation . . . precluded other employment for these attorneys (factor 4)."); *Urethane*, 2016 WL 4060156, at *5 ("The amount of time expended over a protracted period leaves little doubt that these attorneys were forced to forego other work during this case").

V. THE COURT SHOULD AWARD CO-LEAD COUNSEL'S EXPENSES.

Co-Lead Counsel request the Court also award the reasonable expenses incurred in successfully prosecuting and resolving this MDL litigation against the Mylan Defendants. "As with attorney fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred . . . in addition to the attorney fee percentage." *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) (citation omitted). Rule 23(h) authorizes courts to reimburse counsel for "non-taxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). And the Settlement Agreement expressly authorizes Co-Lead Counsel to seek "an award of . . . expenses and charges in connection with prosecuting the Action," Settlement Agreement at ¶ 6.1, and provides that "expenses awarded by the Court shall be paid solely from the Settlement Fund." *Id.* at ¶ 6.4.

Co-Lead Counsel have incurred an additional $1,426,642.93 in reasonable expenses since the Pfizer Settlement. Joint Decl. at ¶ 66. These expenses include items typically borne by clients in non-contingent fee litigation, such as expert costs, court reporting services and transcripts, document management, travel, electronic research, photocopying, overnight delivery, phone

charges, and jury consultant fees, among others.[25] *Id*. at ¶ 67. All expenses were directly related and necessary to Co-Lead Counsel's continued prosecution of this litigation against the Mylan Defendants following the Pfizer Settlement, and typical of large, complex class actions such as this. *Id*. Co-Lead Counsel have advanced or incurred these expenses and maintained careful records to document them. *Id.* at ¶ 68. These expenses are summarized in the Co-Lead Joint Declaration and its attached exhibits. *Id*.

The Court should approve an award of Co-Lead Counsel's expenses in the amount of $1,426,642.93.

VI. THE PROPOSED SERVICE AWARDS FOR CLASS REPRESENTATIVE PLAINTIFFS ARE WELL DESERVED.

"At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." 5 Newberg on Class Actions § 17:1 (5th ed. 2021). Serving as a class representative is a burdensome role and without plaintiffs willing to assume that role, the entire class would receive nothing. "Service payments induce individuals to become class representatives and reward them for time sacrificed and personal risk incurred on behalf of the class." *Harlow v. Sprint Nextel Corp.*, No. 08-2222-KHV, 2018 WL 2568044, at *7 (D. Kan. June 4, 2018) (citing *UFCW Local 880-Retail Food Emp't Joint Pension Fund v. Newmont Min. Corp.*, 352 F. App'x 232, 235 (10th Cir. 2009); *see also* Newberg § 17:1 (service awards "aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function."); *and* Gensler Decl. at ¶¶ 64-67.[26]

---

[25] *See In re Bank of Am. Wage & Hour Emp. Litig.*, 10-MD-2138-JWL, 2013 WL 6670602, at *4 (D. Kan. Dec. 18, 2013) (awarding class counsel expenses "typically borne by clients in non-contingent fee litigation") (citing *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1257 (10th Cir. 1998)).

[26] *See also Nieberding*, 129 F. Supp. 3d at 1251 (D. Kan. 2015) ("An incentive award performs the legitimate function of encouraging individuals to undertake the frequently onerous

"When considering the appropriateness of an award for class representation, the Court should consider: (1) the actions the class representative took to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the class representative expended in pursuing the litigation." *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1010 (D. Colo. 2014) (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). Empirical evidence shows service awards are now paid in most class actions and average between $10,000 and $15,000 per class representative. *See* Newberg § 17:1; *Harlow* 2018 WL 2568044, at *7 (citing Newberg § 17:1).

Here, the Class Representatives consist of 34 individual consumers and one third-party payor. Joint Decl. at ¶ 69. Each of the Class Representatives are a named plaintiff in the Complaint, assisted Co-Lead Counsel in various aspects of the litigation, searched for and provided information in response to Defendants' discovery requests, prepared for and sat for their deposition (many had to travel to Kansas City for their deposition), stayed informed of case developments and procedural matters over the course of the case, and reviewed and approved the settlement with the Mylan Defendants. *Id.* at ¶ 70 and Exhibits A-2 to A-36. In doing so, all the Class Representatives stepped

---

responsibility of serving as the named class representative.") (cleaned up) (quoting *Hershey v. ExxonMobil Oil Corp.,* No. 07–1300–JTM, 2012 WL 5306260, at *12 (D. Kan. Oct. 26, 2012); *UFCW Local 880-Retail Food Emp'r Joint Pension Fund*, 352 F. App'x at 235 (10th Cir. 2009) ("Incentive awards to class representatives are justified when necessary to induce individuals to become named representatives…Moreover, a class representative may be entitled to an award for personal risk incurred") (cleaned up); *Cecil v. BP Am. Prod. Co.*, No. 16-CV-410-KEW, 2018 WL 8367957, at *10 (E.D. Okla. Nov. 19, 2018) ("Federal courts regularly give incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case and the risks they take.") (citations omitted); *Lucken Family Ltd. P'ship v. Ultra Res., Inc.*, 2010 WL 5387559, at *6 (D. Colo. Dec. 22, 2010) ("Courts have held that incentive awards are an efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class.") (citing *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *Ponca Tribe of Indians of Oklahoma v. Continental Carbon Co.*, 2009 WL 2836508, at *2 (W.D. Okla. July 30, 2009) ("The practice of granting incentive awards to Class Representatives is common and widespread in class litigation.") (citations omitted).

forward to bring large, fiercely-defended claims against two of the most powerful pharmaceutical companies in the world, after which they devoted five years of their attention to the case. Their efforts contributed to the success of the case and resulted in significant benefits to the Class. And without their willingness to step forward and undertake the responsibilities as a class representative, the additional $264 million class-wide recovery would not exist.

In authorizing service awards for the Class Representatives in the Pfizer Settlement, the Court used the following formula to determine the amount for each Class Representative: (1) Class Representatives who spent 60 or more hours working on the case were awarded a $5,000 service award, and (2) Class Representatives who devoted fewer than 60 hours working on the case were awarded a service award calculated using the number of hours that the Class Representative worked on the case multiplied by $79 per hour. ECF No. 2506 at ¶ 24; *see also id.* at ¶ 22 (finding $79 per hour reasonable based on extensive nature of discovery and required travel). In recognition of their time, service, personal risk, and willingness to serve, Co-Lead Counsel request service awards for each Class Representative based on this same formula.

The table in the attached Exhibit D lists each Class Representative's attested hours spent on the case and the amount of service award requested for each based on the above formula. Based on the hours set forth in their declarations, service awards are requested in the amount of $5,000 for 13 Class Representatives and between $3,160 and $4,503 for 22 Class Representatives. Together the requested 35 service awards amount to $151,584, which is 0.06% of the $264 million Settlement Fund, a small percentage compared to similar cases.[27] Joint Decl. at ¶ 73. The service awards are

[27] *See In re Syngenta,* 2018 WL 6839380, at *16 (D. Kan. Dec. 31, 2018) (approving $2,782,500 in service awards, which represented 0.18% of $1.51 billion in settlement funds); *Cecil v. BP Am. Prod. Co.*, No. 16-CV-410-KEW, 2018 WL 8367957, at *11 (E.D. Okla. Nov. 19, 2018) (awarding $450,000 in service awards, which was 0.3% of $147 million of settlement funds); *In re Urethane Antitrust Litig*., 2008 WL 696244, at *1 (D. Kan. Mar. 13, 2008) (approving $30,000 in

fair and reasonable considering what the Class Representatives contributed and achieved on behalf of the Class, and should be approved. *See* Gensler Decl. at ¶¶ 68-69 (finding the requested service awards for Class Representatives appropriate and fair).

In the Pfizer Settlement proceedings, the Court questioned whether it could grant service awards to four individuals (Landon Ipson, Donna Dvorak, April Sumner, and Michael Gill) that were no longer class representatives. ECF No. 2502. It ultimately concluded that service awards for those four individuals were warranted in this case. ECF No. 2506 at ¶ 25. Co-Lead Counsel include those four individuals plus plaintiff Anastaisa Johnston in their service awards request here. All five were named plaintiffs in the Complaint and appointed class representatives at one time—but are currently not class representatives. As the Court noted in the Pfizer Settlement proceedings, it dismissed Mr. Ipson, Ms. Dvorak, Ms. Sumner, and Mr. Gill on June 23, 2021 because they had never filed an underlying case transferred to this MDL. *Id.* (citing ECF No. 2381 at 163). Then more recently, on December 15, 2021, the Court granted the Mylan Defendants' unopposed motion to dismiss Ms. Johnston. ECF No. 2531 at 2. Since their dismissal, Mr. Ipson, Ms. Dvorak, Ms. Sumner, and Mr. Gill have filed the Other Actions, which have been transferred to this MDL and are settled as part of the Mylan Settlement. Joint Decl. at ¶ 72.

---

service awards, which represented 0.091% of the $33 million in settlement funds); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *17-18 (N.D. Cal. Sept. 2, 2015) (awarding $540,000 to class representatives, which represented 0.13% of the $415 million in settlement funds); *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318-RDB, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (awarding $175,000 to class representatives, which represented 0.11% of the $163.5 million in settlement funds); *Hershey v. ExxonMobil Oil Corp.,* No. 07–1300–JTM, 2012 WL 5306260, at *12 (D. Kan. Oct. 26, 2012) (awarding 0.1% of $54 million settlement as service award); *Eatinger v. BP America Prod. Co.*, No. 07-1266-EFM (D. Kan. Sept. 17, 2012), ECF No. 375, at ¶ 36 (awarding 0.5% of $19 million settlement as service award).

For the same reasons the Court awarded service awards to Mr. Ipson, Ms. Dvorak, Ms. Sumner, and Mr. Gill in the Pfizer Settlement, it should award service awards to them and Ms. Johnston in this Settlement. Even though they were no longer class representatives at the time of this Settlement, they have remained Class Members who meaningfully advanced the litigation. Each has spent 45 hours or more contributing to the case, participated in discovery, and sat for deposition. *Id.* And all are parties to the Settlement Agreement with the Mylan Defendants, which requires Mr. Ipson, Ms. Dvorak, Ms. Sumner, and Mr. Gill to dismiss and release their claims in the Other Actions. *Id.* As the Court found in its ruling on this issue in the Pfizer Settlement, the persuasive legal authority permits "service awards to class members who have provided significant contributions to the prosecution of a case, including sitting for a deposition, even if those class members aren't named as class representatives." ECF No. 2506, ¶ 25 (collecting cases). Here, service awards using the formula above to these five individuals (class members and one-time class representatives) are appropriate based on their time and contribution to the prosecution of this case.

CONCLUSION

For the reasons above and in the supporting declarations, Class Plaintiffs respectfully request the Court grant Class Plaintiffs' Motion for Final Approval of Settlement, Approval of Plan of Allocation, and Award of Attorneys' Fees, Expenses, and Service Awards.

Respectfully submitted,

DATED: May 20, 2022

SHARP LAW LLP

By: */s/ Rex A. Sharp*
SHARP LAW LLP
REX A. SHARP
RYAN C. HUDSON
W. GREG WRIGHT
4820 West 75th Street
Prairie Village, KS 66208
Telephone: 913/901-0505
913/901-0419 (fax)
rsharp@midwest-law.com
rhudson@midwest-law.com
gwright@midwest-law.com

KELLER ROHRBACK L.L.P.
LYNN LINCOLN SARKO
GRETCHEN FREEMAN CAPPIO
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: 206/623-1900
206/623-3384 (fax)
lsarko@kellerrohrback.com
gcappio@kellerrohrback.com

ROBBINS GELLER RUDMAN
& DOWD LLP
PAUL J. GELLER
STUART A. DAVIDSON
BRADLEY M. BEALL
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)
pgeller@rgrdlaw.com
sdavidson@rgrdlaw.com
bbeall@rgrdlaw.com

PRITZKER LEVINE LLP
ELIZABETH C. PRITZKER
JONATHAN K. LEVINE
1900 Powell Street, Suite 450
Emeryville, CA 94608
Telephone: 415/692-0772
415/366-6110 (fax)
ecp@pritzkerlevine.com
jkl@pritzkerlevine.com

BURNS CHAREST LLP
WARREN T. BURNS
SPENCER COX
900 Jackson Street, Suite 500
Dallas, TX 75202
Telephone: 469/904-4550
469/444-5002 (fax)
wburns@burnscharest.com
scox@burnscharest.com

Co-Lead Counsel and Liaison Counsel for Class Plaintiffs

CERTIFICATE OF SERVICE

I certify that on May 20, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to parties and attorneys who are filing users.

/s/ Rex A. Sharp
Rex A. Sharp