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** 19 2981 **Case No.** _____

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND PROPOSED CONSUMER NOTICE AND DISTRIBUTION PLAN

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I. INTRODUCTION

Plaintiff State of California ("California") respectfully requests preliminary approval of a proposed settlement with Teva Pharmaceutical Industries Ltd, Cephalon, Inc., Barr Laboratories, Inc., and Teva Pharmaceuticals USA, Inc. (collectively, "Teva"). After ten years of investigation, both in conjunction with other states and on its own, extensive and voluminous discovery, and lengthy negotiations, California has agreed to a settlement with Teva ("Settlement"). If finally approved, the Settlement will resolve and release California's federal and state antitrust and consumer protection law claims that Teva unlawfully delayed generic competition for the wakefulness drug Provigil® and damaged the State of California and consumers in California, in exchange for the payment of $69 million and injunctive relief. California bases its claims on allegations, catalogued in detail in California's accompanying Complaint, that Cephalon, the branded manufacturer of Provigil®, entered into collusive "pay-for-delay" settlements of patent infringement suits with generic competitors under which Cephalon would pay the generic companies to stay off the market, delaying generic competition to Provigil for years and resulting in vast overcharges to purchasers of Provigil.

California asserts claims in its sovereign capacity, on behalf of state entities that purchased Provigil®, the substantially identical Nuvigil® and/or the generic version of Provigil® (modafinil), in its capacity as the chief law enforcement agency of California, and as *parens patriae* on behalf of natural persons in California who purchased Provigil®, Nuvigil® and/or modafinil. The Settlement releases those claims and provides recovery for Provigil®, Nuvigil®, and modafinil purchases made by natural persons residing in California between June 24, 2006 and December 31, 2012 (the "Relevant Period"). California submits that the Settlement[1]

[1] Defined terms in the Settlement have been capitalized in this Memorandum and have the same meaning as in the Settlement, unless otherwise defined herein. The Settlement is attached as Exhibit 1 to the accompanying Declaration of Cheryl Lee Johnson ("Johnson Decl.").

is presumptively fair and will likely be found fair, reasonable, and adequate at final approval such that the Court should grant preliminary approval and permit notice of the Settlement to Eligible Consumers,[2] giving them an opportunity to submit a claim, object to, or opt out of the Settlement. The Settlement includes a proposed plan under which Eligible Consumers may present claims for their purchases of Provigil®, Nuvigil® and/or modafinil, which plan California expects will merit final approval as fair, reasonable, and adequate. California has filed its Complaint in this district and seeks approval of the Settlement from this Court because its action arises from the same operative facts as in the action brought by the Federal Trade Commission and several other actions by states and private parties that were filed in this court.[3]

The California Attorney General is a representative of his state and has authority under state law to recover (1) for consumers; (2) for public purchasers; and (3) for the state, in the form of disgorgement, costs, and fees. Here, the Attorney General is providing consumer recovery and exercising authority to settle and release consumer claims pursuant to his *parens patriae* authority under California state law. For this case and as a matter of law and/or policy, California seeks court approval of its plan to distribute funds to consumers and the process by which that plan is explained to consumers..[4]

[2] "Eligible Consumers" means natural persons who resided in California and purchased Provigil®, Nuvigil, and/or modafinil during the Relevant Period.

[3] *Federal Trade Commission v. Cephalon, Inc.*, No. 08-2141 (E.D. Pa.) ("FTC Case"); *King Drug Co., et al. v. Cephalon, Inc., et al.*, No 06-1797 (E.D. Pa.) ("Direct Purchaser Class Case"); *Vista Healthplan, Inc., et al. v. Cephalon, Inc., et al*., No. 06-1833 (E.D. Pa.) ("End Payor Class Case"); *Apotex, Inc. v. Cephalon, Inc., et al.*, No. 06-2768 (E.D. Pa.); *Rite Aid Corp. v. Cephalon, Inc., et al.*, No. 09-3820 (E.D. Pa.); *Walgreen Co. v. Cephalon, Inc., et al.*, No. 09-3956 (E.D. Pa.); *Giant Eagle, Inc. v. Cephalon, Inc., et al*., No. I 0-5164 (E.D. Pa.); and *State of New York, et al. v. Cephalon, Inc., et al.*, No. 16-4234 (E.D. Pa.) ("Multistate Case")

[4] California consumers who are class members under the terms of the settlement in the End Payor Class Case may also recover settlement monies from that lawsuit. Nothing in the terms of the Settlement, including the terms describing released claims, affects any consumer's right to participate in or receive monies in that case.

II. THE SETTLEMENT

A. Monetary Payment, Distribution, and Injunctive Relief

The Settlement provides for a total cash payment (referred to as the "Settlement Payment") of $69,000,000, $25,250,000 of which will be made available for distribution to Eligible Consumers and possible *cy pres* distribution and $43,750,000 of which will be paid to the State of California. Johnson. Decl., ¶ 2, Exh. 1 at 8-9, 10-12.

1. Consumer Compensation

Under the Settlement, California will transfer $25,250,000 of the Settlement Payment into a Consumer Compensation Account. *Id*., Exh. 1 at 10. These funds, plus any interest earned and less any taxes earned on the interest, constitute the "Consumer Fund." *Id*., Exh. 1 at 11. Natural persons who resided in California and purchased Provigil, Nuvigil, and /or modafinil during the Relevant Period (when there was no or very little generic competition to Provigil as a result of the Teva's alleged anticompetitive acts), are deemed "Eligible Consumers" and are entitled to make claims on the Consumer Fund. *Id*., Exh. 1 at 13, Exh. 4 thereto at 1. Disbursements from this fund will be made pursuant to section IV.A. of the Settlement, according to the Distribution Plan which is Exhibit 4 to the Settlement and which is discussed in more detail in Section V.A below. *Id*., Exh. 1 at 13. After it is known how much of the Consumer Fund has been claimed by Claimants, any remaining funds will be distributed *cy pres* as described in the Distribution Plan and discussed in Section V.C. below. *Id*., Exh 1 at 13, Exh. 4 thereto at 2.

2. Compensation to California

The balance of the Settlement Payment, $43,750,000, is to be transferred to a State Compensation, Disgorgement, Costs, and Fees Account. *Id*., Exh. 1 at 11-12. These funds, plus any interest earned and less any taxes earned on the interest, constitute the "State Proprietary

Fund." *Id*., Exh. 1 at 12. Disbursements from this State Proprietary Fund will be made pursuant to section IV.B. of the Settlement. *Id*., Exh. 1 at 14. The funds in the State Proprietary Fund shall be used for: (i) civil penalties due to the Defendants' alleged anticompetitive conduct; (ii) deposit into California's antitrust or consumer protection account for use in accordance with the laws governing such account; (iii) antitrust or consumer protection enforcement by the California Attorney General; (iv) compensation to California for, *inter alia*, disgorgement under California's antitrust law, the Cartwright Act, harm to California's general economy caused by the alleged anticompetitive conduct, otherwise known as deadweight loss, and damages/restitution for proprietary claims; (v) settlement administration fees and costs, including costs of notice and claims administration, escrow costs, taxes due for the escrow fund, and related attorneys' fees; (vi) reimbursement of California's attorneys' fees, costs, and expenses relating to California's investigation of Defendants' conduct and litigation of the settlement complaint filed pursuant to the terms of the Settlement; and (vii) for such other purposes as California deems appropriate, consistent with California law. *Id*.

3. Injunctive Relief

Under the Settlement, Teva agreed to be bound by all operative terms of the Stipulated Revised Order for Permanent Injunction and Equitable Monetary Relief (the "Revised FTC Injunction") entered by this Court on February 21, 2019 in the FTC's Action against Teva. *Id*., Exh. 1 at 14-15. 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. *Id*. Additionally, California under this injunction received 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*.

B. Release of Claims

Under the Settlement, if this Court enters a Final Approval Order finding the Settlement to be fair, reasonable, and adequate, and all appeals have been resolved or all appeal periods have expired, California, upon release of the Settlement Payment from escrow[5], shall release, to the extent permitted by law, all "Released Claims," as that term is defined in the Settlement. *Id*., Exh. 1 at 16. Exercising its *parens patriae* authority under state law, California, to the extent permitted by state law, will release the claims of individual consumers, with the exception of claims of individual consumers who exercise the right to exclude themselves from the Settlement that were asserted or could have been asserted in California's Complaint. *Id*., Exh. 1 at 16, 6-7..

C. California's *Parens Patriae* Authority

1. California's *Parens Patriae* Authority to Represent Consumers

Although California's consumers are also represented in the private End Payor Class Case, California's authority to represent consumers is significantly different than the authority of counsel seeking to represent a class. California brings its claim for damages to California consumers under its state antitrust law, the Cartwright Act, as *parens patriae* on behalf of California consumers. The California Attorney General's authority to bring *parens patriae* actions under its antitrust laws on behalf of consumers is codified in statute. 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).

[5] These funds shall be released and available for distribution from escrow accounts established by California on the Effective Date, i.e. the date on which the Settlement has received final approval and is no longer subject to further appeal or review. *Id*., Exh 1 at 16.

State *parens patriae* actions, such as those authorized under the California statute, are vehicles for states to protect the "'health and well-being – both physical and economic – of its residents in general.'" *In re Ins. Antitrust Litig.*, 938 F.2d 919, 927 (9th Cir. 1991) (*aff'd in part, rev'd in part sub. nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)). A "state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction." *Id*. As the California Supreme Court has recognized, the California Legislature enacted the California *parens patriae* statute for the purpose of "maximizing deterrence and ensuring full disgorgement of profits generated by antitrust violations." *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 778 n. 16 (2010).

2. *Parens Patriae* Claims Differ From Class Actions And Are Not Subject to Rule 23 Requirements

As courts have consistently recognized, state attorney general *parens patriae* actions and class actions differ fundamentally in their procedure and purpose. Courts have clearly held that state *parens patriae* actions, including *parens patriae* state antitrust actions brought under California's *parens patriae* statute, are not class actions and therefore not subject to the requirements of Federal Rule of Procedure 23. *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847-48 (9th Cir. 2011). Thus, unlike an attorney purporting to represent a class, the California Attorney General need not demonstrate that its action meets the requirements of Rule 23 such as adequacy of representation, numerosity, commonality, and typicality. *Id*. Indeed, the very purpose of *parens patriae* authority is to enable state attorneys general to more effectively function as consumer advocates by obviating the need to meet Rule 23 requirements. *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 35 (2d Cir.1981) (citation omitted); *see also New York v. Reebok Int'l Ltd.*, 96 F.3d 44, 46 (2d Cir.1996) ("Congress empowered state

attorneys general to investigate and prosecute antitrust abuses on behalf of consumers stymied by Rule 23's certification and notification hurdles").[6] While a class action is not effective until a court finds the criteria of Rule 23 are satisfied and certifies the class, *parens patriae* authority is exercised as soon as a state attorney general files an action.[7]

3. *Parens Patriae* Successfully Provides Consumer Recovery for Antitrust Violations

State Attorneys General have been recognized as having deep familiarity with the markets in their states. *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 679 (2003). Using this understanding to identify and provide relief to consumers, the California Attorney General, either on its own or as part of multistate litigation, has vigorously and successfully prosecuted antitrust actions that have delivered significant recovery directly to consumers. *See, e.g.*, *California v. eBay, Inc.*, No. 5:12-cv-05874, 2015 U.S. Dist. LEXIS 118060 (N.D. Cal. Sept. 3, 2015) (California *parens patriae* suit resulting in recovery of $2.375 million for California natural persons allegedly injured by no-poach agreements); *In re Elec. Books Antitrust Litig.*, 639 F. Appx. 724 (2nd Cir. 2016) (recovery totaling $566 million for consumers); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003) (recovery provided to approximately 3.5 million consumers); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003) ($80 million

[6] While *In re Grand Jury Investigation* and *Reebok* were referring to the federal statute authorizing state attorneys general to bring *parens patriae* antitrust suits, California enacted its parens *patriae* statute soon after the passage of the federal statute and for the same purposes. *See Clayworth*, 49 Cal. 4th at 777-78.

[7] *Compare* Cal. Bus. & Prof. Code § 16760(a)(1) (The Attorney General may bring a *parens* action to secure monetary relief for injury sustained by natural persons in the state) *with* Fed. R. Civ. P. 23(c) (1) (court approval needed for class actions), Rule 23(b)(3) (requiring finding of superiority of class adjudication), and Rule 23(a) (requiring findings of typicality, impracticability of joinder, and fair and adequate representation).

provided in consumer recovery); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369 (D.D.C. 2002) ($100 million for consumer and governmental compensation).

III. THE SETTLEMENT MEETS THE STANDARD FOR PRELIMINARY APPROVAL

A. Standard for Approval

The standards for evaluating and approving *parens patriae* settlements brought under state or federal *parens* statutes are the same as for class action settlements under Rule 23. *In re: Remeron End-Payor Antitrust Litig*. 2005 WL 2230314, at *17 n. 5 (D.N.J. Sept. 13, 2005). Courts generally apply a two-step approach to the settlement approval process in *parens patriae* proceedings and class actions: 1) preliminary approval of the settlement; and 2) final approval of the settlement at a hearing following notice to those represented. At the preliminary approval stage, the movant must show that the court "will likely be able to" grant final approval of the settlement; final approval requires the court to find that the settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e); 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 13:13 (5th ed. 2011 & Supp. 2019).[8] A court may preliminarily determine that a settlement is fair, and thus grant preliminary approval, if it finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected."[9] *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) ("*General Motors*"). If the proposed settlement is acceptable at this stage, the court then directs

[8] Prior to 2018, Rule 23 did not set forth any specific standards for preliminary approval, but such standards had been developed through case law. Conte & Newberg, *supra* at § 13:13 (Supp. 2019). In 2018, Congress amended Rule 23 to adopt this standard for preliminary approval, essentially codifying prior practice. *Id*. Thus, the 2018 amendment is "unlikely to generate a significant change in the settlement process or outcome" as compared to prior case law. *Id*.

[9] Because notice to Eligible Consumers has not yet been sent, no objections have been received.

that notice be provided to those who would be bound by the proposed settlement in order to afford them an opportunity to be heard on, object to, and opt out of the settlement. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714 (E.D. Pa. 2014). Final approval requires a determination that the settlement is "fair, adequate, and reasonable." *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965 (3rd Cir. 1983).

Thus, this Court need not make a final determination that the Settlement is fair, reasonable, and adequate until the fairness hearing.[10] Rather, court review for preliminary approval is intended to "ascertain whether there is any reason to notify [consumers] of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Bd. of School Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980). The Court need only find that the Settlement fits "within the range of possible approval." *Id.*

Because a settlement represents an exercise of judgment by the negotiating parties, cases consistently hold that the function of a court reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the claims resolved by the settlement. *Blyan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 804 (3d Cir. 1974), *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1315 (3d Cir. 1993); *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975) (applies to consumer class actions); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283,317 (3d Cir. 1998) ("*In re Prudential*") (same). Thus, a court should be "hesitant to

[10] Preliminary approval does not require a full fairness hearing. As this Court observed in *Dugan v. Towers, Perrin, Forster & Crosby, Inc.*, No. 2:09-CV-5099, 2013 WL 5330116, at *4 (E.D. Pa. Sept. 24, 2013): "Preliminary approval may be granted as long as the proposal does not 'disclose grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys, and whether it appears to fall within the range of possible approval'" (citations omitted). At the preliminary approval stage, "the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute." *Curiale v. Lenox Grp., Inc.*, No. 07-1432, 2008 U.S. Dist. LEXIS 92851, at *10-11 (E.D. Pa. Nov. 14, 2008) (quoting *Thomas v. NCO Fin.* Sys., No. 00-5118, 2002 U.S. Dist. LEXIS 14157, at *5 (E.D. Pa. July 31, 2002)).

undo an agreement that has resolved a hard-fought, multi-year litigation." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013).

B. The Settlement Satisfies the Standard for Preliminary Approval

1. The Settlement Was Negotiated at Arm's Length, Supported by Extensive Discovery, Conducted by Counsel Highly Experienced in Antitrust and Pay-for-Delay Litigation, and Should Therefore Be Preliminarily Approved

At the preliminary approval stage, a court is to determine whether the settlement was the result of good-faith bargaining at arm's-length by experienced counsel after reasonable discovery and not based on fraud or collusion. *Mehling v. New York Life Insurance Co.*, 246 F.R.D. 467 (E.D. Pa. 2007); *Tenuta v. Transworld Sys., Inc.*, 2001 WL 1347235, at *1 (E.D. Pa. Oct. 31, 2001). Such findings support a presumption that the settlement is fair. *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532, 535 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996). When evaluating these issues, courts have deferred to the judgment of experienced counsel who have conducted arm's-length negotiations in approving proposed settlements. *See, e.g., Stewart v. Rubin*, 948 F. Supp. 1077, 1099 (D.D.C. 1996); *In re Nasdaq Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 515 (S.D.N.Y. 1996).

California was well informed about the facts and the law in this matter when it entered into settlement negotiations with Teva. California had been investigating its claims with respect to the defendants' delay of competition to Provigil since 2009 with a group of four other states before entering a tolling agreement with Teva that year. Johnson Decl., ¶ 3. Thereafter, in 2015, California, working with an expanded group of antitrust lawyers fro mover 45 states(the "Multistate Group"), began further investigations of the Provigil claims. *Id*. at 4. This Multistate Group, which included California at the time, sent out subpoenas for key documents from the four private and FTC litigations relating to Provigil competition. *Id*. This investigation led to a

$125 million settlement between Teva and 48 states and the District of Columbia, which was approved by this Court on July 25, 2017. *Id.* at ¶¶ 6, 17. However, California declined to participate in this settlement as no injunctive relief was being pursued despite California's belief that a state enforcement vehicle was essential to bring greater enforcement to the pay-for-delay problem. *Id*. at ¶ 6. California also believed that it should seek greater monetary recovery than was available under that multistate settlement. *Id*..

California then launched its own investigation and, in mid-2016, issued investigatory demands for further documents from defendants, including the litigation and pretrial records in four cases that had extensively scrutinized Teva's conduct in blocking generic competition to Provigil, to wit in the *Apotex* action, Direct Purchaser Class Case, End Payor Class Case, and the FTC Case. *Id*. at ¶¶ 6, 7. In each of these four actions that were filed between 2006 and 2008, highly experienced antitrust litigants spent years conducting discovery, motions, and depositions, obtaining numerous court rulings, and preparing trial exhibits and pretrial briefing respecting competition to Provigil and the pay-for-delay agreements at issue. *Id*. at ¶ 5. Scores of the most significant fact witnesses as to Provigil competition and the pay-for delay agreements were thoroughly deposed in these suits, and numerous experts submitted reports and rebuttal reports and were also deposed. *Id*.

The material 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. at ¶ 8. Thus, for instance, the prosecution history of the Provigil patent on which Cephalon sued its rival generics was thoroughly examined, and the patent was found by this Court to be invalid and unenforceable, a decision affirmed by the Federal Circuit. *Apotex Inc. v. Cephalon, Inc.*, 2011 WL 6090696 (Nov. 7,

2011); *aff'd* 500 Fed. Appx. 959 (2013). California conducted additional discovery as to the delay of Mylan and Ranbaxy's launch of generic Provigil after the agreed-upon entry date in their pay-for-delay agreements. *Id*. at ¶ 9. California also initiated enforcement proceedings in California state court when Teva's responses to California's discovery requests were deemed inadequate. *Id*. at ¶ 10.

After withdrawing from the Multistate Group, California also began its own negotiations with the Teva defendants in 2016, and was in frequent communication and negotiations with Teva over a three-year period, ultimately arriving at the terms of the present Settlement.. *Id*. at ¶ 11. Under this Settlement, in addition to obtaining an injunction and settling its proprietary claims, California has obtained $25,250,000 for consumers, an amount that easily falls within the range of possible approval for this case. Indeed, this Court has already approved and adjudicated as fair, reasonable, and adequate the Multistate Group settlement which recovered $35 million dollars for consumers in 48 states and the District of Columbia, while California's proposed settlement recovers $25.25 million for consumers *just in California*.

The attorneys representing the parties to the Settlement are highly experienced in pay-for delay matters, antitrust litigation and settlement. California's counsel filed the suit that ultimately went to the Supreme Court and became the *Federal Trade Commission v. Actavis*, 570 U.S. 136 (2013) decision, authored the Attorney General's amicus brief before the California Supreme Court in its landmark *In re Cipro Cases I & II* pay-for- delay decision, authored numerous multistate amicus briefs and journal articles on pay-for-delay cases, and recently authored California's pending legislation against pay-for-delay agreements. *Id*. at ¶¶ 13, 14. The attorneys representing California have, together, more than sixty years experience in complex and antitrust litigation, and have handled numerous antitrust cases involving *parens patriae* claims or

coordination with private class actions. *Id*. at ¶ 12. In addition, one of these attorneys has been the Editor-in-Chief of a 1,300-page treatise on California state antitrust law for more than 20 years, and has written extensively on antitrust litigation. *Id*. at ¶ 13, 15.

The Office of the California Attorney General has been recognized as having "extensive expertise in complex antitrust cases brought under [its] *parens patriae* powers." *New York v. Nintendo of Am.*, 775 F. Supp. 676, 680 (S.D.N.Y. 1991). Further, courts place special weight on a settlement agreement being negotiated by government attorneys committed to protect the public interest. *Wellman v. Dickson*, 497 F. Supp. 824, 830 (S.D.N.Y. 1980), *aff'd*, 682 F.2d 355 (2d Cir. 1982); *see Reebok*, 96 F.3d at 48 (noting Attorneys General in *parens* actions are motivated by concern for the public interest); *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).

In sum, the settlement discussions were initiated, after significant investigation and discovery, and were conducted by informed and highly experienced counsel who vigorously advocated their positions at arm's length. This Settlement is thus presumptively fair and should be preliminarily approved. *General Motors*, 55 F.3d at 785.

2. The Settlement Will Likely Be Deemed Fair, Reasonable and Adequate at the Fairness Hearing

The Settlement is not only presumptively fair, as demonstrated above, but there can be little doubt that it will be found to be fair, reasonable, and adequate after a fairness hearing. Considerations in making this assessment include whether counsel have adequately represented the consumers; whether the proposed settlement was negotiated at arm's length; whether the relief provided is adequate; and whether the settlement treats consumers equitably relative to each other. Fed. R. Civ. P. 23(e)(2).

Here, as described in detail section III.B.1, California consumers were vigorously represented by attorneys highly experienced in antitrust litigation generally and pay-for-delay cases specifically, who began investigating Teva's conduct ten years ago, obtained extensive discovery through subpoenas and from four other litigations relating to Teva's conduct, and pressed for and obtained, after lengthy negotiations, injunctive relief as well as more compensation than in the Multistate Case settlement already finally approved by this Court. California consumers were more than adequately represented[11] and the Settlement was negotiated at arm's length.

Further, when benchmarked against the Multistate Group's $35 million recovery for consumers in 48 states and the District of Columbia, representing 88% of the nation's population and already adjudicated by this Court as fair, reasonable, and adequate on July 25, 2017, the relief California obtained in its Settlement is fair and reasonable. California obtained $25.25 million for its residents, representing just 12% of the nation's population, as well as strong injunctive relief against any future pay-for-delay agreements. Johnson Decl., ¶ 16. Likewise, the Settlement is clearly fair, reasonable and adequate when benchmarked against the settlement in the End Payor Class Case in which a consumer pot of $35 million was obtained for 28 states, including California after years of hard-fought litigation. Given that California represents 20% of the collective 28 states' population, California's $25.25 million settlement for consumers offers a reasonable and robust recovery.[12] Thus, the consumer compensation obtained by California in

[11] Indeed, as also noted in section III.B.1, the participation of State Attorneys General in negotiations of antitrust settlements on behalf of consumers "furnishes *extra assurance* that consumer's interests are protected" *In re Toys R Us Antitrust Litig.*, 191 F.R.D. at 351 (emphasis added).

[12] In fact, even settlements that achieve recoveries that amount only to a hundredth or even a thousandth part of a single percent of the potential recovery can be approved as fair, reasonable, and adequate. *Detroit v. Grinnell Corp*, 495 F.2d 448, 455 n. 2 (2d Cir. 1974).

the Settlement is more than adequate, especially in light of the risks inherent in any litigation, but particularly in a complex antitrust case such as this matter. See *In re Prudential*, 148 F.3d at 318, 329 (upholding final approval of settlement because, *inter alia*, the anticipated complexity and risks of litigation substantiated fairness of settlement).

Finally, the Settlement makes this significant recovery available to all California consumers who purchased Provigil®, Nuvigil®, and/or modafinil during the Relevant Period. The terms are calculated to bring relief to as many consumers as possible by employing a method that will equitably distribute the benefits to affected consumers. All Eligible Consumers will be equally entitled to make a claim for their Provigil®, Nuvigil®, and modafinil purchases. No consumers will receive preferential treatment and no portion of the consumer recovery is being paid to California as fees. Such equitable treatment of class members relative to each other indicates that the Settlement is fair and reasonable. *Becker v. Bank of New York Mellong Trust Co., N.A.*, 2018 WL 6727820, at *8 (E.D. Pa. Dec. 21, 2018).

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED BY THE COURT

California seeks the Court's approval of the proposed Consumer Notice Plan ("Notice Plan"), attached as Exhibit 1 to the Declaration of Linda V. Young, Vice President, Media, with A.B. Data, Ltd. ("Young Decl."). California's *parens* statute requires that notice of any proposed settlement of *parens patriae* claims must be given to California consumers on whose behalf the claims were brought by publication. Cal. Bus. & Prof. Code §§ 16760(b)(1) and (c). California consumers have the right to exclude themselves from settlements of *parens patriae* claims brought on their behalf and the notice must apprise California consumers of this right and of the procedure and deadline for requesting exclusion. Cal. Bus. & Prof. Code § 16760(b)(2). The manner and content of the notice are otherwise entirely at the discretion of the court, provided due process standards are satisfied. Cal. Bus. & Prof. Code §§ 16760(b)(1). Due process is

satisfied if the notice is "reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" and informs them of: "(1) the nature of the litigation; (2) the settlement's general terms; (3) where complete information can be located; and (4) the time and place of the fairness hearing." *In re Cendant Corp.*,109 F. Supp. 2d at 254 (internal quotations omitted). California's Notice Plan fully complies with California state law and due process requirements.

A. The Notice Plan

California has retained A.B. Data, Ltd. ("A.B. Data"), a company specializing in providing notice in class action cases, addressing consumer inquiries, and processing claims. A.B. Data has extensive experience in state and federal class actions. Young Decl., ¶¶ 5, 6. Exh. 3; Declaration of Eric Miller ("Miller Decl."), ¶ 2, Exh. 1. A.B. Data was approved by this Court to provide notice and claims administration on behalf of the Multistate State Attorneys General in the Multistate Case on November 7, 2016. Miller Decl., ¶ 3. A.B. Data has also been retained as the notice and claims administrator for the class action plaintiffs ("Class Action Plaintiffs") in the End Payor Class Case. *Id*.

The Notice Plan will fully apprise Eligible Consumers of the claims asserted by California, the Settlement, and the information needed to make informed decisions about the Settlement. Young Decl., ¶¶ 3, 9-24, Exh. 1. The Class Action Plaintiffs in the End Payor Class Case have also filed their Motion for Preliminary Approval with this Court. California intends to coordinate portions of its Notice Plan with the Class Action Plaintiffs' national notice plan in order to jointly disseminate information about both settlements to California consumers, who may be eligible to claim in both settlements. *Id*. at ¶ 8, Exh. 1; Miller Decl. ¶ 6. A.B. Data has developed a Joint Direct Notice of the Proposed Class Action and California Attorney General Settlements, Settlement Hearing and Right to Appear ("Joint Direct Notice,"), which provides

notice of both settlements, and a Joint Consumer Claim Form ("Joint Claim Form"), which provides for claims submissions for both settlements. Young Decl., ¶¶ 11, 25-27, Exh. 4; Miller Decl., ¶ 6, Exh. 2. Other elements of California's Notice Plan include California's Summary Notice for consumer publications ("California Summary Notice"), and the digital media notification program. Young Decl, ¶¶ 11-19, Exh. 5. The Joint Direct Notice and Joint Claim Form will be disseminated by direct mail and the California Summary Notice will be published in print and digital media. Young Decl, ¶¶ 20-21.

The Joint Direct Notice and Joint Claim Form will be mailed to potential Eligible Consumers via direct mail using the addresses obtained from large retail pharmacies and pharmaceutical benefits managers by Class Counsel pursuant to subpoenas to be served upon entry of the Preliminary Approval Order in the End Payor Class Case. Young Decl., ¶ 20. Class Counsel will also publish the Class' Summary Notice in national print media, which will include language referencing California's Settlement and will direct potential Eligible Consumers to the joint Class and California settlement website.[13] California's Notice Program also includes "California Focused" notices of California's Settlement which includes print and digital publication of the California Summary Notice in 42 major newspapers throughout California, targeted advertising in digital media, and notice through earned media. Young Decl., ¶¶ 15-17, Exh. 1.

All forms of notice and digital media advertising inform consumers of the joint California and Class settlement website. The joint settlement website will host both California's and the End Payor Class Case settlements, and all relevant documents pertaining to the

[13] California will share in the costs associated with direct mail notice, the publication of the Classes' Summary Notice, and the shared website domain. Johnson Decl., ¶ 17.

Settlement, which will allow potential Eligible Consumers to learn about their settlement rights for both settlements in one website location. *Id*. at ¶¶ 28-3. A.B. Data will also post all relevant Settlement information on their website, which will be accessible to media and news outlets and to potential Eligible Consumers. *Id.* at ¶ 28. The same toll-free telephone numbers and mailing addresses will be maintained by A.B. Data for both settlements so that consumers may conveniently request settlement-related information or documents for either settlement. *Id*. at ¶¶ 32-34.

California proposes that notice begin within 14 days of entry of the Preliminary Approval Order and that mailed notice be completed in accordance with the End Payor Class Case Notice Plan, or 90 days after entry of the Preliminary Approval Order (or as soon thereafter as practicable). The proposed California Summary Notice will inform consumers about the Settlement, and includes an address to write to for more information, a toll-free telephone number, and Settlement website address. Young Decl, ¶ 11, Exh. 5, Exh. 1. The California Summary Notice will also apprise consumers that the Joint Direct Notice and Joint Claim Form are available upon request. *Id*. The Joint Direct Notice provides more detailed information about the Settlement, including summaries of the Settlement, and how to access more detailed information about release terms. *Id*. at ¶ 11, Exh. 4. The Joint Direct Notice also provides information about the fairness hearing date, consumers' rights to object or opt out (and the deadlines), information as to eligibility, and the procedure to make claims, including a claim form. *Id*.

Mr. Miller's declaration describes how A.B. Data will review and scrutinize each claim for validity. Miller Decl, ¶¶ 9. Consumers will need to complete and submit a claim form that provides the consumer's name, contact information, and the number of prescriptions for

Provigil®, Nuvigil®, and/or modafinil pursuant to which purchases were made during the Relevant Period. Miller Decl., ¶¶ 6. 7, Exh. 2. Eligible Consumers will also have to certify that they were California residents at the time they purchased these drugs. *Id*. By using this process and requiring claimants to sign the form under penalty of perjury, the claims administrator can validate that the claimant is eligible without requiring consumers to shoulder the burden of compiling purchase records for several years. *Id*. A.B. Data's process will lessen the burdens on consumers and increase consumer participation. *Id.* This procedure promotes California's goal of delivering the settlement proceeds to as many consumers as possible.

Consumers will also be able to call a toll-free number and access a website with links to the long form notice, California's Complaint and the Settlement. Young Decl., ¶¶ 28-34. After submitted claims have been reviewed, A.B. Data will prepare a Distribution Report for review and approval by the Court at the final approval hearing. Miller Decl., ¶ 9 . The Report will contain a plan for the distribution of the Consumer Fund to Eligible Consumers with valid claims. *Id*. Upon final approval of a distribution plan from the Court, A.B. Data will distribute the settlement proceeds to consumers. *Id*.

B. The Proposed Notice Plan and Claims Procedure Meet the Requirements of Due Process

The Notices and the proposed Notice Plan provide a reasonable method of providing notice to Eligible Consumers and meet due process notice requirements. The Notices "fairly, accurately, and neutrally describe the claims and parties in the litigation, the terms of the proposed settlement and the identity of persons entitled to participate in it as well as apprising affected consumers of their options with regard to the proposed Settlement." *Shapiro v. Alliance MMA, Inc.*, 2018 WL 3158812 at *7 (D.N.J. Jun. 28, 2018) (quoting *Foe v. Cuomo*, 700 F. Supp. 107, 113 (E.D.N.Y. 1988), *aff'd*, 892 F.2d 196 (2d Cir. 1989)).

California requests that this Court preliminarily approve the Notice Plan, and order that Notice be initiated fourteen (14) days after the entry of the Preliminary Approval Order, or as soon thereafter as practicable.

C. The Court Should Appoint A.B. Data, Ltd. as Settlement Administrator

California requests that A.B. Data be appointed as Settlement Administrator. As discussed above, A.B. Data has extensive experience in settlement and claims administration in state and federal class actions. A.B. Data was approved by this Court to provide notice and claims administration on behalf of the Multistate State Attorneys General in the Multistate Case on November 7, 2016. The End Payor Class Action Plaintiffs have also requested that A.B. Data be appointed as the settlement and claims administrator in the End Payor Class Case.

V. THE PROPOSED DISTRIBUTION PLAN SHOULD BE APPROVED BY THE COURT

The Distribution Plan, which is Exhibit 4 to the Settlement, describes how the Consumer Fund will be distributed and requires this Court's approval. The Distribution Plan is designed to fairly compensate consumers for damages suffered from overcharges caused by the alleged anticompetitive conduct.

A. Distribution Plan

The Court should approve the proposed Distribution Plan, which sets forth how claims will be reviewed and processed, and how the Consumer Fund will be allocated and disbursed. As discussed above, California has allocated $25,250,000 of the Settlement Payment to the Consumer Fund for the purpose of compensating Eligible Consumers and to pay any taxes attributable to the Consumer Fund. The goal of the plan is to compensate the largest possible number of injured consumers in a way that makes it very simple for them to participate and

recover. California strives to identify and elicit claims from as many Eligible Consumers as is practicable.

Under the plan, any natural person residing in California during the Relevant Period who purchased Provigil®, Nuvigil®, and/or modafinil is entitled to recovery from the Consumer Fund. Johnson Decl, ¶ 2, Exh. 1, Exh. 4 thereto, at 1. Proof of purchase will not be required. *Id*. The Claims Administrator will vet the claims for legitimacy. *Id*. The $25,250,000 recovered for consumers by California will be allocated *pro rata* among Eligible Consumers based on the number of prescriptions each Eligible Consumer filled. *Id*. That is, the Consumer Fund will be divided by an estimate of the total number of prescriptions issued to Californians during the Relevant Period to yield a "Recovery Per Prescription." *Id* If the Claims Rate is 40% or greater, each California claimant shall receive 100% of his or her Recovery Per Prescription for each prescription pursuant to which the claimant purchased Provigil®, Nuvigil®, and/or modafinil. *Id*. To more fully compensate Eligible Consumers and incentivize them to submit claims, if 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. *Id*. 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. *Id*.

B. The Distribution Plan is Clearly Fair, Reasonable, and Adequate

Approval of a distribution plan for settlement funds is governed by the same standards of review applicable to the approval of the settlement as a whole: the plan must be fair, reasonable and adequate. *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F.Supp.2d 322, 335 (E.D. Pa. 2007); *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 107 (E.D. Pa. 2013). As described above, here, the Distribution Plan distributes settlement funds *pro rata* among consumers based on their purchases of the relevant drugs.

This Court has routinely found that *pro rata* distributions based on consumer purchases are fair, reasonable and adequate. *See, e.g., In Re Flonase*, 291 F.R.D. at 110 (where plaintiffs alleged that defendant drug manufacturer delayed entry of generic competition and thereby caused overcharges to drug purchasers, proposal to distribute settlement proceeds *pro rata* based on Class members' purchases of drug was fair, reasonable, and adequate); *see also, In re Auto. Refinishing Paint Antitrust Litig.*, 617 F.Supp.2d 336, 345-46 (E.D. Pa. 2007) (approving plan to distribute settlement fund to Class members based on purchases of priced-fixed products). Thus, this Court should also find that the Distribution Plan proposed in this case is fair, reasonable, and adequate.

C. The Proposed Distribution of Residual Funds to *Cy Pres* Recipients Should Be Approved

The Distribution Plan provides that if any funds from the Consumer Fund remain following distribution of funds to Eligible Consumers, such residue will be distributed to *cy pres* recipients following a competitive grant-making process. Johnson Decl. ¶ 2, Exh. 1, Exh. 4 thereto at 2. This process will be overseen by a neutral third-party administrator who will ensure the process is transparent and competitive and that the grantees' proposed use of the funds aligns with the purpose of the litigation and the harm incurred by California consumers. *Id*. Because the size of any residue is unknown at this point, the Attorney General will defer soliciting and selecting grantees until after final approval, at which point the Attorney General will submit a supplemental *cy pres* distribution plan with a list of proposed grantees to the Court. *Id*. at ¶ 2, Exh. 1, Exh. 4 thereto at 3.

Cy pres distribution is appropriate when the intended use of the residual funds will further the underlying goals of the litigation, is in the best interest of the silent class members, and where the funds are put to their next best use. *See In re Google Inc. Cookie Placement*

Consumer Privacy Litig., No. 12-MD-2358, 2017 WL 446121, at *4-*5 (D. Del. Feb. 2, 2017) (granting final approval of settlement involving *cy pres* distribution and noting a *cy pres* remedy "must 'account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members"); *California v. eBay, Inc.*, No. 5:12-CV-05874-EJD, 2015 WL 5168666, at *6, *9 (N.D. Cal. Sept. 3, 2015) (granting final approval of settlement involving *cy pres* distribution of residual funds and noting "a court may employ the *cy pres* doctrine to put the unclaimed fund to its next best compensation use") (citations omitted); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 WL 4542669, at *5 (E.D. Pa. Oct. 3, 2008) (approving *cy pres* distribution of residual funds to Philadelphia Bar Association where distribution "furthers the underlying litigation goals of this case"). The Third Circuit has expressly rejected any notion that distribution of residual settlement funds to eligible consumers must be infeasible or that such consumers must be fully compensated for their estimated damages for *cy pres* distribution to be approved. *In re Baby Prods.*, 708 F.3d at 173, 176. When evaluating settlements with a *cy pres* distribution, the "district court is not to determine whether the settlement is the fairest possible resolution", but, rather, whether the settlement and distribution are fair, reasonable, and adequate from the perspective of the class as a whole."[14] *Id.* at 173-74.

Applying these standards, courts routinely approve settlements that provide for distributing remaining funds to *cy pres* recipients when settlement funds remain following a payout to eligible class members. *See Kopchak v. United Res. Sys.*, No. CV 13-5884, 2016 WL

[14] *In re Baby Prods.* vacated the district court's approval of the *cy pres* distribution in that case on the ground that the documentary proof required for consumer claims was overly burdensome under the circumstances and, thus, resulted in very minimal payouts before *cy pres* distribution. *Id.* at 176. By contrast, the proposed Distribution Plan in this case requires no documentary proof for consumer claims and provides for up to doubling of payout amounts if the claims rate turns out to be less than 40%.

4138633, at *9 (E.D. Pa. Aug. 4, 2016) (J. Goldberg) (granting preliminary approval of settlement agreement providing for *cy pres* distribution of residual funds); *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 agreement providing for *cy pres* award of undeliverable funds); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 125 (E.D. Pa. 2005) (granting final approval of settlement agreement providing for *cy pres* donation).

As noted above, the proposed *cy pres* distribution will occur only after distributions are made to consumers via a claims process requiring no documentary proof and subject to enhancements of up to 200% of a *pro rata* allocation of the settlement funds over the estimated total number of prescriptions issued to California consumers during the Relevant Period. Further, the *cy pres* distribution will be administered by a third party with the explicit purpose of ensuring that the proposed use of the funds aligns with the purpose of the litigation and the harm incurred by California consumers. Because courts have approved *cy pres* distributions with these characteristics, this Court should do so here.

VI. CALIFORNIA REQUESTS APPROVAL OF THE PROPOSED SCHEDULE FOR FINAL APPROVAL

California requests that the Final Approval Hearing be coordinated with the End Payor Class Case, if practicable. California proposes that the Final Approval Hearing be scheduled at least 180 days after the entry of the Preliminary Approval Order to allow the notice and claims process to be completed. Notice will begin 14 days after entry of the Preliminary Approval Order and should be completed by 90 days after entry of that Order. Opt-outs would be due 120 days after the entry of the Preliminary Approval Order. Objections and the Joint Claim Forms would be due 160 days after entry of the Preliminary Approval Order.

VII. CONCLUSION

For the foregoing reasons, California respectfully requests that the Court: (1) grant preliminary approval of the Settlement; (2) approve and authorize the Notice Plan and the related notices to be disseminated to Eligible Consumers; (3) approve the Distribution Plan, including the proposed plan for *cy pres* distribution; (4) appoint A.B. Data as the Settlement Administrator; and (6) approve the proposed notice and claims schedule.

Dated: July 29, 2019

Respectfully submitted,

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*Pro Hac Vice Application for Admission pending
**Pro Hac Vice Application for Admission to be filed