

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION

MDL No. 2724
Case No. 2:16-MD-2724

THIS DOCUMENT RELATES TO:

HON. CYNTHIA M. RUFE

Direct Purchaser Plaintiffs' Actions

NOTICE OF FILING SECOND CORRECTED MEMORANDUM OF LAW

Direct Purchaser Plaintiffs (“DPPs”) provide notice of filing the attached second corrected Memorandum of Law in Support of Direct Purchaser Plaintiffs’ Motion for an Order Granting: (1) Reimbursement of Expenses; (2) Payment of Service Awards; and (3) A One-Third Set Aside of Each of the Apotex, Breckenridge, and Heritage Settlement Funds (ECF No. 2957).

Page 5 of the original Memorandum of Law (ECF No. 2957-1) contained a typographical error concerning the amount DPPs propose withdrawing from the Apotex Settlement Fund to provide service awards to DPPs’ class representatives. The corrected Memorandum of Law DPPs filed on May 21, 2024 (ECF No. 2963-1) inadvertently contained another typographical error concerning that amount. The attached corrected Memorandum of Law corrects the typographical errors but makes no other changes.

Accordingly, DPPs provide notice to the Court and the Parties of the filing of the attached second corrected version of the Memorandum of Law.

Dated: May 22, 2024

Respectfully submitted,



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Direct Purchaser Plaintiffs' Steering Committee

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION

MDL No. 2724
Case No. 2:16-MD-2724

THIS DOCUMENT RELATES TO:

HON. CYNTHIA M. RUFE

Direct Purchaser Plaintiffs' Actions

**MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER
PLAINTIFFS' MOTION FOR AN ORDER GRANTING:
(1) REIMBURSEMENT OF EXPENSES;
(2) PAYMENT OF SERVICE AWARDS; AND
(3) A ONE-THIRD SET ASIDE OF EACH OF THE
APOTEX, BRECKENRIDGE, AND HERITAGE SETTLEMENT FUNDS**

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I. INTRODUCTION

Pursuant to paragraph 26 of this Court’s February 13, 2024 Orders Granting Preliminary Approval of the Apotex, Breckenridge, and Heritage Settlements (ECF Nos. 2841, 2842, and 2843) (“Preliminary Approval Orders”), as modified by the Court’s March 20, 2024 Order (ECF No. 2891), DPPs seek reimbursement of expenses and for future expenses not to exceed \$4,500,000 allocated proportionally across the Apotex, Breckenridge, and Heritage Settlement Funds, \$20,000 service awards for each of the four DPP Class Representatives allocated proportionally across the three Settlement Funds, and for permission to set aside up to one-third of each of the Settlement Funds for attorneys’ fees, net of expenses and service awards, plus accrued interest. DPPs present request is similar to the request DPPs presented and the Court granted in connection with the Sun and Taro Settlements. *See* Order Granting Motion by Direct Purchaser Class Plaintiffs for an Order Pursuant to Paragraph 26 of this Court’s May 11, 2022 Order, ECF No. 2387 (Mar. 9, 2023) (“Sun/Taro Order”).

DPPs’ settlements with Apotex, Breckenridge, and Heritage have created common Settlement Funds of \$45,000,000¹ that will benefit the preliminarily certified Settlement Classes of likely over 700 direct purchasers of various generic drugs. *See* Preliminary Approval Orders at ¶¶ 3-12 (preliminarily certifying settlement class for notice and subject to further consideration at the Final Fairness

¹ Apotex, Breckenridge, and Heritage collectively deposited \$45,000,000 into the Settlement Funds. If certain circumstances are met, the value of these Settlement Funds could adjust downward to \$40,795,000 or upward to \$55,735,294.10.

Hearing).

To date, DPPs have financed reasonable expenses required to achieve these settlements, determine appropriate allocations to Settlement Class members of the Net Settlement Funds, and to continue the litigation against the remaining Defendants. Additionally, the present Settlement Funds were facilitated by the active participation of DPPs' Class Representatives in the litigation. Finally, because the Settlement Funds are a product of the significant efforts of DPP attorneys, DPPs request that one-third of the net of each Settlement Fund be held in escrow so that DPPs may apply for fees at a later date.

DPPs seek entry of the attached proposed Order permitting reimbursement for DPPs' expenses, service awards for DPPs' Class Representatives, and permission to set aside one-third of each of the Apotex, Breckenridge, and Heritage Settlement Funds net of expenses and service awards, and plus accrued interest, for a future fee petition.

II. REQUEST FOR REIMBURSEMENT OF DPPS' EXPENSES

Through April 30, 2024, and exclusive of the expenses for which DPPs already received reimbursement of \$6,800,000 via the Sun and Taro settlements, DPPs' common expenses (expenses paid or incurred by the DPP Litigation Fund, excluding held expenses paid or incurred by DPP law firms) total \$4,924,204.80. The notice disseminated to Settlement Class members states that "Settlement Class Counsel will apply to the Court from the three Settlements no later than May 13, 2024 for reimbursement of past unreimbursed expenses and for future expenses not to exceed a total of \$4.5 million." Therefore, because DPPs have incurred expenses

in excess of that number since the prior reimbursement under the Sun and Taro settlements, DPPs are seeking reimbursement of the full \$4,500,000.²

Early in this MDL, this Court entered Pretrial Order No. 8, specifying appropriate categories of common benefit expenses. *See* Pretrial Order No. 8 (“PTO 8”) at p. 3-6. As explained in the attached Declaration of Dianne M. Nast, DPPs have incurred and continue to incur reasonably appropriate expenses that are consistent with the framework outlined in PTO 8. *See* Declaration of Dianne M. Nast (“Nast Decl.”) ¶ 8. Many of the complaints in this litigation have been pending since 2016 and collectively involve over one hundred generic drugs and dozens of Defendants. *See id.* at ¶¶ 3-5. The litigation to has been hard fought and may continue for years, with trials in DPPs’ Bellwethers yet to commence. *See id.*

Courts regularly reimburse class counsel for reasonable litigation expenses accrued to the benefit of a class. Fed. R. Civ. P. 23(h) (“In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.”); *In re Certain Teed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 226 (E.D. Pa. 2014) (“[C]ounsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.”) (quoting *In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002)). Awarding such reasonable expenses allows a court to ensure that absent class

² The deadline for Settlement Class members to object to this reimbursement request is June 27, 2024, but, to date, we are not aware of any objection to the \$4,500,000 expense number which was included in the notice.

members are not unjustly enriched by avoiding a share of the expenses that were reasonably necessary. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970) (“To allow the others to obtain full benefit from the plaintiff’s efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff’s expense.”).

Consistent with Third Circuit precedent, reasonable expenses under PTO 8 include: assessments; deposition and court reporter costs; costs for the electronic storage, retrieval and searches of ESI; Court, filing, and service costs; expert witness and consultant fees and expenses; data and materials provided by outside third-party vendors, consultants and attorneys; and bank or financial institution charges. *Cf.* PTO 8; *In re Certain Teed Fiber Cement Siding Litig.*, 303 F.R.D. at 226 (finding reasonable expenses to include “mediation costs, court filing fees, hearing transcripts, expert fees, [and] online research”); *Mehring v. New York Life Ins. Co.*, 248 F.R.D. 455, 467 (E.D. Pa. 2008) (finding the following types of out-of-pocket expenses compensable: “(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, [and] (11) the cost of hiring a mediator”). The common expenses incurred through April 30, 2024, net of the expenses previously reimbursed, are listed in Exhibit A to the Nast Declaration.

In DPPs’ Motions for Preliminary Approval of the Apotex, Breckenridge, and Heritage settlements, DPPs requested approval to seek expenses not to exceed

\$4,500,000. As set forth above, through April 30, 2024, DPPs have incurred common costs of \$4,924,204.80 that were reasonably necessary to litigate DPPs' claims in this MDL, obtain the Settlements with Apotex, Breckenridge, and Heritage, and effectuate a plan of allocation and notice of those settlements. *See* Nast Decl. ¶¶ 8-12. These expenses have been for the common benefit of the class, are reasonable in amount, and are adequately supported by documentation in DPPs' possession. *See id.* The litigation is continuing against most Defendants and no trials have commenced. *Id.* at ¶ 6.

At this time, DPPs request reimbursement of \$4,500,000 for expenses.

III. REQUEST FOR SERVICE AWARDS OF \$20,000 FOR EACH OF THE FOUR CLASS REPRESENTATIVES

Consistent with this Court's Orders Granting Preliminary Approval of the Apotex, Breckenridge, and Heritage Settlements, DPPs request approval of payment from the Settlement Funds of four equal service awards of \$20,000 to each of DPPs' four Class Representatives, allocated as \$53,333.33 from the Apotex Settlement Fund, \$8,888.89 from the Breckenridge Settlement Fund, and \$17,777.78 from the Heritage Settlement Fund. The allocations were described to putative class members in the Notice. The Court awarded identical service awards earlier in this case in connection with the Sun and Taro settlements. *See* Sun/Taro Order. ECF No. 2387.

Courts in the Third Circuit have regularly approved payment of service awards to class representatives in recognition of the time and effort they have

invested in a class action to the benefit of other absent class members.³ *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) (“Incentive awards are not uncommon in class action litigation and particularly where, as here, a common fund has been created for the benefit of the entire class.”) (internal quotation marks omitted). “The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws.” *Sullivan v. D.B. Invs. Inc.*, 667 F.3d 273, 333, fn. 65 (3d Cir. 2011) (internal quotation marks omitted).

This Court has previously approved service awards of \$20,000 for named plaintiffs in this MDL. Sun/Taro Order, ECF No. 2387. Moreover, Courts in this Circuit and elsewhere often compensate class representatives for their services in amounts comparable to or exceeding the \$20,000 that DPPs request here for each Class Representative. *See e.g., In re Linerboard Antitrust Litig.*, No. CIV.A. 98-5055, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004) (approving service awards of \$25,000 to each of five class representatives); *In re Flonase Antitrust Litig.*, 951 F. Supp 2d 739, 752 (E.D. Pa. 2013) (finding “an incentive award of \$50,000 and \$40,000 is within the range of payments awarded by courts within the Third Circuit in other direct purchaser antitrust litigation.”); *Bradburn Parent Tchr. Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007)

³ Historically, Courts have used the term “incentive award.” These payments are more properly described as “service awards” for the efforts that class representatives put forth on behalf of the class.

(approving service award of \$75,000 to class representative); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (approving service awards representing an aggregate of “approximately 0.3% of each class’s recovery”); *In re Namenda Direct Purchaser Antitrust Litig.*, No. 15 CIV. 7488 (CM), 2020 WL 3170586, at *2 (S.D.N.Y. June 15, 2020) (approving service awards of \$75,000 to each class representative); *In re Solodyn Antitrust Litig.*, No. CV114MD2503DJC, 2018 WL 7075881, at *2 (D. Mass. July 18, 2018) (approving service awards of \$90,000 to each class representative); *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH, 2005 WL 3008808, at *18 (D.N.J. Nov. 9, 2005) (approving service awards totaling \$60,000 for two class representatives from a \$75,000,000 settlement fund); *In re Pork Antitrust Litig.*, Civ. A. No. 18-1776, Order Granting Direct Purchaser Plaintiffs’ Motion for Interim Payment of Attorneys’ Fees, Current and Ongoing Expenses, and Service Awards, ECF No. 1424, ¶ 12 (D. Minn. July 22, 2022) (awarding service awards of \$25,000 each to four DPP class representatives).

DPPs’ Class Representatives have devoted their time and efforts without the promise of any compensation. This lawsuit on behalf of all direct purchasers and these settlements were facilitated by Named Plaintiffs services as DPPs’ Class Representatives. *See* Nast Decl. ¶¶ 13-16. Throughout this litigation, the Named Plaintiffs have advised Class Counsel, approved pleadings, reviewed and responded to written discovery, searched for, gathered, preserved, and produced documents,

prepared for and sat for depositions, and kept up to date on the progress of the case. *See id.* at ¶14.

Additionally, unlike many other litigants in this MDL, some of the DPPs' Class Representatives have direct business relationships with the Defendants. *See id.* at ¶13. Accordingly, DPPs' Class Representatives have exposed themselves to substantial business risks for the benefit of the entire class.

Class Representatives' contributions benefited the entire class. Accordingly, DPPs respectfully submit this request for service awards of \$20,000 for each Class Representative to be paid from the Settlement Funds as described above.

IV. REQUEST FOR TO SET ASIDE ONE-THIRD OF EACH NET SETTLEMENT FUND FOR A FUTURE FEE PETITION

Consistent with the Sun/Taro Order in which this Court granted DPPs' request to set aside one-third of the Sun/Taro net Settlement Fund (ECF No. 2387), DPPs are deferring an application for attorneys' fees and instead seek to set aside in escrow one-third of the Settlement Funds, net of expenses and service awards, plus accrued interest. When DPPs do file a petition for and award of attorneys' fees, this escrow, along with the already set-aside funds from the Sun/Taro Settlements, would be available to satisfy any fee award granted by the Court.

Setting aside one third of each net settlement fund for a future fee petition is consistent with the Court's earlier Order concerning the Sun and Taro settlements and within this Court's equitable powers. *See* Sun/Taro Order, ECF No. 2387. Set asides will ensure that all class members who benefit from the Settlement Funds created via the Apotex, Breckenridge, and Heritage Settlements shall "participate

in paying attorney's fees when a prevailing plaintiff's litigation redounds to the benefit of the common fund." See *Polanski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 145 (3d Cir. 1998) (citing *Hall v. Cole*, 412 U.S. 1, 5 n. 7 (1973); *id.* ("Under the exercise of its equitable powers, however, a federal court may fashion an attorney's fees award to successful litigants who confer a common benefit upon a class of individuals not participating in the litigation.")).

Creating escrow accounts containing one-third of each net Settlement Funds will ensure that adequate funds are available to satisfy a Court award granted pursuant to a future petition. Courts in this Circuit and other Circuits often award fees as a percentage of recovery. See, e.g., *In re Auto. Refinishing Paint Antitrust Litig.*, No. 2:10-md-1426, ECF No. 136 (E.D. Pa. Oct. 13, 2004) (approving a request for attorneys' fees of approximately 32%); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *16 (approving request for attorneys' fees of approximately 30%); *In re Ikon Office Solutions, Inc., Securities Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (approving a request for attorneys' fees of 30% of the net settlement fund); *In re Pork Antitrust Litig.*, Civ. A. No. 18-1776, Order Granting Direct Purchaser Plaintiffs' Motion for Interim Payment of Attorneys' Fees, Current and Ongoing Expenses, and Service Awards, ECF No. 1424, ¶ 1-2 (D. Minn. July 22, 2022) (awarding "33 1/3% of the \$101,864,300.00 Settlement Fund" and noting that "Courts in [the District of Minnesota] routinely approve attorneys' fees in class actions of at least one-third of the common fund created for the settlement class.").

When DPPs eventually seek fees from the escrowed portions of the net

Settlement Funds, DPPs will provide notice of the motion to Settlement Class members. For the purposes of objections or requests for exclusions, the Settlement Class has been informed that Class Counsel will seek to set aside one-third of the net Settlement Funds to be applied for as attorneys' fees at a later date. Settlement Class Members will have the opportunity to review, and object to, DPPs' motion for attorneys' fees after it is filed and before the Court rules.

Accordingly, DPPs respectfully request an Order setting aside one third of each Settlement Fund created by the Apotex, Breckenridge, and Heritage settlements, net of expenses and service awards, plus accrued interest.

V. CONCLUSION

For the reasons set forth above, DPPs request that the Court enter the attached proposed Order Granting: (1) reimbursement from the Apotex, Breckenridge, and Heritage Settlement Funds of \$4,500,000 for DPPs' incurred and future expenses; (2) payment from the Apotex, Breckenridge, and Heritage Settlement Funds of \$20,000 Service Awards to each of DPPs' four Class Representatives; and (3) permitting DPPs to set aside in escrow one-third of each of the net Settlement Funds in anticipation of a future application for attorneys' fees.

Dated: May 22, 2024

Respectfully submitted,



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