IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE OF CALIFORNIA, Plaintiff, **v.** **TEVA PHARMACEUTICAL INDUSTRIES, LTD.*, et al.*** Defendants.	**CIVIL ACTION** **Case No. 19-3281**

MEMORANDUM IN SUPPORT OF PLAINTIFF STATE OF CALIFORNIA'S MOTION FOR FINAL APPROVAL OF THE CONSUMER SETTLEMENT AND ENTRY OF THE STIPULATED STATE INJUNCTION ORDER

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Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure, Plaintiff State of California respectfully submits this Memorandum in support of its Motion for Final Approval of the Consumer Settlement and Entry of the Stipulated State Injunction Order (the "Motion"). The requested actions are warranted and should be granted for the reasons set forth below.

I. INTRODUCTION

Both the Consumer Settlement[1] as well as the stipulated State Injunction Order before the Court for approval are part of a larger, global settlement ("Global Settlement") reached between the State of California (the "State" or "California") and Teva[2] to resolve and release all federal and state antitrust and consumer protection law claims as alleged in the settlement Complaint filed on July 29, 2019, ECF No. 1 ("Settlement Complaint" or "Action").[3] The State's claims arose from the alleged unlawful delay of generic competition to the wakefulness drug Provigil® between June 24, 2006 and December 31, 2012 (the "Relevant Period") by design of the named defendants that resulted in antitrust injury to the State, its general economy as well as its natural persons. The State asserts these claims in its sovereign and law enforcement capacities, in its proprietary capacity on behalf of state entities that purchased Provigil®, the substantially identical Nuvigil® and/or the generic version of Provigil® (modafinil) (the "Relevant Products") during the Relevant Period, and also under its *parens patriae* authority on behalf of natural persons who were California residents and purchased the Relevant Products during the Relevant Period (Eligible Consumers).

In exchange for release of the Released Claims under the Global Settlement, Teva agreed (1) to seek disbursement of monetary relief to both the State and its Eligible Consumers and (2) to enter a stipulated ten-year injunction. ECF No. 2-3 at 8-107. As to the monetary payment,

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[1] Defined terms in the Settlement Agreement have been capitalized in this Memorandum and have the same meaning as in the Settlement Agreement, unless otherwise defined herein. The Settlement Agreement is attached as Exhibit 1 to the Declaration of Cheryl Lee Johnson filed on July 29, 2019 (ECF No. 2-3).

[2] As used herein "Teva" refers to Teva Pharmaceutical Industries Ltd., on behalf of itself and its wholly-owned subsidiaries Cephalon, Inc., Teva Pharmaceuticals USA, Inc., and Barr Pharmaceuticals, Inc.

[3] The parties hereto may sometimes be collectively referred to as "Parties" or individually as "Party."

Teva agreed to request disbursement of ***the sum total of $69 million*** from the previously established the Federal Trade Commission (FTC) Settlement Fund (Settlement Payment), which would then be allocated and divided by the State, as a matter of sovereign right, for purposes of (1) compensating the State and its consumers, (2) civil penalties, (3) enforcement of the injunction, (4) payment of settlement administration costs, expenses and fees, (5) reimbursement to the State for the state attorney's fees, costs, and expenses incurred in the underlying investigation and litigation, and (6) for such other purposes as the State deems appropriate consistent with California law. *Id.* at 16-22. With respect to the stipulated injunction, Teva agreed to be bound by the State Injunction Order (consistent with the terms of the Revised FTC Injunction entered in *F.T.C v. Cephalon, Inc.*, No. 08-2141 (E.D. Pa.)) pending entry by this Court through ***February 21, 2029***. *Id.* at 22-24. Teva and California also agreed to use "best efforts to effectuate this Settlement Agreement and its purpose, including jointly seeking any orders and final judgment necessary to effectuate the injunctive terms set forth in Section V and the release of *parens patriae* claims set forth in Section VI." *Id.* at 25. Other than Teva's settlement with the FTC, this is the only settlement by Teva in these Provigil pay-for-delay matters that includes an injunction for prevention of the alleged conduct.

The FTC disbursed the Settlement Payment in full shortly after the Parties executed the Settlement Agreement, which payment is currently being held in two separate escrow accounts and will remain there until the approval of the Consumer Settlement is complete. Declaration of Doan-Phuong Pamela Pham ("Pham Decl."), ¶ 5. Pursuant to the terms of the Settlement Agreement, the State's Attorney General has allocated to the Consumer Settlement and caused to be deposited into the Escrow Account designated as the Consumer Fund the sum of $25.25 million (36.6% of the Settlement Payment) solely for the compensation of Eligible Consumers. ECF No. 2-3 at 16-22; Pham Decl., ¶ 6. If finally approved, the Consumer Fund, including all interests accruing therein, would be distributed to Eligible Consumers first through direct cash payments to claimants whose claims have been vetted for legitimacy by the court-appointed Settlement Administrator A.B. Data, Ltd. ("A.B. Data"), and thereafter through *cy pres*

distribution of any portion of the Consumer Fund that remains unclaimed in order to promote the interests of the Eligible Consumers as a whole, including those who could not or chose not to submit a claim. ECF No. 2-3 at 105-107; Pham Decl., ¶¶ 8-13. No portion of the Consumer Fund would escheat to the State or revert to Teva, nor be used to pay any of the costs associated with administering the Consumer Settlement such as fees and costs incurred in providing notice to Eligible Consumers. *See Id.* All such expenses are to be paid from the State Proprietary Fund. Pham Decl., ¶ 8. This proposed Distribution Plan reflects the State's longstanding policy and preference in favor of direct compensation to claimants coupled with *cy pres* distribution of any unclaimed fund, as well as the Third Circuit's guidelines on *cy pres* settlements, which the State consulted in preparing its proposed Distribution Plan. Pham Decl., ¶¶ 8-13.

The proposed Consumer Settlement and accompanying Distribution Plan both warrant the Court's final approval. Because the Consumer Settlement is a *parens patriae* settlement obtained on behalf of an unnamed group of Eligible Consumers seeking to release the claims of Eligible Consumers who do not opt out of the settlement, adequate notice to the affected group and court approval of its terms are required by Section 16760 of the California Business and Professions Code (the "*Parens Patriae* Statute"). Since the *Parens Patriae* Statute does not specify a specific standard for notice or approval of the settlement, courts generally look to the class action standards with deference to States' views on fairness, adequacy, and reasonableness of a settlement since *parens patriae* actions are solely motivated by public interest concerns.

The State submits that all applicable requirements for final approval are satisfied here. First, the best practicable notice has been provided to California's Eligible Consumers in accordance with the Court's Preliminary Approval Order, ECF No. 8 ("CA PAO"). While the State has received at least 8,435 timely claims to the Consumer Settlement, there are only two objectors to the settlement, although one appears to lack standing to object. Pham Decl., ¶ 16, Exhs. 5 and 6. There are no opt-outs or requests to appear at the Fairness Hearing. *Id.* at ¶ 17. The overall support for this *parens patriae* settlement appears to be unanimous, warranting final approval.

Second, the Consumer Settlement readily meets the standards for fairness, reasonableness, and adequacy set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998), and *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013). *See In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 322, 324 (3d Cir. 2019) (framework for evaluating fairness, adequacy, and reasonableness of class action settlement requires application of *Girsh* and *Prudential* factors and, if applicable, *Baby Products* factors to assess *cy pres* awards). Moreover, the record presented in support of final approval of the Consumer Settlement also confirms this Court's findings and conclusion at the time of preliminary approval that "there are no grounds to doubt its fairness." ECF No. 8 at 2.

Entry of the stipulated State Injunction Order is also warranted. The Court has already approved and entered a substantially similar stipulated injunction order in *F.T.C. v. Cephalon, Inc.*, No. 08-2141 (E.D. Pa.) (Revised FTC Injunction). Entry of the State Injunction Order is needed to enable California to secure compliance records and consult with the FTC in the compliance determination process.

California therefore respectfully requests that the Court grant final approval of the Consumer Settlement and Distribution Plan as well as enter the State Injunction Order by entering the proposed Order Granting Plaintiff State of California's Motion for Final Approval of the Consumer Settlement and Entry of the Stipulated State Injunction Order submitted herewith.

II. BACKGROUND

A. California's Antitrust and Consumer Protection Claims Against Teva

The Settlement Complaint alleges actions were taken by Teva Pharmaceutical Industries Ltd. and its wholly-owned subsidiaries Cephalon, Inc. ("Cephalon"), Teva Pharmaceuticals USA, Inc. ("Teva USA"), and Barr Pharmaceuticals, Inc. ("Barr") to delay the launch of generic alternatives to the blockbuster wakefulness drug Provigil® in order to protect monopoly profits on Provigil® during the Relevant Period. ECF No. 1. Provigil® is widely prescribed for the

treatment of narcolepsy and other sleep disorders. *Id.* The Settlement Complaint alleges monopoly profits from the drug initially flowed solely to Cephalon after the company fraudulently obtained a patent for Provigil® in the 1990s and thereafter introduced the drug as its own to the US market. *Id.* By 2011, sales of Provigil® exceeded $1 billion and accounted for more than half of Cephalon's consolidated net sales. *Id.* The Settlement Complaint alleges that Cephalon fended off generic competition with sham patent infringement suits against generic drug manufacturers that sought to enter the market, but later settled the suits paying its competitors more than $200 million in exchange for agreements to delay generic competition to Provigil®. *Id.* Teva and its subsidiary Teva USA as well as Barr were among the five generic drug manufacturers that received settlement payments from Cephalon. *Id.* They all consolidated following Teva's acquisition of Barr in 2008 and Cephalon in 2011. *Id.* The Settlement Complaint alleges that generic competition to Provigil® was unlawfully delayed from June 24, 2006 through December 31, 2012, causing harm not just to California and its consumers, but also to the US at large. *Id.*

B. California's Non-Public Investigation from 2009 to 2019 Concerning Teva's Alleged Anticompetitive Behavior to Thwart Generic Competition to Provigil® in Violation of Federal and State Antitrust and Consumer Protection Laws

The Global Settlement reached between California and Teva comes on the heels of ten years of investigation by California of the pay-for-delay allegations against Teva, which investigation had to be kept confidential pursuant to California Government Code Section 11183. California began investigating these allegations in 2009 with four other states (the "Multistate Group"). ECF No. 2-3 at 2. Thereafter, the group entered into a tolling agreement with Teva and expanded the investigation to reflect the public interest concerns and enforcement efforts of antitrust lawyers from the Offices of the Attorneys General from over 45 states (the "Multistate Investigation"). *Id.* By mid-2015, the Multistate Group had subpoenaed and synthesized certain key documents as well as expert reports from the actions filed by FTC and private litigants from

2006 to 2008 to challenge the settlement agreements at issue, to wit, *F.T.C. v. Cephalon, Inc.*, No. 08-2141 (E.D. Pa.) ("FTC Action"), *King Drug Co., et al. v. Cephalon, Inc., et al.*, No 06-1797 (E.D. Pa.) ("DPP Case"), *Vista Healthplan, Inc., et al. v. Cephalon, Inc.*, et al., No. 06-1833 (E.D. Pa.) ("EPP Case"), and *Apotex, Inc. v. Cephalon, Inc., et al.*, No. 06-2768 (E.D. Pa.) ("*Apotex* Case"). *Id.* In each of these actions, highly experienced antitrust and patent attorneys from the FTC as well as from highly regarded private law firms, all with expertise in pay-for-delay litigation, had spent more than seven years conducting exhaustive discovery, shepherding the submissions of expert reports and rebuttal reports, filing and litigating motions, as well as preparing trial brief and exhibits. *Id.*; *see also* Pham Decl., ¶ 3, Exh. 1, EPP Final Approval Motion at 5-8.

Armed with this information, the Multistate Group began settlement negotiations with Teva that culminated in the settlement of the Multistate Investigation in 2015 (the "Multistate Settlement"). ECF No. 2-3 at 2-3. Final approval of the Multistate Settlement was granted by this Court in 2017. *See* Pham Decl., ¶ 3, Exh. 4, Multistate Final Approval Order.

The Multistate Settlement covers the claims of 48 states and resulted in monetary payment of $125 million from the FTC Settlement Fund to the Multistate Group. ECF No. 2-3 at 2-3. California declined to join the Multistate Settlement because the allocation to California and its consumers was lower than what California believed that it should seek, and because the settlement provided no injunctive relief to facilitate state enforcement efforts against future pay-for-delay agreements. *Id*.

After withdrawing from the Multistate Group in 2016, California resumed the investigation on its own and reached settlement with Teva in 2019. *Id.* at 3-4. Between 2016 and 2019, California's team of antitrust attorneys, senior legal analysts, and law student interns conducted further investigation and discovery of the facts and laws that supported this Court's grant of final approval in 2017 of both the DPP's settlement and the Multistate Group's settlement with Teva. *Id*. California's team also subpoenaed and evaluated the records in the FTC Action, DPP Case, EPP Case, and *Apotex* Case to the extent such records were not covered by the Multistate

Group's subpoenas. *Id*. The materials subpoenaed by California from these four cases provided a highly synthesized overview of the facts and law relating to Teva's conduct in extending the monopoly of Provigil® and thwarting generic competition. *Id*. They were further synthesized by California's team to support each and every negotiation between California's lead counsel and Teva's attorneys throughout 2016 to 2019. *Id*.

C. Arms-Length Settlement Negotiations with Teva's Counsel

Negotiations between California and Teva's counsel were robust from beginning to end, especially given both sides' firm command of the antitrust laws, specialized expertise in pay-for-delay matters, as well as intimate knowledge of the facts and legal nuances in the matter at hand. *Id.* at 4-6. Indeed, in granting preliminary approval, the Court found that "the Settlement was the result of arms-length negotiations by counsel highly experienced in antitrust litigation, including pay-for-delay litigation, after extensive discovery and fact-finding." ECF No. 8 at 2.

III. SUMMARY OF THE GLOBAL SETTLEMENT BETWEEN CALIFORNIA AND TEVA

A. The State Attorney General's Constitutional and *Parens Patriae* Authority to Enter into the Underlying Global Settlement with Teva

As the State's "chief law officer," the State Attorney General has the sole discretion to settle the underlying action on behalf of the State pursuant to the State's sovereign and proprietary authorities, and on behalf of the State's "natural persons" injured by the alleged conduct pursuant to the State's quasi-sovereign *parens patriae* authority. *See* Cal. Const. art. V, § 13; Cal. Bus. & Prof. Code § 16760(a)(1) ("The Attorney General may bring a civil action…as *parens patriae* on behalf of natural persons residing in the state…to secure monetary relief" for injuries caused by state antitrust law violations). In exercising the State's sovereign authority in this action, the State Attorney General is also authorized to allocate and divide the settlement funds among the various Released Claims and considerations underlying the settlement as the State sees fit. *Id.* Only the portion of the Global Settlement that seeks to release *parens patriae*

claims is subject to court approval and open to input by the "natural persons" to whom those claims belong. *Id.*

B. Settlement Terms

The Global Settlement reached between California and Teva provides for the following:

1. Monetary Relief Pending Court Approval of the *Parens Patriae* Portion: Pursuant to the Global Settlement Agreement, Teva agreed to request disbursement from the FTC Settlement Fund to the State and its Eligible Consumers the sum total of $69,000,000 (Settlement Payment), acknowledging the State's sovereign right to allocate and divide the funds between the Consumer Fund and the State Proprietary Fund as the State sees fit. ECF No. 2-3 at 16-22. The Settlement Payment has been received in full and is currently held in escrow awaiting the Court's final approval and disbursement order. Pham Decl., ¶ 5. Pursuant to the Settlement Agreement, the State has allocated $25,250,000 (36.6% of the Settlement Payment) to the Consumer Settlement and directed its deposit into the escrow account designated as the Consumer Fund. *Id.* at ¶ 6. The remaining $43,750,000 (63.4% of the Settlement Payment) has been deposited into the State Proprietary Fund and currently held in escrow as well. ECF No. 2-3 at 16-22; Pham Decl., ¶ 6.

2. Injunctive Relief Through February 21, 2029 Pending Court Entry: In addition to the Settlement Payment, Teva agreed to be bound by the stipulated State Injunction Order, which adopts and incorporates all of the operative terms of the Revised FTC Injunction entered by this Court on February 21, 2019, in the FTC's Action against Teva. ECF No. 2-3 at 22-24. Teva agreed that as part of this injunctive relief, California would receive the same reports, documents, agreements and information that the FTC received under its parallel injunction, as well as the rights to participate in any inspections or interviews pursued by the FTC under the Revised FTC Injunction and may consult with the FTC on enforcement of the Revised FTC Injunction. *Id.* Teva further agreed to "comply with the State Injunction Order pending its entry by the Court per the terms of this Settlement Agreement." *Id.* at 26.

Since court approval is required as to the Consumer Settlement, the Parties agreed that the Effective Date of the entire Settlement Agreement would key off of the finality of the Consumer Settlement. ECF No. 2-3 at 12 and 25-26. Both the Consumer Fund and the State Proprietary Fund will remain in escrow until then. *Id.* at 21-22. But in the interim, the Escrow Agent is authorized to use the proceeds in the discretionary State Proprietary Fund to pay the settlement administration costs, expenses, and fees incurred in the approval process. *Id.* at 95-102.

IV. THE CONSUMER SETTLEMENT OBTAINED UNDER *PARENS PATRIAE*

A. Consumer Compensation in Exchange for Release of Claims

The Consumer Settlement ultimately seeks to release and dismiss with prejudice all claims asserted in the Settlement Complaint under California's *parens patriae* authority on behalf of the unnamed group of Eligible Consumers who purchased the Relevant Products during the Relevant Period. *Id.* at 14-16 and 24-26. The Consumer Fund was established by the Parties for the purpose of compensating Eligible Consumers should the Court so permit. *Id.* at 18-19, 21-22, and 105-107. The Consumer Fund began with a deposit of $25.25 million and has since been accruing interests at the rate of about $19,000 per month. Pham Decl., ¶ 7.

Upon final approval of the Consumer Settlement and its Distribution Plan, the Consumer Fund and all accrued interests will be used to compensate Eligible Consumers first through direct cash payments of claims from Eligible Consumers that have been vetted for legitimacy, and thereafter through *cy pres* distribution of any portion that remains unclaimed. ECF No. 2-3 at 105-107. To incentivize and maximize submission of claims by potential Eligible Consumers, neither proof of purchase nor out-of-pocket expense is required under the proposed Distribution Plan. *Id.* Rather, each claimant is simply required to state under oath that each claimed purchase was made during the Relevant Period for personal use or by the claimant as a caregiver, and that the claimant was a California resident at the time of purchase. ECF No. 2-4 at 13-15.

While direct compensation is the preference here, the State is mindful that since these relevant products are deemed "controlled substances," perhaps not all Eligible Consumers will

come forward to claim their share of the Consumer Settlement. Pham Decl., ¶ 10. By distributing any unclaimed funds to *cy pres* recipients, the State is ensuring that the Consumer Settlement is put to its next best use and benefits the *parens patriae* group at large, not only those who submitted claims. *Id.* at ¶¶ 8-13.

B. Reasonable Estimate of the Direct and *Cy Pres* Distribution Amounts

January 15, 2020, was the last day for California's Eligible Consumers to submit claims to the Consumer Settlement in order to receive a direct cash payment from the Consumer Fund. CA PAO at 4. A.B. Data is presently processing and vetting these claims for legitimacy by, among other things, reviewing claims for indicia of invalidity. Declaration of Eric Miller ("Miller Decl."), ¶¶ 23-24. While review and processing of these claims is ongoing, there have been at least 8,435 timely claims made to the Consumer Settlement, though at least 996 of those claims warrant further scrutiny and possible rejection because they seek compensation for an implausible number of prescriptions. *Id*. at ¶ 23.

Based on the presently estimated number of claims, rejecting those that are implausible and paying the remainder would yield an estimated total distribution of $8,496,798.42 to 7,489 claimants and a residue of $16,753,201.58. The residue would be distributed *cy pres* to promote the interests of those California Eligible Consumers who either could not or chose not to file a claim for direct payment. Pham Decl., ¶¶ 7-13. California anticipates that it will be able to provide a more precise estimate of the direct and *cy pres* distribution amounts in its supplemental briefing on February 14, 2020, by which time A.B. Data plans to complete the initial review of claims and identify deficient or potentially invalid claims.[4] Miller Decl., ¶ 24.

[4] A.B. Data will thereafter notify such claimants of the deficiencies or other conditions of ineligibility in their claims and afford them an opportunity to object to A.B. Data's determination or to provide additional information necessary to remedy the deficiency or condition of ineligibility. Miller Decl., ¶ 24.

V. THE PROPOSED CONSUMER SETTLEMENT AND DISTRIBUTION PLAN BOTH MEET THIRD CIRCUIT STANDARDS FOR FINAL APPROVAL

A. Standard for Approval

The proposed Consumer Settlement and Distribution Plan are governed by the State's *Parens Patriae* statute, under which *parens patriae* actions brought on behalf of California natural persons "shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in any manner as the court directs." *See* Cal Bus. & Prof. Code § 16760(c). But since the Statute does not specify the standard for evaluating adequacy of notice or approval of settlement, courts have generally looked to the class action standards for guidance on both, while deferring to the settling State's views on fairness, adequacy, and reasonableness of its settlement because *parens patriae* actions and their settlement are solely motivated by concern for the public interest. *See, e.g., In re Compact Disc Minimum Advertised Price Litig.*, 216 F.R.D. 197, 212 (D.Me. 2003) ("[T]ake note of the fact that 43 State Attorneys General, by virtue of their office assigned to defend the best interest of their respective citizens, have endorsed the fairness, reasonableness and adequacy of the proposed settlement.").

B. The Best Practicable Notice Has Been Provided to California's Eligible Consumers Leading to the Submission of At Least 8,435 Timely Claims for Direct Payment and Two Objections, But No Opt-Outs or Any Notices to Appear at the Fairness Hearing.

The best notice that is practicable under the circumstances has been provided to the target group in accordance with the Court's Preliminary Approval Order. While notice could have been "given by publication" alone, Cal Bus. & Prof. Code § 16760(b)(1), the Notice Program that the Court ultimately ordered herein goes beyond the use of publication in order to reach Eligible Consumers currently living within as well as outside the State's borders. ECF No. 8 at 2; *see also* ECF No. 2-4; ECF No. 2-5. Accordingly, notice to the target group was first effectuated as part of the Joint Notice Program recommended by the State and the End-Payor Plaintiffs ("EPPs") and adopted by the Court, and additionally through the State's standalone

efforts as well. Miller Decl, ¶¶ 2-3; *see also* Pham Decl., ¶¶ 3 and 14-17, Exh. 1, EPP Final Approval Motion at 11-15, and Exh. 2, EPP Preliminary Approval Order at 7.

Altogether, notice of the Consumer Settlement was provided to the target group as follows:

a. By direct notice via United States Mail to over one million potential Eligible Consumers and Class Members identified through subpoenas issued by EPPs' Lead Counsel in accordance with the EPP Preliminary Approval Order to 25 providers of retail pharmacy services and pharmacy benefits managers, including mail-order pharmacies. Approximately 160,311 (20%) of those direct notices were mailed to California addresses;

b. By direct notice via United States Mail to 42,793 consumer names and addresses that were identified in the Multistate Action who may be potential Eligible Consumers and Class Members;

c. By publication notice in national consumer magazines: *Better Homes and Gardens, People, and Time*;

d. By publication notice of the Consumer Settlement in two Sunday editions in forty-two (42) California newspapers;

e. By internet banner and newsfeed ads on multiple networks, including social media and targeted websites such as Facebook, Google Networks, Google AdWords, YouTube, and Pinterest;

f. By distributing notice via PR Newswire's US1 Newsline on September 4, 2019;

g. By distributing notice of the Consumer Settlement via California Newswire and the California Hispanic Newswire on September 4, 2019;

h. By developing and launching a dedicated informational website for the Consumer Settlement and EPP Settlement at ProvigilSettlement.com (the "Settlement Website"); and

i. By establishing a dedicated toll-free telephone number with an interactive voice response ("IVR") system and live operators. Miller Decl., ¶¶ 6-17.

j. In addition, the Office of the California Attorney General ("AG") provided additional notice to potential Eligible Consumers through the AG's press conference and press releases concerning both settlements. The press conference was recorded and then made available thereafter via the AG's media library (https://oag.ca.gov/media/library) and on YouTube (https://www.youtube.com/watch?v=rNNDwWcZEjo). The press release regarding the Consumer Settlement as well as updated information regarding the

> settlement and Settlement Website can be found at https://oag.ca.gov/news/press-releases/attorney-general-becerra-secures-nearly-70-million-against-several-drug and https://oag.ca.gov/antitrust/provigilsettlement. Pham Decl., ¶ 15.

Thus, as directed by the Court pursuant to the *Parens Patriae* Statute, the target group has been adequately apprised of their individualized rights to opt out of the Consumer Settlement and forfeit all rights to file a claim and object to the settlement, or to do nothing and thereby remain in the settlement in order to file a claim as well as object to its terms either in writing or in court at the Fairness Hearing. ECF No. 2-5 at 124-138. The target group also has been adequately apprised by notice that upon final approval, those who remain in the settlement will be bound by the release of their claims pursuant to the State's *parens patriae* authority. *Id.*

To date, the State has received only two objections to the settlement, though one of the two lacks the required attestation of California residency for standing to object. *See* Pham Decl., ¶ 16, Exhs. 5 and 6. There are no opt-outs or appearance notices. *Id.* at ¶ 17; Miller Decl., ¶ 20.

C. The Consumer Settlement Obtained Under *Parens Patriae* Authority Satisfies Third Circuit Standards for Final Approval

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh*, 521 F.2d at 157. Inasmuch as California's *Parens Patriae* Statute does not specify the standard that courts should use in approving a *parens patriae* settlement, courts have looked to the class action standards in evaluating a *parens patriae* settlement but with deference for a State's views on fairness, reasonableness and adequacy of its *parens patriae* settlement. See *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) ("[T]he Court may place greater weight on such opinion in addressing a settlement negotiated by government attorneys committed to protecting the public interest."); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.Supp. 1379, 1384-1386 (D.Md. 1983) (same); *In re Toys 'R' Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y.2000) ("The participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected."); *accord New York v. Reebok Int'l. Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (Attorneys General in *parens actions* are motivated by concern for the public interest). To the extent the factors and

considerations as applied under the Third Circuit framework to a class action settlement also would apply to a *parens patriae* settlement, they all weigh in favor of final approval here.

1. The Settlement is Presumptively Fair

It was determined during the preliminary approval phase that the State's Consumer Settlement is entitled to a presumption of fairness on the grounds that (1) the negotiations occurred at arm's-length; (2) there was sufficient discovery; and (3) the Parties are experienced in similar litigation.[5] ECF No. 8 at 2. Specifically, the Court found "the Settlement was the result of arms-length negotiations by counsel highly experienced in antitrust litigation, including pay-for-delay litigation, after extensive discovery and fact-finding"; that "[t]here are no grounds to doubt its fairness or other obvious deficiencies, and it appears to fall within the range of settlements subject to possible approval"; and that "[t]he Settlement will likely be found fair, reasonable, and adequate after a fairness hearing." *Id*.

These facts remain unchanged (Pham Decl., ¶ 3), as is the underlying judicial policy in favor of "an agreement to resolve a hard-fought, multi-year litigation" of antitrust actions which "are arguably the most complex action to prosecute." *See In re Comcast Corp. Set-Top Cable TV Box Antitrust Litig.*, 2019 WL 4645331 at *5, *10 (E.D. Pa. Sept. 24, 2019). Moreover, there appears to be overwhelming support for the State's Consumer Settlement by its Eligible Consumers. In fact, following months of intensive and extensive notice to California's Eligible Consumers currently living within and outside California, only two objections have been made to the settlement. Miller Decl., ¶ 22; Pham Decl., ¶ 16, Exhs. 5 and 6. But one of the objectors appears as a New Mexico resident without claim to any residency status in California during the Relevant Period, and thus lacks standing to object. *See* Pham Decl., ¶ 16, Exh. 6.

Final approval of the settlement is therefore warranted at this time.

[5] See *In re Google*, 934 F.3d at 326.

2. The *Girsh* Factors Also Support Approval of this Settlement

In the context of a class settlement, *Girsh* requires consideration of the following factors in assessing whether the proposed settlement merits approval: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risk of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[6] These factors all weigh in favor of approval of the State's Consumer Settlement, though the sixth factor has no application to *parens patriae* actions. *See* ECF No. 2-2 at 12-15.

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

"This factor 'captures the probable costs, in both time and money, of continued litigation.'" *In re Comcast,* 2019 WL 4645331, at *12 (*quoting In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231 (D.Del. 2002) *aff'd*, 391 F.3d 516, 535-36 (3d Cir. 2004). It is well recognized that antitrust cases are particularly complex making them among the lengthiest and most expensive to prosecute. *See id.* (*citing In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008); *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)). The State would submit that this antitrust action, which pits patent and antitrust laws and principles against each other, is among the most complex of those cases.

Indeed, it took the combined efforts of the FTC, the DPPs, the EPPs, the *Apotex* Plaintiffs, as well as the Multistate Group comprising state antitrust enforcers from Offices of the Attorneys General from nearly every state in the nation, including the California Attorney General, to prosecute the anticompetitive conduct alleged against Teva to the instant resolution.

[6] 521 F.2d at 157.

ECF No. 2-3 at 2-4. And while it has taken nearly twelve years and millions in investigation and litigation costs, expenses, and fees to arrive here, there are still unresolved related issues. Apart from that, the instant settlement reached between the State of California and Teva in 2019 might not have been reached at all had the State not maintained its active investigative pursuit of the pay-for-delay allegations against Teva for nearly a decade. *Id.* Ultimately, the assessments of other plaintiffs in support of settlement ring true for California as well. Continued prosecution of the State's federal and state antitrust and consumer protection law claims would have necessarily required the State to file suit leading to the re-litigation of the factual and legal issues already raised and resolved in the other actions, and ultimately, would have required a substantial trial of the action, preceded by complicated and time consuming pretrial proceedings addressing, *inter alia*, *Daubert* and *in limine* motions. Pham Decl., ¶¶ 3-4. The trial itself would likely span weeks, involving not only fact witnesses but also the expensive presentation of many experts, thereby massively increasing the fees, costs, and expenses already incurred by the State without providing the same level of certainty that the instant compromise provides. *Id.* This *Girsh* factor therefore weighs heavily in favor of granting final approval.

b. California Eligible Consumers' Reaction to the Settlement

The second *Girsh* factor also weighs heavily in favor of approval. This factor "attempts to gauge whether members of the class support the settlement." *Prudential*, 148 F.3d at 318. Here, at least 8,435 timely claims have been received, with only two objections and no request to opt out. Miller Decl., ¶¶ 19-21. These numbers reflect overwhelmingly strong support for the Consumer Settlement and are consistent with Third Circuit precedent approving settlements. *See, e.g., Prudential,* 148 F.3d at 318 (concluding that the reaction of the class was favorable when 19,000 out of 8 million class members opted out and 300 objected); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-110 (3d Cir. 1990) (holding that only 29 objections in a 281-member class – or 10% – "strongly favors settlement"); *In re Processed Egg Prods. Antitrust*

Litig., 284 F.R.D. 249, 269 (E.D. Pa. 2012) (holding that 150 requests for exclusion were "virtually *di minimis* in light of the over 13,200 notices of settlement that were sent").

c. Stage of the Proceedings and Amount of Discovery Completed

"The third *Girsh* factor captures the degree of case development that [counsel had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Comcast*, 2019 WL 4645331, at *13 (*quoting In re Nat'l Football League Players Concussion Injury Litig. (NFL Concussion Litig.).*, 821 F.3d 410 (3d Cir. 2016)). This settlement is the result of a ten-year investigation by California, during which time, its antitrust team had subpoenaed and synthesized all relevant litigation records, pre-trial materials, as well as trial briefs in the four highly litigated actions, to wit, the FTC Action, the DPP Case, the EPP Case, as well as the *Apotex* Case. ECF No. 2-3 at 2-4. The State's antitrust team also subpoenaed and synthesized related information that may not have been considered in those matters before they were settled. *Id.*[7] Armed as such, the State engaged in several settlement negotiations with Teva's counsel, both in conjunction with the Multistate Group's negotiations as well as on its own, and even rejected several settlement offers that the State believed to be insufficient, all in order to arrive at the present settlement before the Court. *Id.* Accordingly, the third *Girsch* factor also supports final approval of the settlement herein.

d. Risks of Establishing Liability and Proving Damages

"The fourth and fifth *Girsh* factors survey the possible risks of litigation to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *NFL Concussion Litig.*, 821 F.3d at 438-39. (*quoting Prudential*, 148 F.3d at 319). The legal theories pursued by California against Teva for its

[7] In maintaining its pursuit of the allegations against Teva as a non-public government investigation, the State was able to resolve its investigation without facing the risks and exorbitant expenses of litigating the same. See *Prudential*, 148 F.3d at 319 (lauding the use of "informal discovery" to develop a case as just as effective as formal discovery).

alleged anticompetitive behavior, as described in the Settlement Complaint, are complex and involve issues that are unsettled. While California is confident in its case, it recognizes that establishing liability and proving causation, damages and remedies in the context of a full-blown litigation heading toward trial involves some uncertainty.

As to liability, while agreements settling patent litigation betwe-en branded and generic drug companies that contain payments for delayed entry may violate federal and state antitrust laws per *F.T.C. v. Actavis*, 570 U.S. 756 (2013), and *In re Cipro Cases I & II*, 61 Cal.4th 116 (2015), some lower courts have had difficulties determining when such agreements are unlawful or harmful. *See, e.g., In re Nexium Antitrust Litig.*, 309 FRD 107 (D. Mass 2015)*; In re Loestrin 24 Fe Antitrust Litig*., 814 F.3d 538 (1st Cir. 2016); *King Drug Co. of Florence Inc. v. SmithKline Beecham Corp*., 791 F.3d 388 (3d Cir. 2015).

Proving remedies and damages in a pay-for-deday matter is an equally difficult and uncertain undertaking. To do so, California would have to estimate what its state agencies and consumers would have paid had the Teva defendants *not* alledgedly unlawfully delayed generic competition to Provigil® throughout the Relevant Period beginning back in 2006. As observed by the Multistate Group, various factors complicate this equation:

> Because generic drug prices depend on the number of generics on the market, a robust, accurate damages calculation would have to account for a variety of factors, possibly including: (a) how many generic drug manufacturers would launch "at risk" (*i.e*. prior to expiration of the Provigil patent); (b) when each generic would launch; (c) whether a generic that launched at risk would ultimately succeed in defending the patent infringement case (either by proving invalidity or non-infringement); (d) generic and branded drug pricing in the "but for" world; and (e) how many branded and generic purchases would be made by state entities and consumers. While this could certainly be done by expert analysis and testimony, it would be an estimate, uncertain and subject to challenge.

See Pham Decl., ¶ 3, Exh. 3, Multistate Final Approval Motion at 18-19.

The instant settlement provides meaningful relief to the thousands of California Eligible Consumers all the while buttressing all of the aforementioned risks. The fourth and fifth *Girsch* factors therefore weigh heavily in favor of approval.

e. Ability of Defendants to Withstand a Greater Judgment

This *Girsh* factor is neutral here and would not prevent approval. As observed by the Multistate Group, even if the Teva defendants could pay more to the States, it is not clear that they would agree to pay (or be found liable for) a higher amount given the complex legal theories, ability to challenge damages or remedies calculations, numerous potential defenses they could assert, and the numerous private litigations involving similar theories. *Id.* at 19. In these circumstances, it would be appropriate for a district court to conclude that this factor neither favors nor disfavors settlement. *See Warfarin*, 391 F.3d at 538; *see also In re Comcast*, 2019 WL 4645331, at *15 (even where a defendants' ability to withstand a greater judgment is conceded that fact does not undermine the reasonableness of a settlement where the defendant never professed an inability to pay during settlement negotiations); *accord Lazy Oil Co. v. Wotco Corp.*, 95 F. Supp. 2d 290, 318 (W.D. Pa. 1997), *aff'd Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999)

f. Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation

The final two *Girsh* factors are typically considered together to determine "whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Prudential*, 148 F.3d at 322; *see also Warfarin*, 391 F.3d at 538. As part of this determination, courts typically ask "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Id.* But in so doing, a court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re Nat'l Student Mktg. Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974). *See also Lazy Oil*, 95 F. Supp. 2d 290 at 338-339 (a court "should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and abandoning of highest hopes.")

The State's proposed Consumer Settlement is indeed within the range of reasonableness given the legal complexities and difficulties estimating harm and damages unique to pay-for-delay matters, and the certainty of an enormous increase in litigation risks, fees, expenses, and costs if the action were to be tried while the certainty of a win is not something that any antitrust attorney seasoned in these kinds of pay-for-delay litigation could guarantee. Pham Decl., ¶¶ 3-4. Indeed, in comparison to other similar settlements, the ten-year injunction provides California with a tool to also protect consumers from the harms of the alleged anticompetitive conduct going forward.

3. The *Prudential* Considerations and *Baby Products* "Direct Benefit" Analysis Support Approval of this Settlement

The relevant *Prudential* and *Baby Products* considerations all weigh in favor of approval of the Consumer Settlement. Under the Third Circuit framework for assessing a proposed class action settlement, a district court must also "apply[] the *Prudential* factors where applicable; and …consider[] 'the degree of direct benefit provided to the class'…." *In Re Google*, 934 F. 3d at 329. The following *Prudential* factors are permissive and non-exhaustive and often overlap with the *Girsh* factors, and need only be considered "when appropriate":

> [1] the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved — or likely to be achieved — for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential, 148 F.3d at 322. As to settlements involving the *cy pres* distribution of any unclaimed funds, courts are "to consider the degree of direct benefit provided to the class" and in doing so, may consider: "the number of individual awards compared to both the number of

claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards." *Baby Prods.*, 708 F.3d at 174.

As reflected in the court records of the FTC Action, the DPP Case, the EPP Case, the *Apotex* Case, and the Multistate Action, the "maturity" of the factual and legal allegations is beyond dispute having been litigated in several actions before this Court for over a decade. Second, as to the second and third *Prudential* factors, the State's Consumer Settlement obtained on behalf of California's Eligible Consumer is cumulative of the portion of the EPPs' class action settlement that also applies to California's Eligible Consumers. *See United States v. Borden* (1954) 347 U.S. 514, 518 ("These private and public actions were designed to be cumulative, not mutually exclusive. . . . Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other."). Third, California's Eligible Consumers have been afforded the right to be excluded, and all have chosen to remain in the settlement. Miller Decl., ¶¶ 19-20. Fourth, a simple procedure for processing claims which is both fair and reasonable has been established by A.B. Data. Miller Decl., ¶ 24.[8]

As to the degree of direct benefit provided to the class, the inquiry should focus on what the settlement actually delivers to class members, specifically: whether claimants are fully compensated for their losses and whether the claims process results in actual distribution of the settlement funds to class members. *See Baby Prods.*, 708 F.3d at 174–75; *Cf. Harlan v. Transworld Sys., Inc.*, No. 13-5882, 2015 WL 505400, at *10, *12 (E.D. Pa. Feb. 6, 2015) (granting final approval of settlement that provided for *cy pres* distribution of residual funds to "financial education programs for low-income individuals" because award furthered objectives of underlying statute and litigation and matched geographic scope of lawsuit); *Kopchak v. United Res. Sys.*, No. CV 13-5884, 2016 WL 4138633, at *5, *9 (E.D. Pa. Jan. 4, 2017) (J.

[8] The fifth *Prudential* factor is irrelevant here because the State's attorney's fees, costs, and expenses will not be paid from the Consumer Settlement. *See* ECF No. 2-3 at 21-22 and 95-102; *see also* Pham Decl., ¶ 8.

Goldberg) (granting final approval of settlement agreement providing for cy pres distribution of residual funds). Here, the Distribution Plan ensures that all of the proceeds from the State's Consumer Settlement will be distributed to California's Eligible Consumers first through direct cash payments to vetted claimants. The lower the claims rate, the higher the percentage recovery per prescription each claimant will receive. ECF No. 2-3 at 105-107. Only after a maximum recovery of 200% per claimed prescription and following a lengthy, competitive, and transparent grant-making process overseen by a neutral third-party administrator, will any residue be distributed to *cy pres* recipients. *See id.*; Declaration of Harry Snyder ("Snyder Decl."), ¶¶ 9-10. This promotes the interests of those California Eligible Consumers who could not or did not submit a claim for direct payment, thereby ensuring that the Consumer Settlement benefits the *parens patriae* group at large. Pham Decl., ¶¶ 8-13.

4. The Proposed Distribution Plan Should Also Be Approved for the Reasons Stated Herein

In addition to final approval of the Consumer Settlement, the Court should also approve the State's proposed Distribution Plan, which sets forth how the claims of California's Eligible Consumers will be reviewed and processed, and how the Consumer Fund will be allocated and disbursed. *See* ECF No. 2-3 at 105-107. "Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to the approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Melhing v. N.Y. Life Ins. Co.*, 248 F.R.D. 455, 463 (E.D. Pa. 2008). "In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable." *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 752 (E.D. Pa. 2013) (quoting *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000)). The distribution of any remaining funds to *cy pres* recipients is similarly reasonable where, as here, the claimants will be receiving their full share of the settlement but "class members cannot be located, decline to file claims, have died, or the parties have overestimated the amount projected for distribution." *In re Google*, 934 F.3d at 326-327 (quoting *Baby* Prods., 708 F.3d at 169). Under such

circumstances, *cy pres* distributions are to be preferred over reversion to the defendant or escheating to the state, neither of which effectively preserves the deterrent effect or benefits those specifically harmed by the defendant's conduct. *Baby Prods.*, 708 F. 3d at 172. "In determining whether a Plan of Allocation is fair, reasonable, and adequate, courts give great weight to the opinion of qualified counsel." *In re Schering-Plough Corp*., 2012 WL 1964451, at *6 (D.N.J. May 31, 2012).

The State's proposed allocation of the Consumer Fund satisfies these standards. Currently, approximately $25,326,207.25 is available for distribution from the Consumer Fund. Pham Decl., ¶ 7. As discussed in section IV.B. above, based on the currently available figures, rejection of apparently facially invalid claims (*i.e.* claims for an implausible number of prescriptions) and payment of the rest would result in an approximate distribution of $8,496,798.42 directly to consumers and a residue of approximately $16,753,201.58 to be distributed *cy pres*.[9] *Id.* at ¶ 11. As to the proposed actual distribution of the Consumer Fund, claimants will be reimbursed solely based on the number of prescriptions pursuant to which the claimant purchased the Relevant Products so long as the reported purchases were made during the Relevant Period for the claimant's personal use or as a caregiver to another, and while the claimant was a resident of California. ECF No. 2-3 at 105-107. Further, the plan clearly explains the valuation of each reported prescription as follows:

> [I]f the proportion of Total California Prescriptions submitted for claims (the "Claims Rate") is 20% or less, each California Claimant shall be entitled to receive 200% of his or her Recoveries Per Prescription, or $42.68 per prescription. If the Claims Rate is between 20% and 40%, each California Claimant shall be entitled to receive 150% of his or her Recoveries Per Prescription, or $32.01. If the Claims Rate is 40% or greater, each California Claimant shall receive 100% of his or her Recoveries Per Prescription.

[9] As also noted in section IV.B, California anticipates that it will be able to provide a more precise reasonable estimate of direct and *cy pres* distribution in supplemental briefing on February 14th, after A.B. Data has had sufficient time to complete a full review of claims and identify deficient or potentially invalid claims.

Id. As to any unclaimed portion of the Consumer Fund, the plan proposes to distribute these funds *cy pres* to public interest organizations following a competitive grant-making process. *Id.* This process is described in detail in the declaration of Harry Snyder, whom the state has engaged as a neutral third-party administrator to oversee this process. Snyder Decl., ¶¶ 8-10. Distribution of the residue in this manner ensures that claimants are not overcompensated at the expense of non-claimants and that the funds are put to their next best use. *Id.* at ¶ 13.

The State therefore urges the Court to grant final approval of its Consumer Settlement and Distribution Plan so that California's Eligible Consumers can be compensated without delay.

VI. ENTRY OF THE STATE INJUNCTION ORDER IS WARRANTED AND NECESSARY

Entry of the stipulated State Injunction Order is also appropriate here as the Court has already approved and entered a substantially similar stipulated injunction order in the FTC Case on February 21, 2019 ("Revised FTC Injunction"). By adopting and incorporating into the State Injunction Order all of the operative terms and related definitions set forth in the Revised FTC Injunction, the Parties intend to put California on similar footing with the FTC in determining Teva's compliance, as well as to facilitate California and the FTC's consultation and coordination of the compliance determination process. Since Teva has not entered a similar injunction with any other state, this Court's entry of the instant State Injunction Order is vital to the State's efforts to protect consumers from the alleged harms flowing from the alleged anticompetitive conduct.

VII. CONCLUSION

For the foregoing reasons, California respectfully requests that the Court enter the proposed Order Granting Plaintiff State of California's Motion for Final Approval of the Consumer Settlement and Entry of the Stipulated State Injunction Order submitted herewith.

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