   NeutralAs of: August 13, 2018 3:02 PM Z



# [***Castro v. Sanofi Pasteur Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PSR-81R1-F04D-W3FJ-00000-00&context=)

United States District Court for the District of New Jersey

October 20, 2017, Decided; October 23, 2017, Filed

Civ. No. 11-7178 (JMV)(MAH)

**Reporter**

2017 U.S. Dist. LEXIS 174708 \*; 2017 WL 4776626

ADRIANA M. CASTRO, M.D., P.A., SUGARTOWN PEDIACTRICS, LLC, and MARQUEZ & BENGOCHEA, M.D., P.A., on behalf of themselves and all others similarly situated, Plaintiffs, v. SANOFI PASTEUR INC., Defendants.

**Notice:** NOT FOR PUBLICATION

**Prior History:** [*Castro v. Sanofi Pasteur, Inc., 2012 U.S. Dist. LEXIS 96001 (D.N.J., July 10, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:563B-1T11-F04D-W37T-00000-00&context=)

**Core Terms**

Settlement, class member, notice, expenses, factors, awards, settlement fund, parties, attorneys', class representative, Plaintiffs', damages, reimbursement, Pediatrics, class action, ***antitrust***, documents, risks, approving, lodestar, vaccine, discovery, purchases, terms, cases, negotiations, Claimants, courts, weighs, proposed settlement

**Counsel:** **[\*1]**For Novartis Vaccines & Diagnostics, Inc., Movant: REBEKAH R. CONROY, LEAD ATTORNEY, BROWN MOSKOWITZ & KALLEN, PC, SUMMIT, NJ.

For RONALD J. RICCIO, Special Master: RONALD J. RICCIO, LEAD ATTORNEY, MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, MORRISTOWN, NJ.

For ADRIANA CASTRO, M.D., P.A., on behalf of itself and all others similarly situated, Plaintiff: KELLY MAGNUS PURCARO, PETER S. PEARLMAN, LEADS ATTORNEYS, Cohn Lifland Pearlman Herrman & Knopf, LLP, Saddle Brook, NJ.

For SUGARTOWN PEDIATRICS, LLC, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; KELLY MAGNUS PURCARO, PETER S. PEARLMAN, LEADS ATTORNEYS, Cohn Lifland Pearlman Herrman & Knopf, LLP, Saddle Brook, NJ; PAUL COSTA, LEAD ATTORNEY, FINE, KAPLAN AND BLACK, RPC, PHILADELPHIA, PA; BRENT WILLIAM JOHNSON, COHEN MILSTEIN SELLERS & TOLL PLLC, WASHINGTON, DC.

For MARQUEZ AND BENGOCHEA, M.D.P.A., on behalf of itself and all others similarly situated, Plaintiff Consolidated: PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, LEAD ATTORNEY, SADDLE BROOK, NJ.

For SANOFI PASTEUR INC., Defendant, Counter Claimant: JOHN P. BARRY, LEAD ATTORNEY, PROSKAUER ROSE, LLP.,**[\*2]** NEWARK, NJ; LIZA M. WALSH, LEAD ATTORNEY, WALSH PIZZI O'REILLY FALANGA LLP, NEWARK, NJ; JOEL A PISANO, KATELYN O'REILLY, WALSH PIZZI O'REILLY FALANGA LLP, NEWARK, NJ.

For ADRIANA CASTRO, M.D., P.A., on behalf of itself and all others similarly situated, Counter Defendant: JOHN D. RADICE, LEAD ATTORNEY, Radice Law Firm, PC, Long Beach, NJ; PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ.

**Judges:** John Michael Vazquez, United States District Judge.

**Opinion by:** John Michael Vazquez

**Opinion**

**John Michael Vazquez, U.S.D.J.**

This case comes before the Court on the Parties' joint motion for final approval of the settlement in this healthcare-related ***antitrust*** class action. Also pending is Plaintiffs' motion for an award of attorneys' fees, reimbursement of expenses, and payment of service awards. The proposed settlement is for $61.5 million in cash and the release of Defendant Sanofi Pasteur's counterclaim. The class is comprised of approximately 30,000 members including pediatricians, physician groups, and other vaccine purchasers. The underlying dispute arose out of a claim made by Plaintiffs against Defendant, a manufacturer of pediatric vaccines including Menactra, the**[\*3]** brand name for Defendant's conjugate quadrivalent meningococcal, or MCV4, vaccine. Plaintiffs alleged that Defendant bundled its pediatric vaccines for sale to keep and enhance its monopoly in the market after a competitor planned to produce their own vaccine. Of the class members, only 16 have opted out and none have objected to the settlement.

The Court reviewed the submissions in support of the motions and held a final settlement hearing on October 3, 2017. For the reasons discussed below, both motions are **GRANTED**.

**I. Background & Procedural History**

This settlement represents the culmination of several years of hard-fought and complex litigation. Plaintiffs filed their First Consolidated Amended Class Action Complaint ("CAC" or "Compl.") on January 20, 2012. D.E. 28. The CAC alleged that Defendant, through Menactra, has a 93% monopoly of the meningococcal pediatric vaccine market. Compl. at P 2. Menactra inoculates against bacterial meningitis. *Id.* After Novartis, the only other producer of a meningococcal vaccine in the U.S., planned to enter the meningococcal vaccine market with its Menveo vaccine, Defendant allegedly bundled its other pediatric vaccines with Menactra to force physicians**[\*4]** to buy their vaccines at higher prices. *Id.* at PP 1-5. As a result, purchasers of the Menveo vaccine incurred "substantial price penalties" if they bought even small quantities of the drug. *Id.* at P 3.

On February 27, 2012, Defendant filed a motion to dismiss and a counterclaim against Plaintiff and proposed class members. D.E. 50. After the stand-alone counterclaim was struck, the motion to dismiss was also denied, and Defendant answered and asserted its counterclaim again on August 21, 2012. D.E. 100, 111. Defendants claimed that Plaintiffs and other purported class members had "engaged in unlawful collective action" by forming physician buying groups, or "PBGs," causing the prices of vaccines to fall. D.E. 111.

Discovery has been lengthy, contentious and expensive. Document discovery produced over one million documents, the parties conducted thirty depositions, and the Court eventually appointed a Special Master, Ronald J. Riccio, to resolve discovery disputes. *See* D.E. 191, Declaration of Co-Lead Counsel Eric L. Cramer, Esq. (hereinafter "Cramer Decl.) at P 12. Special Master Riccio made several Reports & Recommendations. *See, e.g.*, D.E. 211, 212, 213, 229, 238, 239. Expert discovery was similarly complex**[\*5]** and ultimately bifurcated into class and merits phases. D.E. 104. The class certification process was lengthy, and included an appeal by Defendant to the Third Circuit challenging the order certifying the class, which was denied. *See* [*Castro v. Sanofi Pasteur Inc., No. 15-8099, 2015 U.S. App. LEXIS 23390 (3d Cir. Dec. 8, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5S7N-JKR1-JWR6-S4C4-00000-00&context=). The class was defined as:

All persons or entities in the United States and its territories that purchase Menactra directly from defendant Sanofi Pasteur Inc. ("Sanofi") or any of its divisions, subsidiaries, predecessors or affiliates, such a VaxServe, Inc., during the period from March 1, 2010 through such time as the effects of Sanofi's illegal conduct have ceased ("Class Period"), and excluding all governmental entities, Sanofi, Sanofi's divisions, subsidiaries, predecessors, and affiliates of Kaiser Permanente and the Kaiser Foundation (collectively, "Kaiser"), and an purchases by entities buying Menactra pursuant to a publicly-negotiated price (*i.e.*, governmental purchasers). D.E. 416.

The class period was later amended with an end date of December 31, 2014. D.E. 476.

The Court also conducted a *Daubert* hearing concerning expert testimony on the class. The hearing lasted three days, from**[\*6]** September 9, 2009 through September 11, 2001. D.E. 380, 417, 418,419. The class expert reports totaled over 1,000 pages. Cramer Decl. at P 25. The merit expert reports were also 1,000 pages, exclusive of appendices and supporting data. *Id.*

On April 24, 2017, the Court granted preliminary approval of the settlement, and approved Rust Consulting as the settlement administrator. D.E. 512. The Court also ordered a notice plan on April 24, 2017. *Id.* The parties also held extensive settlement negotiations, beginning with a private mediation in November 2014. Cramer Decl. at P 39.

The Court ordered that the notice to class members of the proposed settlement ("Settlement Notice") and the proposed summary form of notice ("Summary Notice") be disseminated in three ways: (1) direct first class mail of the Settlement Notice to class members, (2) publication of the Summary Notice in the Pediatrics medical journal[[1]](#footnote-0)1; and (3) posting the Settlement Notice and Summary Notice on a litigation specific-website established by the settlement administrator. D.E. 514-1, Declaration of Jessica Jenkins Regarding Notice by Mailing and Publication (hereinafter "Jenkins Decl.") at PP 4-16. In addition, the settlement**[\*7]** administrator created a case-specific website, email address, toll-free phone number, and post office box to facilitate communication with potential class members. *Id.* The website eventually received approximately 1,734 visits, and the hotline received 147 calls. *Id.* at PP 14, 16.

The proposed distribution plan will allocate the settlement fund on a *pro rata* basis calculated by each claimant's (class members who timely submit valid claim forms) total Menactra purchases made during the class period. D.E. 515-2, Plan of Distribution of the Net Settlement Fund at 1-2. Sanofi will provide data showing the Menactra purchases made, and the Plan Administrator will mail a Claim Form to each Class Member with the details of their purchases included. *Id.* The *pro rata* share will be calculated by dividing the total volume of Menactra purchases made by a Claimant by the total volume of Menactra purchases for all Claimants. *Id.* That *pro rata* share will then be multiplied by the total net settlement fund amount. *Id.*

Approximately 30% of the purchases of Menactra during the class period were made by three national wholesalers of pediatric vaccines: AmerisourceBergen, Cardinal Health, and McKesson. Cramer Decl. at P 3. All**[\*8]** three fully support the settlement terms. *Id.*

**II. Final Settlement Approval**

**a. *Rule 23***

Under *Rule 23(e)(2) of the Federal Rules of Civil Procedure*, the Court may approve a proposed settlement of a class action after a hearing if the settlement "is fair, reasonable and adequate." *Fed. R. Civ. P. 23(e)(2)*. The law encourages and favors settlement of civil actions in federal courts, particularly in complex class actions. [*In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 784 (3d Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FND0-001T-D2GH-00000-00&context=). As a result, when a settlement is reached on terms agreeable to all parties, it is to be encouraged. [*Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1314 & n.16 (3d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DGF0-003B-P1F4-00000-00&context=).

**b. *Girsh Factors***

In determining the reasonableness, fairness, and adequacy of a proposed settlement for the purposes of *Rule 23(e)*, courts consider the following factors, known as the *Girsch* factors:

(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 risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the 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 in light of all the attendant**[\*9]** risks of litigation.

[*In re Nat'l Football League, 821 F.3d at 437*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JJT-6V21-F04K-K197-00000-00&context=) (citing [*Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2RW0-0039-M001-00000-00&context=). The settling parties bear the burden of establishing that the *Girsh* factors weigh in favor of approval. But the ultimate decision of whether to approve a proposed settlement "is left to the sound discretion of the district court." [*Girsh, 521 F.2d at 157*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2RW0-0039-M001-00000-00&context=).

**1. Complexity, Expense & Likely Duration of Litigation**

The first factor considers "the probable costs, in both time and money, of continued litigation." [*In re Gen. Motors., 55 F.3d at 812*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FND0-001T-D2GH-00000-00&context=) (quoting [*Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir. 1974))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XW80-0039-X0BP-00000-00&context=). Courts must weigh the proposed settlement "against the enormous time and expense of achieving a potentially more favorable result through further litigation." [*In re Remeron End-Payor* ***Antitrust*** *Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at \*4 (D.N.J. Nov. 9, 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HHR-G1W0-TVVX-S3DH-00000-00&context=) (citation omitted). "Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming." [*Yedlowski v. Roka Bioscience, 2016 U.S. Dist. LEXIS 155951, 2016 WL 6661336, at \*12 (D.N.J. Nov. 10, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M4R-HV41-F04D-W0F3-00000-00&context=) (quoting [*In re Royal Dutch/Shell Transp. Sec. Litig., 2008 U.S. Dist. LEXIS 124269, 2008 WL 9447623, at \*17 (D.N.J. Dec. 9, 2008))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5957-S7H1-F04D-W0C4-00000-00&context=).

This litigation has already spanned six years. The matter has been exhaustively litigated,[[2]](#footnote-1)2 with both sides spending literally thousands of hours and millions of dollars. In addition, an "***antitrust*** class action is arguably the most complex action to prosecute." [*In re Remeron, 2005 U.S. Dist. LEXIS 27011, 2005 WL 2230314, at \*13*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HHR-G680-TVVX-S1V4-00000-00&context=) (citations omitted). This case is no exception. Moreover, there was no corresponding governmental action; Plaintiffs developed the case on their own. Continuing this case through summary judgment or trial would**[\*10]** undoubtedly result in a great deal more expense. The parties would have to fully brief Defendant's summary judgment motion, and if Plaintiffs were successful, then extensive pretrial motions, a lengthy trial, and (most likely) post-trial motions and appeals would ensue. The first *Girsh* factor favors the proposed settlement.

**2. Reaction of Class to Settlement**

The second *Girsh* factor "gauge[s] whether members of the class support the settlement." [*In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283, 318 (3d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=). As such, courts look at the "number and vociferousness of the objectors. . . . [and] generally assume[] that silence constitutes tacit consent to the agreement." [*In re Gen. Motors, 55 F.3d at 812*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FND0-001T-D2GH-00000-00&context=) (quoting [*Bell Atl. Corp., 2 F.3d at 1313 & n.15*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DGF0-003B-P1F4-00000-00&context=)).

To date, there are no objections to the settlement by any class member. Additionally, the three sophisticated national wholesale class members have all joined the settlement and submitted letters in support of its terms. This lack of objection weighs in favor of approving the settlement.[[3]](#footnote-2)3

**3. State of the Proceedings**

The purpose of this factor is to determine "the degree of case development that class counsel have accomplished prior to settlement." [*In re Cendant Corp. Litig., 264 F.3d 201, 235 (3d Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43VV-5SP0-0038-X08R-00000-00&context=). "[C]ourts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating."**[\*11]** *Id.* (citing [*In re Gen. Motors, 55 F.3d at 813*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FND0-001T-D2GH-00000-00&context=)). As noted, there has been extensive class and merits discovery in this case. Over one million documents have been produced, over 30 depositions have been taken, and the Court conducted a multi-day *Daubert* hearing. The parties have litigated this case for six years. They have fully briefed motions to dismiss, the motion for class certification—including an appeal to the Third Circuit—and have engaged in extensive discovery. Accordingly, Lead Plaintiffs are well aware of the relative strengths and weaknesses of their case against Sanofi. *See, e.g.,* [*In re Genta Sec. Litig., 2008 U.S. Dist. LEXIS 41658, 2008 WL 2229843, at \*6 (D.N.J. May 28, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SMM-FD00-TXFR-F2RV-00000-00&context=). This factor also weighs in favor of approving the settlement.

**4. Risks of Establishing Liability & Damages**

The purpose of these factors is 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." [*In re Prudential, 148 F.3d at 319*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=). "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." [*In re Gen. Motors, 55 F.3d at 814*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FND0-001T-D2GH-00000-00&context=). Where there is a prospect of long, contentious, and uncertain litigation along with a lack of evidence required**[\*12]** to support claims in such protracted litigation, these factors weigh in favor of approval. *See* [*In re Cendant Corp. Litig., 264 F.3d at 238*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43VV-5SP0-0038-X08R-00000-00&context=).

**a. Liability**

Plaintiffs used a novel theory to show liability in this case. Unlike many ***antitrust*** matters, Plaintiff did not provide evidence of increased costs to Defendants' competitors. Rather, Plaintiffs, by way of expert testimony, proceeded on a "divided market theory," which no previous court had expressly accepted. Thus, Plaintiffs' ability to prove liability was in no way a certainty.

**b. Damages**

Proving damages in ***antitrust*** cases is difficult and depends on extensive expert testimony, "which can become an esoteric exercise with unpredictable results." [*In re Elec. Carbon Prods.* ***Antitrust*** *Litig., 447 F.Supp.2d 389, 401 (D.N.J. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KW0-4480-TVVX-S33Y-00000-00&context=). Rather than showing either the periods before or after the bundling, or another similarly competitive period in the market, Plaintiffs relied on the "Bertrand price model" to show damages. The differentiated Bertrand model had not been used in this context before, and is normally used instead to illustrate competition after a merger. Professor Elhauge's testimony, especially his use of the Bertrand model to prove damages to Plaintiffs, was hotly contested in this litigation. Moreover, as Plaintiff's counsel points out, Defendant "certainly**[\*13]** would have continued to press [their counterarguments] on appeal if Plaintiffs were to prevail at trial." Joint Motion at 32. Plaintiff's counsel also notes that Judge Arleo's Opinion on Defendant's *Daubert* motion to exclude Professor Elhauge's testimony, D.E. 415, "appears to be the first time that a differentiated Bertrand model was found reliable as a means of assessing impact and damages in an ***antitrust*** class action." *Id.* at 11.

Both liability and damages were hotly contested and both parties had evidence supporting their respective positions. In sum, the risks associated with both liability and damages lead the Court to conclude that this factor favors approving the settlement.

**5. Risks of Retaining Class Certification throughout Trial**

The risk of losing class certification persists through every litigation; there will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." [*In re Prudential, 148 F.3d at 321*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=). Given that this is a risk in any case, this factor weighs in favor of approving the settlement, although not strongly as there was no specific indication for the Court to conclude that the risk was greater in this matter.

**6. Defendant's [\*14]  Ability to Withstand Greater Judgment**

This factor "is concerned with whether defendants could withstand a judgment for an amount *significantly* greater than the [s]ettlement." [*In re Cendant Corp. Litig., 264 F.3d at 240*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43VV-5SP0-0038-X08R-00000-00&context=) (emphasis added). Financially, Defendant can certainly withstand a greater judgment, but this factor cannot be considered in a vacuum, *i.e.* a party's financial resources. Instead, it must be analyzed in light of the context of the actual case. For example, if a plaintiff has a strong case in terms of both liability and damages, but a defendant (who could afford more) proposes an unreasonably low settlement amount, this factor would weigh against approving the settlement. *See* [*In re Warfarin Sodium* ***Antitrust*** *Litig., 391 F.3d 516, 538 (3d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F03-7JF0-0038-X19X-00000-00&context=). On the other hand, where (as here) the matter is complex and expensive, coupled with risks as to both liability and damages, the Court considers a party's ability to withstand a greater judgment against the likelihood of recovering the greater amount. In this case, the sixth factor does not weigh against approving the settlement.

**7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery & the Attendant Risk of Litigation**

These factors aim to "evaluate whether the settlement represents a good value for a weak case or**[\*15]** a poor value for a strong case." [*In re Warfarin Sodium* ***Antitrust*** *Litig., 391 F.3d 516, 538 (3d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F03-7JF0-0038-X19X-00000-00&context=). "In conducting this evaluation, it is recognized that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *See* [*In re Johnson & Johnson Derivative Litig., 900 F. Supp. 2d 467, 484-85 (D.N.J. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56X1-60X1-F04D-W1WN-00000-00&context=) (internal quotations omitted). These factors consider "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." [*Pro v. Hertz Equip. Rental Corp., 2013 U.S. Dist. LEXIS 86995, 2013 WL 3167736, at \*5 (D.N.J. June 20, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58PP-41N1-F04D-W000-00000-00&context=) (quoting [*In re Prudential, 148 F.3d at 322*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=)).

The Cramer Declaration presents a table comparing the settlement amount to other "analogous healthcare-related ***antitrust*** bundling cases," some of which were brought by class counsel using the same experts and consultants. Cramer Decl. at P 20. While Plaintiff's experts pointed to a potentially larger settlement, Defendant's experts "yielded much lower results." Joint Motion at 35. Plaintiff's counsel estimates that the total damages of overcharging on purchases of Menactra is $439 million. *Id.* The Settlement represents approximately 14% of those damages, which both parties agree is "within ... the range of possible settlements." *Id.* at 35-36.

The Court**[\*16]** agrees. The settlement is within a reasonable range in light of the risks faced by both parties if the case proceeded to trial and in light of the best possible recovery. In addition to the liability concerns addressed above, Defendant also has expert evidence indicating that the amount of damages should be significantly lower than those sought by Plaintiffs even if Plaintiff prevailed on liability.

**c. *Prudential* Factors**

The Third Circuit also requires courts to consider whether the settlement satisfies several additional factors as set forth in [*In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283 (3d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=). *See, e.g.,* [*Yedlowski, 2016 U.S. Dist. LEXIS 155951, 2016 WL 6661336, at \*12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M4R-HV41-F04D-W0F3-00000-00&context=) (quoting [*In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 350 (3d Cir. 2010))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51R0-77T1-652R-100B-00000-00&context=). The *Prudential* factors include:

[1] [T]he maturity of the underlying substantive issues . . . .; [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.

*Id.* The Court**[\*17]** does not have to perform analysis on each *Prudential* factor—rather it must address the factors that are relevant to the particular case at hand. *See* [*In re Prudential, 148 F.3d at 323-324*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=). The *Prudential* factors relevant to this case are factors one, four, five, and six.

**1. The Maturity of the Underlying Substantive Issues**

As discussed above, there has been full discovery in this case, which itself has been extensively litigated. The underlying substantive issues have been fully developed.

**2. Whether Class Members are Accorded the Right to Opt Out of the Settlement**

Class members were accorded the right to opt out. Moreover, as discussed above, only 16 of the nearly 30,000 class members have elected to opt out of the Settlement.

**3. Whether the Provisions for Attorneys' Fees are Reasonable**

As discussed more fully below, Plaintiff's counsel is requesting one-third of the settlement amount in fees (in addition to its request for expenses). The Court finds this request to be reasonable as is explained below.

**4. Whether the Procedure for Processing Individual claims under the Settlement is Fair and Reasonable**

The proposed procedure is fair and reasonable. Class members were notified by letter mailed on May 15, 2017 that they had until**[\*18]** July 10, 2017 to either opt out or object. Class members who did not opt out will be able submit their claim requests using a Claim Form. The form will be mailed to them and also available on the litigation website. Class members can also obtain information via a toll free number. Class Members can also dispute the basis for their *pro rata* share of the settlement.

**d. The Proposed Distribution Plan**

The distribution plan proposed is also fair, reasonable, and adequate. *Pro rata* distributions of settlement funds are "consistently upheld." [*In re Ocean Power Techs., Inc., No. 14-cv-3799, 2016 U.S. Dist. LEXIS 158222, 2016 WL 6778218, at \*23 (D.N.J. Nov. 15, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M5V-5K81-F04D-W008-00000-00&context=) (citing [*Sullivan v. DB Investments, Inc., 667 F.3d 273 (3d Cir. 2011))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54HN-G291-F04K-K08D-00000-00&context=). Because Defendant is providing the purchase details, there will be less room for error in calculating each claimant's *pro rata* share, as the data will come from one source. Yet, claimants will also be able to contest their share if they believe that there has been an error. Additionally, if less than 100% of the class submits claims, the *pro rata* share for those who do will be larger. None of the settlement fund will revert to Defendant.

**e. Notice Plan**

*Prudential*, pursuant to the *Due Process Clause of the Fifth Amendment* and *Rule 23(e)*, requires that adequate notice be provided to potential class members by "the combination of reasonable notice and**[\*19]** the opportunity to be head and the opportunity to withdraw from the class." [*Prudential, 148 F.3d at 306*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=). The Court approved the proposed notice plan, which included direct mailing to potential class members and publication. Online and phone resources were also available, including the ability to inspect all pertinent documents. D.E. 476. The notices provided information to potential class members, including the date of the final hearing at which they would be allowed to speak, and how to opt out of the settlement. As to due process, the notices were sufficiently clear, detailed and instructive. The notices indicated the legal claims, the class and class period, the terms of the settlement, the request for fees and expenses, the date and location of the fairness hearing, and the opportunity to opt out or object. The settlement administrator also took reasonable steps to update addresses and re-mail the notice information when initial mailings were returned as undeliverable. Finally, pursuant to the Class Action Fairness Act, [*28 U.S.C. §1715*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GRX1-NRF4-428T-00000-00&context=), Defendant duly notified ***regulators*** of the settlement on February 3, 2017.

**III. Attorneys' Fees, Expenses & Service Awards**

Plaintiff's counsel also makes a claim for attorneys' fees of one-third**[\*20]** of the settlement amount, or $20.5 million; reimbursement of litigation expenses; and $100,000 service awards for each of the three class representatives. In common fund cases such as this one, attorneys' fees are typically awarded through the percentage-of-recovery method. *See* [*In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FBH-TJ90-0038-X41H-00000-00&context=). The percentage-of-recovery method provides for attorneys' fees by awarding a reasonable percentage of the common fund. *Id.* The percentage-of-recovery method is preferred in common fund cases because it "rewards counsel for success and penalizes it for failure." *Id.* (quoting [*In re Prudential, 148 F.3d at 333*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=)).

The Third Circuit, however, suggests that when district courts use the percentage-of-recovery method, they also employ the lodestar method to cross-check the fee and ensure that it is reasonable. [*Id. at 305*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=). "The lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *Id.* The cross-check occurs by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier. If "the multiplier is too great, the court should**[\*21]** reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." [*Id. at 306*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=) (quoting [*In re Prudential, 148 F.3d at 338-40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=)). A court, however, need not apply these factors "in a formulaic way because each case is different." *Id.* (quoting [*In re Rite Aid, 396 F.3d at 301*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FBH-TJ90-0038-X41H-00000-00&context=).

**A. The Percentage-of-Recovery Method**

As discussed, Plaintiff's counsel seeks a fee award of one-third of the settlement fund. When analyzing a fee award under the percentage-of-recovery method, courts consider several factors, including:

(1) the size of the fund created and the number of persons benefitted;

(2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;

(3) the skill and efficiency of the attorneys involved;

(4) the complexity and duration of the litigation;

(5) the risk of nonpayment;

(6) the amount of time devoted to the case by plaintiffs' counsel; and

(7) the awards in similar cases.

[*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FBH-TJ90-0038-X41H-00000-00&context=) (citing [*Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 & n.1 (3d Cir. 2000))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40VB-YXT0-0038-X508-00000-00&context=). The list is not exhaustive. [*Yedlowski, 2016 U.S. Dist. LEXIS 155951, 2016 WL 6661336, at \*19*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M4R-HV41-F04D-W0F3-00000-00&context=). As such, in *In re Prudential*, the Third Circuit enumerated three additional factors that may be relevant:

(1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such**[\*22]** as government agencies conducting investigations;

(2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and

(3) any "innovative" terms of settlement.

[*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=)

Here, because the *Gunter* factors substantially overlap with the *Girsch* factors, the Court will refer to its earlier findings when reviewing the fee application. An analysis of these factors supports the requested one-third fee award.

**1. The Size of the Fund & Number of Persons Benefitted**

For this factor, courts "consider the fee request in comparison to the size of the fund created and the number of class members to be benefitted." [*Yedlowski, 2016 U.S. Dist. LEXIS 155951, 2016 WL 6661336, at \*20*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M4R-HV41-F04D-W0F3-00000-00&context=) (quoting [*Rowe v. E.I. DuPont de Nemours & Co., 2011 U.S. Dist. LEXIS 96450, 2011 WL 3837106, at \*18 (D.N.J. Aug. 26, 2011))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:832R-D4T1-652J-9289-00000-00&context=). Plaintiff's counsel indicates that this settlement is the largest of the comparable healthcare related ***antitrust*** bundling cases brought in the last eight years. The Court does not have any information to the contrary. The class consists of almost 30,000 members. The settlement amount is considerable as is the number of persons/entities that will benefit.

**2. Objections to the Fee Request**

The class notice included details of the request for attorneys' fees, litigation costs, and service awards. There have**[\*23]** been no objections. Notably, none of the three sophisticated class members, who make up almost 30% of the class, object to the motion for fees, reimbursement, and service awards; rather, they have submitted letters in support for the settlement.

**3. The Skill & Efficiency of the Attorneys**

"Lead Counsel's skill and efficiency is 'measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel."' [*Yedlowski, 2016 U.S. Dist. LEXIS 155951, 2016 WL 6661336, at \*20*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M4R-HV41-F04D-W0F3-00000-00&context=) (quoting [*Hall v. AT&T Mobility LLC, No. 07-5325, 2010 U.S. Dist. LEXIS 109355, 2010 WL 4053547, at \*19 (D.N.J. Oct. 13, 2010))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:517P-X3K1-652J-9004-00000-00&context=). In addition, "[t]he quality and vigor of opposing counsel" is relevant when evaluating the quality of services rendered by Lead Counsel. [*2016 U.S. Dist. LEXIS 155951, [WL] at \*21*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M4R-HV41-F04D-W0F3-00000-00&context=). Judge Arleo specifically lauded counsel on both sides of this case on the record after the *Daubert* hearing, saying: "I just want to thank you for your outstanding presentation . . . it's not lost on me at all when lawyers come very, very prepared. And really, your clients should be very proud to have such fine lawyering." Cramer Decl. at ¶33. Plaintiffs' counsel is experienced in this area, and Defendant's counsel are similarly familiar**[\*24]** with these types of cases. Both sides were represented by experienced and well-regarded counsel who vigorously and ably litigated this matter.

**4. The Complexity and Duration of the Litigation**

As discussed, this ***antitrust*** class action represent a most complex areas of litigation. This complexity was compounded by the fact that Plaintiffs were advocating positions that had not yet been formally adopted by the courts. As to the duration of the litigation, it was expansive in terms of time, expense, discovery, and court proceedings.

**5. The Risk of Nonpayment**

"Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees." [*Yedlowski, 2016 U.S. Dist. LEXIS 155951, 2016 WL 6661336, at \*21*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M4R-HV41-F04D-W0F3-00000-00&context=). Counsel lists in their brief a number of ***antitrust*** "cases in which plaintiffs succeed at trial on liability but recovered no damages." Plaintiff's counsel certainly accepted the real risk of little or no payment when it undertook the case. This factor weighs in favor of approving the fee request.

**6. The Amount of Time Devoted to the Case**

This factor will be addressed in the Court's discussion of the lodestar cross-check. However it is clear that the hours that Plaintiffs'**[\*25]** counsel devoted to this case—43,200—were considerable.

**7. Awards in Similar Cases**

The one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method; the Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund. *See* [*In re Gen. Motors, 55 F.3d at 822*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FND0-001T-D2GH-00000-00&context=). Thus, the requested fee in this matter is within the normal range.

**1. Value of Benefits Attributable to Class Counsel**

As noted, this case was investigated and brought entirely by private counsel, there was no corresponding government case against Defendant or similar purveyors of pediatric vaccines. Class counsel, along with their experts including Dr. Elhuage, made novel arguments both on the merits and as to damages. Also, this case marks the first time the Bertrand model has been approved in this context. This factor weighs strongly in favor approving the requested fee award.

**2. Percentage Fee**

As discussed above, a one-third contingency fee is relatively standard, and is supported here by the sophisticated class members, who note that the fee here similar to what would have been privately agreed upon.

**3. Innovative Terms**

This settlement includes standard terms, though counsel**[\*26]** notes that the settlement also includes a release of Defendant's counterclaim. The Court finds real value in the dismissal of the counterclaim because, if successful, it would have subjected Plaintiffs to liability (in addition to a lack of recovery).

**B. Lodestar Cross-Check**

The lodestar cross-check "ensures that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." [*In re Cendant Corp. Litig., 264 F.3d at 285*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43VV-5SP0-0038-X08R-00000-00&context=). Again, to perform the cross-check, a court divides the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier. [*In re AT&T Corp., 455 F.3d 160, 164 (3d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KFV-76J0-0038-X1D7-00000-00&context=).

Plaintiffs' counsel logged 43,200 hours of work on this case. Counsel will also have to expend additional time, for example, by answering questions concerning the administration of the net settlement fund. Yet, counsel is not seeking any payment for this additional effort. Using their historical rates, counsel cites the lodestar as $22,086,998.45 (the result of multiplying the number of hours worked by the appropriate hourly rate).[[4]](#footnote-3)4 As a result, the lodestar multiplier is .928 (the result of dividing the fee amount by the lodestar). This is sometimes referred**[\*27]** to as a "negative multiplier," meaning that counsel is receiving less than they would have received if they had instead been paid on an hourly basis. Because the lodestar cross-check results in a negative multiplier, it provides strong evidence that the requested fee is reasonable.

**C. Reimbursement of Expenses**

"Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." [*In re Cendant Corp., 232 F. Supp. 2d 327, 343 (D.N.J. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4788-STH0-0038-Y458-00000-00&context=). Plaintiff's counsel has asked for reimbursement of $7,199,310.00 in out-of-pocket and unpaid expenses out of the settlement fund before it is distributed to class members. The majority of this amount is the result of the extensive expert testimony solicited by Plaintiff's counsel including from Professor Elhauge and Dr. Leitzinger. The total expenses for "Expert Consultants and Witnesses" was $5,716,357.70. Cramer Decl. at ¶62. The next largest line item was for "hosting and managing the millions of pages of documents" produced in discovery on a secure database; counsel owes a bill of $633,727.04 for document management, the majority of which is for "hosting." *Id.* at ¶¶64-66.

These fees are all properly**[\*28]** charged to the class. *See* [*Yedlowski, 2016 U.S. Dist. LEXIS 155951, 2016 WL 6661336, at \*23*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M4R-HV41-F04D-W0F3-00000-00&context=). The Court finds that these expenses are reasonable and sufficiently documented. As a result, the Court will award the requested amount of $7,199,310.00 for reimbursement of expenses.

**D. Service Awards**

Depending on the circumstances, class representatives may receive incentive awards. [*In re Schering-Plough Corp. Enhance Securities Litig., 2013 U.S. Dist. LEXIS 141475, 2013 WL 5505744, at \*56 (D.N.J. Oct. 1, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59GH-8HN1-F04D-W15V-00000-00&context=). Plaintiff's counsel has asked that the Court award $100,000 each to the class representatives, Adriana M. Castro, M.D., P.A., Sugartown Pediatrics, LLC, and Marquez and Bengochea, M.D., P.A. While the requested amount is higher than that awarded in an average case, it is appropriate here. All three were subject to Defendant's counterclaim (thereby exposing themselves to potential liability), and all three participated in the lengthy and onerous discovery process. For example, Marquez and Bengochea were the subject of multi-day depositions. Cramer Decl. at ¶70. In addition, the class representatives aided counsel during written discovery, producing thousands of pages of documents. No objection has been received to this award. The Court finds that given the significant roles the class representatives played throughout the litigation, the service awards are warranted.

**IV. Conclusion [\*29]**

For the reasons stated above, and for good cause shown, is the joint motion for approval of the settlement is **GRANTED**. In addition, Plaintiffs' motion for an award of attorney fees, reimbursement of expenses, and payment of service awards to the class representatives is **GRANTED**. Appropriate Orders accompany this Opinion. One Order addresses the settlement and the other concerns the fee, expenses, and award application.

Dated: October 20, 2017.

/s/ John Michael Vazquez

John Michael Vazquez, U.S.D.J.

**ORDER FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES**

WHEREAS, this matter comes before the Court on Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards to the Class Representatives;

WHEREAS, the Court, having considered: (a) the Settlement Agreement, dated December 27, 2016; (b) the Court's April 24, 2017 Preliminary Approval Order (ECF 512); (c) Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards to the Class Representatives and supporting documents; (d) Plaintiffs' Memorandum of Law in Support of its Motion for**[\*30]** Final Approval of the Settlement and supporting documents; and (e) the Declaration of Co-Lead Counsel Eric L. Cramer, Esq. in Support of (1) Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards to the Class Representatives, and (2) Motion for Final Approval of Settlement, and related exhibits;

WHEREAS, the Court held a Fairness Hearing on October 3, 2017;

WHEREAS, the Court having considered all of the submissions and arguments with respect to the Settlement, and otherwise being fully informed, and for the Reasons set forth in the a company Opinion and good cause appearing therefore;

IT IS HEREBY ORDERED AS FOLLOWS:

1. All defined terms contained herein shall have the same meaning as set forth in the Settlement Agreement executed by the Parties and filed with the Court.

2. The Court has entered a separate order finally approving the Settlement Agreement, finding, among other things, that the Settlement was the result of extensive *bona fide* arm's-length good faith negotiations, is in all respects fair, reasonable, and adequate, is in the best interest of the certified Class, is within a range that responsible and experienced attorneys**[\*31]** could accept considering all relevant risks and factors, and is in full compliance with all applicable requirement of the Federal Rules of Civil Procedure, the United States Constitution (including the *Due Process Clause*), the Class Action Fairness Act, and in light of the factors set forth in [*Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2RW0-0039-M001-00000-00&context=).

3. Class Counsel have moved for an award of attorneys' fees plus accrued interest, reimbursement of litigation expenses, and payment of service awards from the Aggregate Settlement Fund ($61,500,000). Pursuant to *Rules 23(h)(3)* and [*54(d) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F161-00000-00&context=), and pursuant to the factors for assessing the reasonableness of a class action fee request as set forth in [*Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:40VB-YXT0-0038-X508-00000-00&context=) and [*In re Prudential Ins. Co. of Am. Sales Prac. Litig., 148 F.3d 283, 340 (3d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=), this Court makes the following findings of fact and conclusions of law:

a) the Settlement confers an immediate monetary benefit to the Class of $61,500,000 that is substantial, both in absolute terms, and when assessed in light of the risks of establishing liability and damages in this case;

b) the Settlement also contains valuable relief in the form of release of Sanofi's Counterclaim against the Class Representatives and members of the certified Class;

c) the Settlement achieves for the Class a value higher than the most closely analogous healthcare related ***antitrust*** bundling cases;**[\*32]**

d) Class members were advised of Class Counsel's intention to seek attorneys' fees of one-third of the cash value of the Settlement Fund, reimbursement of litigation expenses, and service awards of up to $100,000 for each of the Class Representatives (Adriana M. Castro, M.D., P.A., Sugartown Pediatrics, LLC, and Marquez and Bengochea. M.D., P.A.) in the Long Form Notice, approved by this Court and mailed by the Settlement Administrator to Class members on May 17, 2017. Additionally, Class members were informed about the fee, costs, and service award requests through the Court-approved Publication Notice, which was published in an issue of AAP News, Published by the America Academy of Pediatrics, and which publication directed Class members to the settlement website ([*www.MenactraAntitrustLitigationSettlement.com*](http://www.MenactraAntitrustLitigationSettlement.com)) established by the Settlement Administrator. The settlement website contains copies of, *inter alia*, the Settlement Agreement and the Long Form Notice, both of which notify Class members of the fee, costs and service award requests.

e) Class Counsel filed a motion for an award of attorneys' fees in the amount of one third of the Aggregate Settlement Fund (*i.e.*, an award of $20,500,000)**[\*33]** plus interest earned on that amount since the Aggregate Settlement Fund was created, reimbursement of reasonable costs and expenses incurred in the prosecution of this action of $7,199,310.00, and payment of service awards totaling $300,000 ($100,000 to each of three Class Representatives). Plaintiffs' motion papers have been publicly available since June 23, 2017 on the docket of this action and on the settlement website;

f) no objections were received to the Settlement, to the requested fee award, or to the requested reimbursement of expenses, and less than 0.1% of Class members have opted out of the Settlement;

g) Three large sophisticated Class members (the "National Wholesalers"), who collectively constitute approximately 30% of Class sales, have each submitted letters to the Court explicitly supporting the Settlement, Class Counsel's fee and expense request, and the sought service awards for the Class Representatives; h) the letters from the National Wholesalers, who are sophisticated Fortune 100 companies, are an indication that the fee sought in this matter is akin to what would have been privately negotiated outside the context of *Rule 23*;

i) Class Counsel have effectively and efficiently**[\*34]** prosecuted this difficult and complex action, which was vigorously litigated by both sides, on behalf of the members of the Class for more than five and a half years, with no guarantee they would be compensated for their time or reimbursed for their out-of-pocket costs;

j) Class Counsel undertook numerous and significant risks of nonpayment in connection with the prosecution of this action;

k) Class Counsel have reasonably spent more than 43,200 hours prosecuting this complex, contingent ***antitrust*** litigation over the past five and a half years, resulting in a total lodestar of $22,086,998.45 (using historical rates), and reasonably incurred $7,199,310.00 in out-of-pocket expenses (including substantial expert expenses), in prosecuting this action, with no guarantee of recovery;

l) the Settlement achieved for the benefit of the Class was obtained as a direct result of Class Counsel's skillful advocacy, development of an innovative theory of liability, and vigorous prosecution of this action;

m) the Settlement was reached following five years of litigation, and extensive negotiations held in good-faith and in the absence of collusion;

n) the "percentage-of-the-fund" method is the proper method**[\*35]** for calculating attorneys' fees in common fund class actions in this Circuit *(see, e.g.,* [*In re Rite Aid Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FBH-TJ90-0038-X41H-00000-00&context=);

o) fee awards of one-third of the settlement amount are commonly awarded in this Circuit in analogous cases;

p) as detailed in Class Counsel's declarations, a fee of one-third of the Aggregate Settlement Fund would be less than Class Counsel's total lodestar (at historic rates) and thus result in a multiplier of less than 1, and therefore provide no risk premium whatsoever;

q) in light of the factors and findings described above, the fee award is within the applicable range of reasonable percentage of the fund awards; and

r) the requested fee award is consistent with fee awards in comparable ***antitrust*** class action cases.

4. Accordingly, Class Counsel are hereby awarded attorneys' fees to be paid from the Aggregate Settlement Fund in the amount of $20,500,000 plus interest in an amount equal to the interest earned on $20,500,000 since the Aggregate Settlement Fund was created. The Court finds this award to be fair and reasonable.

5. Further, Class Counsel are hereby awarded an additional $7,199,310.00 out of the Aggregate Settlement Fund to reimburse them for the expenses they incurred in the prosecution**[\*36]** of this complex lawsuit, which expenses the Court finds to be fairly and reasonably incurred to achieve the benefits to the Class obtained in the Settlement.

6. The awarded fees and expenses shall be paid to Class Counsel from the Aggregate Settlement Fund in accordance with the terms of the Settlement Agreement.

7. Plaintiffs' Co-Lead Counsel[[5]](#footnote-4)1 shall allocate the fees and expenses among all of Class Counsel in a manner that Plaintiffs' Co-Lead Counsel in good faith believes reflects the contributions of each firm working for Plaintiffs and the Class in the prosecution and settlement of the claims against Defendant in this action.

8. Plaintiffs have requested that the Court approve Class Representatives receiving service awards from the Aggregate Settlement Fund of $100,000 for Adriana M. Castro, M.D., P.A., $100,000 for Sugartown Pediatrics, LLC; and $100,000 for Marquez and Bengochea, M.D., P.A. This Court makes the following findings of fact and conclusions of law regarding each of the Class Representatives' service to the Class in this litigation:

a) Adriana M. Castro, M.D., P.A.: (a) through its owner, Dr. Adriana M. Castro, was one of the driving forces behind this lawsuit being filed**[\*37]** and prosecuted; (b) submitted Dr. Castro to deposition requiring many hours of preparation and travel time; (c) dedicated hundreds of hours, mostly by Dr. Castro, to (i) assisting Class Counsel in the investigation and development of an initial complaint and the amended complaint, (ii) overseeing Class Counsel's prosecution of this litigation and settlement negotiations, (iii) responding to numerous documents requests, interrogatories, and requests for admission, and (iv) producing documents;

b) Sugartown Pediatrics, LLC: (a) through its owner, Dr. Louis Giangiulio, was one of the driving forces behind this lawsuit being prosecuted; (b) submitted Dr. Giangiulio to deposition requiring many hours of preparation and travel time; (c) dedicated hundreds of hours, mostly by Dr. Giangiulio to (i) investigation and development of the amended complaint; (ii) overseeing Class Counsel's prosecution of this litigation and settlement negotiations, (iii) responding to numerous documents requests, interrogatories, and requests for admission, and (iv) producing documents;

c) Marquez and Bengochea, M.D.. P.A.: (a) through its owners, Dr. Eysa Marquez Brito and Dr. Jose Bengochea, was one of the driving**[\*38]** forces behind this lawsuit being prosecuted; (b) submitted Dr. Marquez-Brito and Dr. Bengochea to deposition requiring many hours of preparation and travel time; (c) dedicated hundreds of hours, mostly by Dr. Marquez Brito and Dr. Bengochea to (i) overseeing Class Counsel's prosecution of this litigation and settlement negotiations, (ii) responding to numerous documents requests, interrogatories, and requests for admission, and (iii) producing documents;

d) in this Circuit, service awards may be paid to class representatives to reward efforts that benefit a class; and

e) no objections were filed concerning the requested service awards and, in addition, large National Wholesaler Class members support the requested service awards.

9. In recognition of the above facts regarding the service of the Class Representatives to the Class, the Class Representatives are hereby awarded service awards in the following amounts as requested by Class Counsel: $100,000 for Adriana M. Castro, M.D., P.A., $100,000 for Sugartown Pediatrics, LLC; and $100,000 for Marquez and Bengochea, M.D., P.A. The Court finds these awards to be fair and reasonable. These awards are in addition to whatever monetary amounts**[\*39]** the Class Representatives may be receiving from the Aggregate Settlement Fund pursuant to the plan of distribution.

10. Without affecting the finality of this Order in any respect. this Court reserves jurisdiction over any matters related to or ancillary to this Order.

**IT IS HEREBY ORDERED**.

Dated: 10/20/2017

/s/ John Michael Vazquez

The Honorable John Michael Vazquez

United States District Court Judge

**ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, APPROVING PLAN OF DISTRIBUTION AND FINAL JUDGMENT AND ORDER OF DISMISSAL**

WHEREAS, the Court, having considered the Joint Motion for Final Approval of Class Action Settlement, Final Judgment, and Order of Dismissal, and supporting materials including the Plan of Distribution of the Net Settlement Fund ("Plan of Distribution"), the Settlement Agreement, dated December 27, 2016 between and among the Parties (the "Settlement"), the July 24, 2017 Notice Concerning Exclusions and Notice Program, the Court's April 24, 2017 Order granting Preliminary Approval of the Proposed Settlement, Approval of the Proposed Manner and Form of Notice, and Appointment of Escrow Agent and Settlement Administrator (the "Preliminary Approval Order"), having held**[\*40]** a Fairness Hearing on the 3rd day of October 2017, and having considered all of the submissions and arguments with respect to the Settlement, and otherwise being fully informed, and for the reasons set forth in the accompanying opinion, and good cause appearing therefore;

IT IS THIS 20th day of October, 2017

ORDERED AS FOLLOWS:

1. This Order incorporates herein and makes a part hereof, the Settlement Agreement and its exhibits, and the Preliminary Approval Order. Unless otherwise provided herein, the terms defined in the Settlement Agreement and Preliminary Approval Order shall have the same meanings for purposes of this Final Order and its accompanying Final Judgment.

2. The Court has jurisdiction over this action and all parties thereto, including, but not limited to, all Class members, for all matters relating to this action, the counterclaim, and the Settlement, including, without limitation, the administration, interpretation, effectuation, or enforcement of the Settlement and this Order.

**I. THE CLASS**

3. On September 30, 2015, this Court entered an Opinion and Order, ECF 415 & 416, certifying a Class, appointing Berger & Montague, P.C. and Nussbaum Law Group, P.C. as Co-Lead Counsel,**[\*41]** and appointing named plaintiffs Adriana M. Castro, M.D., P.A., Sugartown Pediatrics, LLC, and Marquez and Bengochea, M.D., P.A. as the Class Representatives. As amended by the Court's October 11, 2016 Opinion, ECF 475, the Class is defined as:

All persons or entities in the United States and its territories that purchase Menactra directly from defendant Sanofi Pasteur Inc. ("Sanofi") or any of its divisions, subsidiaries, predecessors or affiliates, such as VaxServe, Inc., during the period from March 1, 2010 through and including December 31, 2014 ("Class Period") and excluding all governmental entities, Sanofi, Sanofi's divisions, subsidiaries, predecessors, and affiliates Kaiser Permanente and the Kaiser Foundation (collectively, "Kaiser"), and any purchases by entities buying Menactra pursuant to a publicly-negotiated price (*i.e.* governmental purchasers).

*See* Preliminary Approval Order at 1.

**II. CLASS NOTICE**

4. The record shows, and the Court finds, that notice has been given to the Class in substantially the manner approved by the Court in its Preliminary Approval Order. The Court finds that such notice constitutes: (i) the best notice practicable to the Class under the circumstances;**[\*42]** (ii) notice that was reasonably calculated, under the circumstances, to apprise the Class of the pendency of the action and the terms of the Settlement, their right to exclude themselves from the Settlement or to object to any part thereof, their right to appear at the Fairness Hearing (either on their own or through counsel hired at their own expense), and the binding effect of the orders, the Final Order, and the Final Judgment, whether favorable or unfavorable, on all persons who do not exclude themselves from the Settlement; (iii) due, adequate, and sufficient notice to all persons or entities entitled to receive notice; and (iv) notice that fully satisfies the requirements of the United States Constitution (including the *Due Process Clause*), *Federal Rule of Civil Procedure 23*, and any other applicable law.

5. Due and adequate notice of the proceedings having been given to the Class and a full opportunity having been offered to Class members to participate in the Fairness Hearing, it is hereby determined that all Class members, except those opt-outs identified by Co-Lead Counsel, *see* ECF 514-1 at Ex. D, are bound by the terms of this Order.

6. The Court further finds that defendant Sanofi Pasteur Inc. ("Sanofi") provided notice of**[\*43]** the Settlement to the appropriate state and federal government officials pursuant to [*28 U.S.C. § 1715*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GRX1-NRF4-428T-00000-00&context=), and the requisite 90-day time period for said officials to comment on or object to the Settlement has passed.

**III. FINAL APPROVAL OF THE SETTLEMENT AGREEMENT**

7. The Court finds that the Settlement resulted from extensive *bona fide* arm's-length good faith negotiations between the Parties, through experienced counsel, and with the assistance of two separate mediators and the Court.

8. Pursuant to *Federal Rule of Civil Procedure 23(e)*, the Court hereby finally approves in all respects the Settlement and finds that it benefits the Class members. The Court further finds that the Plan of Distribution and all other parts of the Settlement and its administration, are in all respects, fair, reasonable, and adequate, and in the best interest of the Class, within a range that responsible and experienced attorneys could accept considering all relevant risks and factors, and are in full compliance with all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the *Due Process Clause*), and the Class Action Fairness Act. Accordingly, the Settlement shall be consummated in accordance with its terms and provisions.

9. The**[\*44]** Court finds that the Settlement is fair, reasonable, and adequate in light of the factors set forth in [*Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2RW0-0039-M001-00000-00&context=), and the additional factors set forth in [*In re Prudential Ins. Co. of Mer. Sales Practices Litig., 148 F.3d 283 (3d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8C-CSV0-0038-X3XG-00000-00&context=), based on the following factors, among other things:

a. This case was highly complex, expensive, and time consuming and would have continued to be so through trial if the case had not settled;

b. There were no objections to the Settlement, and only limited opt-out requests comprising less than one tenth of one percent of Class members representing a miniscule amount of Class sales. Each of the Class Representatives and three of the largest, most sophisticated Class members, Cardinal Health, AmerisourceBergen, and McKesson, all expressed affirmative support for the Settlement;

c. Because the case settled after the close of fact and expert discovery, after the parties had briefed discovery, class certification, *Daubert* motions, and summary judgment motions, Class Counsel has had a full appreciation of the strengths and weaknesses of Plaintiffs' case while negotiating the Settlement;

d. The Class faced numerous and substantial risks in establishing liability and damages if, rather than settling, the litigation continued; and

e. The Settlement amount**[\*45]** is well within the range of reasonableness in light of the best possible recovery and the risks the Parties faced if the case continued to verdicts as to both liability and damages.

**IV. THE PLAN OF DISTRIBUTION IS APPROVED**

10. The Court approves the Plan of Distribution proposed by Co-Lead Counsel. The Plan of Distribution, consistent with the descriptions provided in the long form notice mailed first class directly to Class members and posted on a Settlement-specific website, proposes to distribute the Net Settlement Fund *pro rata*, based on the total Menactra purchase volume during the Class Period of each Class member who files a valid Claim Form ("Claimants") relative to the total Menactra purchases of all other Claimants who submit timely, valid Claim Forms. The proposed Plan of Distribution is fair, efficient, and often used, and is approved.

11. The Court directs Rust Consulting, Inc., the firm appointed Settlement Administrator in the Preliminary Approval Order, working with the economic consulting firm, Econ One, Inc., and Co-Lead Counsel, to administer the Settlement, determine the distribution amounts to Claimants, and distribute the Net Settlement Fund proceeds in the manner**[\*46]** provided in the Plan of Distribution.

12. Rust, working in conjunction with Econ One and Co-Lead Counsel, shall distribute an individualized Claim Form to each Class member by first class mail within 45 days of the date of this Order granting final approval of the Settlement and Plan of Distribution (or if the 45th day lands on a weekend or holiday, the first business day thereafter). The submission of the Claim Form to the Settlement Administrator (with any necessary supporting documentation if the Claimant does not agree with information contained in its Claim Form) will be deemed timely if it is received by the Claims Administrator or postmarked within 90 days from the date of this Order (or if the 90th day lands on a weekend or holiday, the first business day thereafter). At Co-Lead Counsel's discretion, this deadline may be extended another 30 days. Co-Lead Counsel may also seek further extensions of the deadline by order of the Court after any initial extension. Untimely Claims Forms may be subject to disallowance.

**V. FINAL JUDGMENT AND ORDER OF DISMISSAL OF CLAIMS**

IT IS HEREBY ADJUDGED AND DECREED PURSUANT TO [*FEDERAL RULE OF CIVIL PROCEDURE 58*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F169-00000-00&context=) AS FOLLOWS:

13. Having found the Settlement to be fair, reasonable, and**[\*47]** adequate within the meaning of *Federal Rule of Civil Procedure 23* as to Class members, and that due, adequate, and sufficient notice has been provided to all persons or entities entitled to receive notice satisfying the requirements of the United States Constitution (including the *Due Process Clause*), *Federal Rule of Civil Procedure 23*, and any other applicable law, the Settlement shall be consummated in accordance with its terms as set forth in the Settlement Agreement, incorporated herein by reference.

14. This Action is hereby dismissed with prejudice and without costs as to Plaintiffs, Class members, and Sanofi.

15. Plaintiffs' Released Claims[[6]](#footnote-5)1 with respect to Sanofi Released Parties are hereby released, such release being effective as of the Effective Date.

16. Plaintiffs' Releasing Parties are permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding asserting any Plaintiffs' Released Claims against any Sanofi Released Parties.

17. Sanofi's Released Claims with respect to the Plaintiffs' Released Parties are hereby released, such release being effective as of the Effective Date;

18. Sanofi Releasing Parties are permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding**[\*48]** asserting any Sanofi's Released Claims against any Plaintiffs' Released Parties;

19. With respect to any non-released claim, all rulings, orders, and judgments in this Action, including but not limited to the Court's orders with respect to Sanofi's counterclaim, shall not have any *res judicata*, collateral estoppel, or offensive collateral estoppel effect;

20. This Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement including its administration and consummation;

21. There being no just reason for delay, the Court directs [*Federal Rule of Civil Procedure 54(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F161-00000-00&context=) judgment of dismissal as to Plaintiffs, Class members, and Sanofi be final and entered forthwith.

/s/ John Michael Vazquez

JOHN MICHAEL VAZQUEZ, U.S.D.J.

**End of Document**

1. 1The Court approved publication of the notice in *Pediatrics*, but as a result of a miscommunication, the notice was published in *AAP News*, published by the American Academy of Pediatrics. D.E. 515, Memorandum of Law in Support of Joint Motion for Final Approval of Class Action Settlement (hereinafter "Joint Motion") at 17. However, because *AAP* has a larger circulation than *Pediatrics* and a similar readership, the Court finds publication in *AAP News* not materially different than in *Pediatrics*. However, the Court also notes that in the future, if such an error occurs, the better practice is to notify the Court immediately and ensure that the Court does not want any corrective action taken. [↑](#footnote-ref-0)
2. 2In fact, Defendant filed its motion for summary judgment, D.E. 649, before settlement was reached. [↑](#footnote-ref-1)
3. 3The Court notes that some courts have suggested that the lack of objectors essentially *requires* a finding that the settlement is fair and reasonable. *See, e.g.,* [*In re Linerboard* ***Antitrust*** *Litig, 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BG3-H610-0038-Y0W7-00000-00&context=) ('"[T]his unanimous approval of the proposed settlement[ ] by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement'" (quoting [*Fisher Bros v. Phelps Dodge Indus., Inc., 604 F. Supp. 446, 451 (E.D. Pa. 1985))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-GG10-0039-R1B6-00000-00&context=). The Court does not necessarily agree with this conclusion but recognizes that the lack of objectors provides a strong indication that the settlement is fair and reasonable, particularly where, as here, sophisticated claimants affirmatively support the settlement. [↑](#footnote-ref-2)
4. 4*See* Cramer Decl. at ¶54 for a table of the historical rates for each firm that contributed hours to this case. [↑](#footnote-ref-3)
5. 1Plaintiffs' Co-Lead Counsel are Berger & Montague, P.C. and Nussbaum Law Group, P.C. [↑](#footnote-ref-4)
6. 1Certain terms used herein are defined in the Settlement Agreement. [↑](#footnote-ref-5)