

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

JERRY PINNELL, JEREMY FERNANDEZ)
AND SHANE PERRILLOUX, individually)
and on behalf of all others similarly situated,)

Plaintiffs,)

v.)

TEVA PHARMACEUTICALS USA, INC.,)
BOARD OF DIRECTORS OF TEVA)
PHARMACEUTICALS USA, INC., TEVA)
PHARMACEUTICALS USA, INC.)
INVESTMENT COMMITTEE, and JOHN)
AND JANE DOES 1-30.)

Defendants.)

CIVIL ACTION NO.:
2:19-CV-05738-MAK

**PLAINTIFFS’ MOTION FOR
FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Named Plaintiffs Jerry Pinnell, Jeremy Fernandez, and Shane Perrilloux (collectively, “Plaintiffs”), participants in the Teva Pharmaceuticals Retirement Savings Plan (the “Plan”) hereby respectfully move this Court, pursuant to FED. R. CIV. P. 23, for an Order:

1. Granting final approval to the class action settlement in this action on the terms of the Class Action Settlement Agreement (“Settlement Agreement”), executed on November 18, 2020 and previously filed with the Court on November 18, 2020 (ECF 68-3, 71-3);
2. Certifying the Class as defined in the Settlement Agreement;
3. Appointing Named Plaintiffs as Class Representatives and Plaintiffs’ Counsel as Class Counsel under FED. R. CIV. 23(g);
4. Finding that the manner in which the Settlement Class was notified of the Settlement was the best practicable under the circumstances and adequately informed the

Settlement Class members of the terms of the Settlement, how to lodge an objection and obtain additional information; and

5. For such other and further relief as the Court may deem just and proper.

The grounds for this Motion are set forth in the following papers filed contemporaneously herewith:

A. Memorandum in support of Plaintiffs' Final Approval of Class Action Settlement; and

B. Declaration of Mark K. Gyandoh in support of Plaintiffs' Motion for Final Approval of Class Action Settlement and exhibits thereto.

Attached hereto is the proposed Final Approval Order and Judgment in the form agreed to by the parties and attached to the Settlement Agreement as Exhibit D. Further, the parties have conferred and respectfully request the May 3, 2021 Fairness Hearing be held telephonically or by video sharing service such as Zoom, as part of the COVID-19 mitigation efforts. If the Court grants this request, Class Counsel shall make this announcement on the Settlement Website as contemplated under paragraph 26 of the Preliminary Approval Order.

DATED: March 15, 2021

Respectfully submitted,

/s/ Mark K. Gyandoh

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT**

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I. INTRODUCTION

On December 7, 2020, the Court preliminarily approved the Settlement in this Action (ECF No. 72), which provides for the creation of a \$2,550,000.00 Settlement Fund.¹ The Court's Preliminary Approval Order also, *inter alia*, conditionally certified a Settlement Class and appointed the Named Plaintiffs as class representatives and Capozzi Adler, P.C ("Capozzi Adler") as Class Counsel. *Id.* Plaintiffs and Class Counsel believe each of these findings in the Preliminary Approval Order should be made final because the proposed Settlement represents an outstanding recovery. In particular, the Settlement represents more than 77% of the Settlement Class's strongest claims for which Plaintiffs estimated damages to be \$3.3 million before interest. *See* Gyandoh Decl., ¶28. Class Counsel achieved this Settlement only after extended negotiations under the auspices of Hunter R. Hughes, III, a neutral, third-party private mediator with experience mediating ERISA class actions. Without doubt, the Settlement was reached after arm's length negotiations by experienced counsel on both sides.

The Settlement Class has received full and fair notice of the terms of the Settlement through individualized direct mail, electronic mail, and a dedicated internet Settlement website, in accordance with the Preliminary Approval Order. After mailing the approved form of Notice of Class Action Settlement to Class Members, Class Counsel have thus far received no objections.² Plaintiffs respectfully request this Court to enter the proposed Judgment Approving Class Action

¹ The Settlement Agreement, previously submitted to the Court, is being submitted herein as Exhibit 1 to the Declaration of Mark K. Gyandoh ("Gyandoh Decl.") which is filed contemporaneously with this memorandum. The Settlement Agreement has several exhibits. These exhibits are: A (Settlement Notice); B (Plan of Allocation); C (Preliminary Approval Order); D (Final Order); and E (CAFA Notice). Undefined capitalized terms herein have the same meaning as in the Settlement Agreement.

² The Preliminary Approval Order provides objectors have until April 12, 2021 to object. Any objections received by the deadline will be addressed by Class Counsel by April 26, 2021 in accordance with the Preliminary Approval Order.

Settlement. Further, the parties have conferred and respectfully request the May 3, 2021 Fairness Hearing be held telephonically or by video sharing service such as Zoom, as part of the COVID-19 mitigation efforts.

II. SUMMARY OF CLAIMS

Plaintiffs, participants in the Teva Pharmaceuticals Retirement Savings Plan (the “Plan”), commenced this action against Defendants³ with the filing of a Complaint on December 6, 2019 (ECF 1) and an amended Complaint on February 5, 2020 (ECF 10.).⁴ The Amended Complaint alleges Defendants breached their fiduciary duties by failing to prudently and loyally manage the Plan. Am. Cmplt.,⁵ ¶¶129-34, 136-41. Defendants strongly dispute Plaintiffs’ allegations and deny liability for the alleged ERISA⁶ violations. Defendants maintain the Plan’s fiduciaries selected and retained prudent, well-performing, and reasonably priced investment options, and the Plan’s fiduciaries ensured participants paid only reasonable fees associated with their participation in the Plan throughout the putative class period.

III. THE SETTLEMENT AGREEMENT

A. The Proposed Settlement

The Settlement provides Defendants, through their insurer, will pay \$2,550,000.00 to the Plan to be allocated to participants pursuant to a Court-approved Plan of Allocation.⁷ In exchange,

³ Plaintiffs and Defendants are collectively referred to as the “Parties.”

⁴ The full procedural history of this matter is recounted in the Gyandoh Declaration.

⁵ “Am. Cmplt.” refers to the Amended Complaint.

⁶ Employee Retirement Income Security Act of 1974.

⁷ Attached to the Settlement Agreement as Exhibit B, the Plan of Allocation is premised on calculating a Plan participant’s pro rata distribution based upon the individual’s balances in the Plan during the Class Period.

Plaintiffs and the Plan will dismiss their claims, as set forth more fully in the Settlement Agreement.

The Settlement resolves all claims of current and former participants in the Plan from December 6, 2013 through June 28, 2019. *See* Settlement Agreement, §§ 1.13, 1.37, 7.2. The Settlement Fund will be used to pay the costs to administer the Settlement, to provide notice to Settlement Class members, and to pay attorneys' fees, expenses, and Case Contribution Awards the Court may order. *Id.* at §§ 4.3, 5.1, 5.2, 5.3, 5.5. The Settlement Fund, up to the amount of \$25,000, will also be used to pay the costs of an Independent Fiduciary who, upon review of the Settlement, will approve and authorize the Settlement in a writing to be submitted to the Court prior to the Fairness Hearing. *Id.* at § 2.1.3.

After the payment of costs, expenses, and fees described above, the Settlement Fund will be distributed to Settlement Class members. *Id.* at §§ 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7. Settlement Class members will not have to make a claim to receive their share of the Settlement Fund. The amount distributed to each Settlement Class member will be *pro rata*, based on account balances, a proxy for the alleged losses, as fully described in the Plan of Allocation attached to the Settlement Agreement. Plan of Allocation at Section C. Class Members who are entitled to a distribution of less than \$10.00 will receive a distribution of \$10.00 from the Net Settlement Amount. Plan of Allocation at Section D.

Current participants will receive their share of the Settlement Fund through an electronic distribution to their Plan account. *Id.* at Section E. Former participants shall be paid directly by the settlement administrator by check. *Id.* at Section F. If any checks to former Plan participants are uncashed, the money shall be forwarded to the Plan's trust for purposes of defraying

administrative fees and expenses of the Plan which would otherwise have been charged to the Plan's participants. *Id.* at Section I.

B. Release of Claims

Plaintiffs and Settlement Class members will provide a release and covenant-not-to-sue to Defendants and the other Released Parties covering the claims which were or could have been asserted in the Action based on the facts alleged in the Complaint filed in this case or Defendants' defenses to the Plaintiffs' claims. *Id.* at §§ 1.37, 1.38, 7.2, 7.3, 7.4. The release and covenant-not-to-sue in the Settlement does not encompass individual claims for vested benefits otherwise due under the terms of the Plan.

IV. THE NOTICE PLAN HAS BEEN EFFECTIVELY IMPLEMENTED

Pursuant to the Preliminary Approval Order, Class Counsel has overseen the issuance of the Court-approved Class Notice. Class Counsel retained JND Legal Administration LLC ("JND") to serve as settlement and notice administrator. *See* Declaration of Jennifer M. Keough Regarding Settlement Administration (attached as Exhibit 2 to the Gyandoh Declaration). On November 16, 2020 and November 17, 2020, Defendants provided JND with 25 spreadsheets containing, among other information, the names, mailing addresses, contact information, Social Security numbers, and other identifying data of individuals identified as potential Settlement Class Members. Keough Decl., ¶¶ 5-6. JND updated the Settlement Class member address information using data from the National Change of Address ("NCOA") database and performed advanced address research using the TransUnion skip-trace database to identify current addresses prior to mailing. Keough Decl., ¶ 6.

The notice program was extremely successful as only 31 Class Notices out of the 18,611 Class Notices mailed were not able to be delivered resulting in a 99.9% success rate. *See* Keough Decl., ¶¶ 7-9. Additionally, on January 6, 2021, JND sent an e-mail notice to 7,311 Class Member e-mail addresses and only 146 E-Mail Notices were undeliverable. *See* Keough Decl., ¶¶ 10-11. The notice program apprised Settlement Class members of the terms of the Settlement, and of their right to object to any or all of the terms of the Settlement, Plan of Allocation, Case Contribution Awards, or to Class Counsel’s motion for award of attorneys’ fees and reimbursement of litigation expenses. The Class Notice was also posted on a dedicated website – www.TevaERISASettlement.com – through which the public, and the Plan’s current and former participants could (i) view a summary description of the Action and the status of the Action, and (ii) access the Settlement Agreement and related Settlement documents. *See* Gyandoh Declaration, ¶ 42. As of the March 12, 2021, the Settlement website has tracked 1,056 unique users who registered 2,148 page views. *Id.* at 13.

Where, as here, a notice program includes direct mail notice to absent class members and is supplemented by a settlement website and a toll-free telephone number, this constitutes the “best notice practicable.” *Hashw v. Dep’t Stores National Bank*, 182 F.Supp.3d 935, 946 (D. Minn. 2016) (citations omitted). Indeed, the Court previously found the combination of the direct-mail Class Notice and dedicated Settlement website and phone number was adequate to inform Settlement Class members of the terms of the proposed Settlement and how to lodge an objection, and obtain additional information. *See* Preliminary Approval Order, ¶ 7.

V. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. Legal Standard

Approval of a class action settlement is in the sound discretion of the court. *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999). In order to grant final approval of a class action settlement, the Court must first determine whether a class can be certified under Rule 23(a) and at least one prong of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Second, the Court must assess “whether the settlement is fair, adequate, and reasonable.” *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983). To make this determination, courts in this circuit employ the more rigorous nine factor test set forth in *Girsh v. Jepsen*, 521 F.2d 153 (3d Cir. 1975), which requires analysis of the following:

(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the state 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 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 to a possible recovery in light of all the attendant risk of litigation.

Girsh, 521 F.2d at 157; *see also In re NJ Tax Sales Certificates Antitrust Litig.*, 750 Fed.Appx. 73, 77 (3d Cir. 2018); *In re: Flonase Antitrust Litig.*, 951 F.Supp.2d 739, 742 (E.D.Pa. 2013) (“*Flonase*”); *Stevens v. SEI Investments Co.*, 2020 WL 996418 (E.D. Pa. Feb. 28, 2020).

Although the Court must scrutinize the Settlement Agreement for fairness, “there is an overriding public interest in settling class action litigation, and it should therefore be encouraged.” *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) (“*Warfarin*”). As set forth below, the Settlement is fair, reasonable and adequate and should be granted final approved.

B. The Third Circuit’s *Girsh* Factors also are Satisfied

Although satisfaction of the *GMC* test is sufficient for preliminary approval, the Settlement also meets the more exacting approval standard articulated by the Third Circuit in *Girsh* and in Rule 23(e)(2). A court may approve a settlement even if it does not find all of these factors militate

in favor of approval. *NJ Tax Sales*, 750 Fed. Appx. at 77, citing *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 489-90, 491 (3d Cir. 2017) (affirming settlement approval where some factors did not weigh in favor of settlement).

i. The Complexity, Expense, and Likely Duration of the Litigation

“The first factor ‘captures the probable costs, in both time and money, of continued litigation.’” *In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 437 (3d Cir. 2016), *as amended* (May 2, 2016) (“NFL”) (quoting *Warfarin*, 391 F.3d at 535-36 (internal quotation omitted)). Here, the probable costs of continued litigation with respect to both time and money are high. Considerable additional discovery, both paper and testimonial, would be required before the case would be trial ready, and there would be voluminous briefing ahead in the absence of the proposed Settlement. The Settlement in this Action comes at an opportune time given, if the litigation continues, there would be substantial expense to the Parties associated with necessary factual and expert discovery and assorted motion practice.

ii. The Reaction of the Class to the Settlement

To date, no objections have been received to the Settlement. Class Counsel will address any objections prior to the Fairness Hearing.

iii. The Stage of the Proceedings and the Amount of Discovery Completed

Pursuant to the third *Girsh* factor, the Court must consider the “degree of case development that Class Counsel have accomplished prior to Settlement,” including the type and amount of discovery already undertaken. *In re General Motors Corp. Pick-Up Truck Fuel Tanks Products Liability Litig.* (“GMC”), 55 F.3d 768, 813 (3d Cir. 1995). “Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before

negotiating.” *NFL*, 821 F.3d at 438-39 (3d Cir. 2016), quoting *Warfarin*, 391 F.3d at 537 (internal quotation omitted).

The discovery efforts in this Action were substantial. *See* Gyandoh Decl., ¶¶ 18-25. Following the filing of the Amended Complaint, the Parties exchanged Rule 26(a)(1) Disclosures in which they identified relevant witnesses and categories of documents. Thereafter, the Parties exchanged document requests, interrogatories, and requests for admission resulting in Defendants producing nearly fifty-thousand pages of documents, including ESI. Additionally, each of the Named Plaintiffs presented for a deposition. The deposition of Gerald Pinnell took place on August 25, 2020; the deposition of Jeremy Fernandez took place on June 11, 2020; and the deposition of Shane Perrilloux took place on June 4, 2020. Gyandoh Decl. 24. From independent research, discovery productions, and depositions, Plaintiffs’ counsel, in consultation with Plaintiffs’ consulting expert witness, were able to assess the strengths and weaknesses of Plaintiffs’ claims, as well as calculate potential Class-wide damages. *See* Gyandoh Decl., ¶¶ 28-29, 32. This prong of the *Girsch* factors is thus amply satisfied.

iv. The Risks of Establishing Liability and Damages

The fourth and fifth *Girsch* factors, which require examination of the risks of establishing liability and damages respectively, are “closely related” and therefore are properly addressed together. *In re Flonase*, 951 F.Supp.2d 739, 744 (E.D. Pa. 2013). “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,” *GMC*, 55 F.3d at 814, and these inquiries “survey the possible risks of litigation in order 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 Ins. Co. America Sales Practice Litig.*

Agent Actions, 148 F.3d 283, 319 (3d Cir. 1998); *see also In re: Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001), quoting *GMC*, 55 F.3d at 816. In this complex ERISA Action, Plaintiffs would proffer their liability and damages experts, which would undoubtedly be countered by Defendants' proffered experts. Ultimately, a battle of experts presenting differing damages calculations would ensue and the factfinder "would therefore be faced with competing expert opinions representing very different damage estimates[,] . . . adding further uncertainty." *In re: Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003).

Although a trial on the merits in any case always entails some risk, in the context of ERISA breach of fiduciary duty class actions, the risk is even more considerable. As the United States District Court for the District of New Jersey noted when analyzing the reasonableness of the settlement of ERISA breach of fiduciary duty allegations, "[r]isk is inherent in litigation. In this case, the risks of litigation are great because Plaintiffs' claims involve complex and contested questions of law and fact." *In re: Merck & Co., Inc., Vytorin ERISA Litig.*, No. 08-cv-285, 2010 WL 547613, at *8 (D.N.J. Feb. 9, 2010). Given the similarly complex and contested questions of law and fact here, the same great risks of a trial on the merits are inherent in this Action. Indeed, the undersigned is particularly qualified to realistically evaluate the risks of continued litigation, as he tried an analogous case to an unfavorable verdict for plaintiffs in *Brieger v. Tellabs, Inc.*, 659 F. Supp. 2d 967 (N.D. Ill. 2009). Gyandoh Decl., ¶ 33.

v. The Risks of Maintaining the Class Action through Trial

The sixth *Girsch* factor requires the Court to examine the risks of maintaining the class-action through trial due to the fact "[t]he value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate

proof on the merits.” *GMC*, 55 F.3d at 817. “Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action.” *Id.*

The Third Circuit has referred to ERISA derivative actions brought on behalf of a plan and its participants, such as the instant Action, as “paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.” *In re: Schering-Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (“*Schering-Plough ERISA*”). However, the Court had yet to rule on class certification at the time the Parties agreed to the proposed Settlement, and Defendants had already asserted arguments in opposition to Plaintiffs’ motion for class certification. This factor, too, militates in favor of settlement, as the settlement eliminates the risks of not being able to establish and maintain the class through trial.

vi. The Ability of the Defendants to Withstand a Greater Judgment

The seventh *Girsh* factor requires the Court to consider “whether the defendants could withstand a judgment for an amount significantly greater than the settlement.” *Warfarin*, 391 F.3d at 537-38. The Third Circuit has noted, “in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement.” *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 323 (3d Cir. 2011). This is because, “when there is no ‘reason to believe that Defendants face any risk of financial instability[,] . . . this factor is largely irrelevant.’” *In re Nat’l Football League Players Concussion Injury Litig.*, 307 F.R.D. 351, 394 (E.D. Pa. 2015) (quoting *Reibstein v. Rite Aid Corp.*, 761 F.Supp.2d 241, 254 (E.D. Pa. 2011)). Thus, “the settling defendant’s ability to pay greater amounts [may be] outweighed by the risk that the plaintiffs would not be able to achieve any greater recovery at trial.” *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 632 (E.D. Pa. 2004).

While Teva could likely withstand a judgment in an amount larger than the Settlement amount, the risks and expenses attendant to continuing this litigation, combined with the immediacy of the benefit to Settlement Class members, easily outweigh this factor.

vii. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of all Attendant Risks of Litigation

“According to *Girsh*, courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth [*Girsh*] factor).” *GMC*, 55 F.3d at 806. To assess the reasonableness of a settlement in a case such as this, seeking primarily monetary relief, a court should compare “the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing . . . with the amount of the proposed settlement.” *NFL*, 821 F.3d at 440, quoting *Prudential*, 148 F.3d at 322 (internal quotation omitted). In determining the range of recovery in this Action, at one extreme is the possibility Defendants might prevail on one or more of their legal or factual arguments to defeat liability entirely. While Plaintiffs are confident of the strength of the claims asserted, they recognize this possibility cannot be discounted completely.

If this case were to proceed to trial, Plaintiffs believe the realistic maximum damages are between \$3.3 million and \$17.6 million. Gyandoh Decl., ¶ 28. Specifically, Plaintiffs calculate Defendants’ failure to invest in the alleged lowest-cost share class available (*i.e.* the T.Rowe Price I shares) during the Class Period resulted in damages of \$3.3 million (or \$4.1 million with 7% compounded interest). *Id.* Plaintiffs chose the Class Period end date of June 28, 2019 because that is when the Plan transitioned from T.Rowe Price mutual fund target dates to State Street collective trust target date funds with expense ratios of only .12%. Plaintiffs calculate the alleged failure to transition to the State Street funds at the start of the Class Period are approximately \$17.6

million. *Id.* In addition to the aforementioned damages, Plaintiffs allege the Plan suffered damages of \$1.3 million due to unreasonably high recordkeeping fees. *Id.*

Defendants vigorously contest these figures. Indeed, Defendants have maintained—even if they were deemed liable on Plaintiffs’ fiduciary-breach claims—the named Plaintiffs and a significant percentage of the members of the putative class would have no damages at all, based on the strong performance of the investment options offered through the Plan during the relevant period and the reasonableness of the Plan’s recordkeeping fees.

Moreover, these figures are dependent on the Court finding Defendants’ fiduciary breaches to have occurred by the start of the Class Period on December 13, 2013, as alleged in the Amended Complaint. Am. Cmplt., ¶6. But there is no guarantee this date would ultimately prevail or Plaintiffs otherwise would be successful in establishing the claimed amount of damages. The use of a later breach date and/or a determination one of the challenged decision-making processes was prudent could result in a recovery well below the \$2,550,000.00 Settlement amount. Given this wide range of potential damage outcomes at trial and the uncertainty of the Plan’s actual losses, the \$2,550,000.00 monetary Settlement is fair and reasonable given the Settlement represents 77% of Plaintiffs’ strongest claims (*i.e.* the lowest share class claim). *See, e.g., Keil v. Lopez*, 862 F.3d 685, 696 (8th Cir. 2017) (finding a 27% recovery of maximum possible full verdict at trial to be reasonable).

viii. The Requirements of FED. R. CIV. P. 23(e)(2) Is Satisfied

Under FED.R.CIV.P. 23(e)(2), the Court is to consider when determining whether to grant final approval the following factors: (1) “the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims”; (2) “the terms of any proposed award of attorney’s fees, including timing of payment”; and (3) whether “the proposal

treats class members equitably relative to each other.” FED. R. CIV. P. 23(e)(2)(C)(ii), (C)(iii) and (D).⁸

(1) Effectiveness of Plan Distribution

The proposed Plan of Allocation, described *infra* in Section VI, describes a plan of allocating the Net Settlement Amount to Class Members utilized in other analogous ERISA matters and is highly effective. Current Plan participants – those who still maintain accounts in the Plan – will have payments made directly into their accounts. Former participants – those who no longer maintain a Plan account – shall receive a check.

(2) Terms of Proposed Attorneys’ Fees

The Settlement does not excessively compensate Class Counsel. The Settlement is not contingent on Class Counsel receiving a specific amount of fees and any fees they receive will be determined by the Court. The amount of fees Class Counsel is requesting, a third of the monetary portion of the Settlement, is reasonable and consistent with the awards in other ERISA cases so the requirement of Rule 23(e)(2)(C)(ii) has been met.⁹

(3) Equitable Treatment of Class Members

⁸ There are no agreements other than the Settlement Agreement, thus FED. R. CIV. P. 23(e)(2)(c)(iv) is irrelevant.

⁹ See *McDonald v. Edward Jones*, 791 Fed.Appx. 638, 640 (8th Cir. 2020) (affirming judgment awarding the class counsel attorneys’ fees of 1/3 of the settlement fund); see also *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *6 (M.D.N.C. Sept. 29, 2016); *Spano v. The Boeing Co.*, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015); *Krueger v. Ameriprise Financial*, 2015 WL 4246879, at *4 (D. Minn. July 13, 2015); *Beesley v. Int’l Paper Co.*, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014); see also Plaintiffs’ Motion For An Award of Attorney’s Fees and Reimbursement of Expenses and Case Contribution Awards and supporting Memorandum of Law being filed contemporaneously herewith (“Fee Motion”).

The Settlement does not unduly favor the Plaintiffs. Plaintiffs' shares of the Settlement will be based on the Plan of Allocation, a formula based on the losses to their Plan account. While Plaintiffs also intend to request Case Contribution Awards, the Settlement is not contingent on Plaintiffs receiving an award in a specified amount and the amount Plaintiffs intend to request is in line with the awards in other cases as explained in the Fee Motion. Further, the Plan of Allocation agreed to by the Parties clearly treats Class Members equitably relative to each other because each member is entitled to their *pro rata* share of losses and all Settlement Class members will receive at least \$10.00.

Given the above, Rule 23(e)(2) is satisfied.

VI. THE PLAN OF ALLOCATION SHOULD BE FINALLY APPROVED

“Approval of a plan of allocation of a settlement fund in a class action is ‘governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.’” *In re Ikon Office Solutions, Inc., Securities Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000) (quoting *In re Computron Software, Inc.*, 6 F.Supp.2d 313, 321 (D.N.J. 1998)). “In general, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable.” *Id.* The proposed Plan of Allocation here, attached to the Settlement Agreement as Exhibit B, is premised on calculating a Settlement Class member’s distribution on a *pro rata* basis based on account balances, a proxy for the alleged losses. No payment to any Settlement Class member shall be smaller than ten dollars (\$10.00). Any Settlement Class Member whose payment pursuant to Section D of the Plan of Allocation is less than ten dollars (\$10.00) shall receive a distribution of ten dollars (\$10.00). *See* Plan of Allocation at Section D. Further, current participants will receive their share of the Settlement Fund through a distribution to their Plan account. *Id.* at Section E.

VII. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS WARRANTED

A. The Proposed Class Meets the Requirements of Rule 23(b)(1) of the Federal Rules of Civil Procedure

Before entering the Preliminary Approval Order, this Court examined the record and conditionally certified the Settlement Class pursuant to FED. R. CIV. P. 23(b)(1). *See* Preliminary Approval Order at ¶¶ 9a-g. Nothing has changed in the record to compel the Court to now reach a different conclusion with respect to the final approval of the Settlement Class. Only recently this Court certified a class in an analogous ERISA action. *See Boley, et al. v. Universal Health Services, Inc., et al.* 2021 WL 859399 (E.D.Pa. Mar. 8, 2021). Indeed, courts within the Third Circuit and across the country have determined breach of fiduciary duty claims under ERISA analogous to those at issue in this action are uniquely appropriate for class treatment.¹⁰ To avoid unnecessary repetition, Plaintiffs incorporate their arguments from their memorandum in support of preliminary approval (ECF 68-1; pp. 14-19) and request the Court make the same findings it did in preliminarily certifying a settlement class and certify the following Class for settlement purposes only:

All persons who participated in the Plan at any time during the Class Period (December 6, 2013 through June 28, 2019), including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Defendants and their Beneficiaries.

¹⁰ *See, e.g., Henderson, et al. v. Emory Univ., et al.*, No. 1:16-cv-02920 (N.D. Ga. Sept. 13, 2018) (certifying class under 23(b)(1)(A) and (B)); *Fuller et al. v. SunTrust Banks, Inc. et al.*, 2018 U.S. Dist. LEXIS 113108 (N.D. Ga. June 27, 2018) (same); *Clark v. Duke Univ.*, 2018 WL 1801946 (M.D.N.C. April 13, 2018) (same); *In re: Merck & Co., Inc. Securities, Derivative & ERISA Litig.*, MDL No. 1658, 2009 WL 331426, at *10-12 (D.N.J. Feb. 10, 2009); *Stanford v. Foamex, L.P.*, 263 F.R.D. 156, 175 (E.D. Pa. 2009); *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451 (D.N.J. May 31, 2012); *Moore v. Comcast Corp.*, 268 F.R.D. 530, 538 (E.D. Pa. 2010).

B. Adequacy of Named Plaintiffs and Class Counsel

Under Rule 23, certification of a class requires the Court determine both Named Plaintiffs and Class Counsel's adequacy. "The adequacy requirement encompasses two distinct inquiries designed to protect the interests of absentee class members: it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class." *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 309 (E.D. Pa. 2012); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012). This test "assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006) (citation and quotation marks omitted). Here both prongs of the adequacy test are met. In its Preliminary Approval Order, the Court found both Named Plaintiffs and Capozzi Adler to be adequate. *See* Preliminary Approval Order at ¶¶ 9e; 11.

In connection with the instant motion for final approval, each of the Named Plaintiffs have submitted declarations and Class Counsel has also submitted a declaration to attest to their adequacy. Plaintiffs dedicated tens of hours to the prosecution of this action and have no interests antagonistic to the Class. *See* Declarations of Plaintiffs Pinnell, Fernandez, and Perrilloux (attached as Exhibits 3, 4, and 5 to the Gyandoh Declaration).

Plaintiffs also retained attorneys whom are highly qualified, experienced, and able to litigate this matter. Mark K. Gyandoh, Chair of the Fiduciary Practice Group at Capozzi Adler and his partner Donald R. Reavey, Esquire, are highly qualified ERISA class action attorneys. Mark K. Gyandoh, is currently serving as Lead or Co-Lead Counsel in numerous breach of fiduciary duty class actions in this District and across the nation. Gyandoh Decl., ¶ 4. Throughout

the litigation Class Counsel has used its experience and access to resources to investigate and litigate Plaintiffs' underlying allegations, which ultimately led to the Settlement in this Action. Class Counsel have nearly two decades of experience in complex class actions and recommend this Settlement as the best solution for Settlement Class Members. The retention of highly qualified counsel, coupled with the alignment of interests between Named Plaintiffs and the Settlement Class Members, satisfies the requirements of Rules 23(a)(4) and 23(g).

VIII. CONCLUSION

For the reasons set forth above, the Settlement meets the standard for final approval under Rule 23. Accordingly, Plaintiffs seek an Order: (1) approving the Class Action Settlement Agreement under FED. R. CIV. P. 23(e); (2) certifying the above-defined Settlement Class; (3) appointing Named Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel under FED. R. CIV. P. 23(g); (4) finding the manner in which the Settlement Class was notified of the Settlement was the best practicable under the circumstances and fair and adequate; and (5) approving the Plan of Allocation.

Further, the parties respectfully request the May 3, 2021 Fairness Hearing be held telephonically or by video sharing service such as Zoom, as part of the COVID-19 mitigation efforts. If the Court grants this request, Class Counsel shall make this announcement on the Settlement Website as contemplated under paragraph 26 of the Preliminary Approval Order.

DATED: March 15, 2021

Respectfully submitted,

/s/ Mark K. Gyandoh

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Class Counsel

CERTIFICATE OF SERVICE

I certify that, on March 15, 2021, I caused the foregoing to be filed with the Clerk of the Court via the CM/ECF system, which will deliver notification of filing to all counsel of record.

/s/ Mark K. Gyandoh
Mark K. Gyandoh, Esquire

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

JERRY PINNELL, et al.,

Plaintiffs,

v.

**TEVA PHARMACEUTICALS USA,
INC., et al.,**

Defendants.

Civil Action No. 2:19-cv-05738-MAK

[PROPOSED] FINAL APPROVAL ORDER AND JUDGMENT

This Action came before the Court for hearing on _____ to determine the fairness of the proposed Settlement presented to the Court and the subject of this Court's Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and Manner of Settlement Notice, and Setting Date for a Fairness Hearing. Due notice having been given and the Court having been fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

Except as otherwise defined herein, all capitalized terms used in this Final Order and Judgment shall have the same meanings as ascribed to them in the Settlement Agreement executed by counsel on behalf of the Named Plaintiffs, all Class Members, and Defendants, respectively.

1. The Court has jurisdiction over the subject matter of the Action and over all Settling Parties, including all members of the Settlement Class.

2. For the sole purpose of settling and resolving the Action, the Court certifies this Action as a class action pursuant to Rules 23(a) and (b)(1) of the Federal Rules of Civil Procedure.

The Settlement Class is defined as:

All persons who participated in the Plan at any time during the Class Period (December 6, 2013 through June 28, 2019), including any Beneficiary of a deceased person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a person subject to a Qualified Domestic Relations Order who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Defendants and their Beneficiaries.

3. The Court finds for the sole purpose of settling and resolving the Action that:

(a) as required by FED. R. CIV. P. 23(a)(1), the Settlement Class is ascertainable from records kept with respect to the Plan and from other objective criteria, and the Settlement Class is so numerous that joinder of all members is impracticable.

(b) as required by FED. R. CIV. P. 23(a)(2), there are one or more questions of law and/or fact common to the Settlement Class.

(c) as required by FED. R. CIV. P. 23(a)(3), the claims of the Named Plaintiffs are typical of the claims of the Settlement Class that the Named Plaintiffs seek to certify.

(d) as required by FED. R. CIV. P. 23(a)(4), the Named Plaintiffs will fairly and adequately protect the interests of the Settlement Class in that: (i) the interests of the Named Plaintiffs and the nature of the alleged claims are consistent with those of the Settlement Class members; and (ii) there appear to be no conflicts between or among the Named Plaintiffs and the Settlement Class.

(e) as required by FED. R. CIV. P. 23(b)(1), the prosecution of separate actions by individual members of the Settlement Class would create a risk of: (i) inconsistent or varying adjudications as to individual Settlement Class members that would establish incompatible standards of conduct for the parties opposing the claims asserted in this Action; or (ii) adjudications as to individual Settlement Class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications, or substantially impair or impede the ability of such persons to protect their interests.

(f) as required by FED. R. CIV. P. 23(g), Class Counsel are capable of fairly and adequately representing the interests of the Settlement Class, and that Class Counsel: (i) have done appropriate work identifying or investigating potential claims in the Action; (ii) are experienced in handling class actions; and (iii) have committed the necessary resources to represent the Settlement Class.

4. The Court hereby appoints Named Plaintiffs Jerry Pinnell, Jeremy Fernandez, and Shane Perrilloux as Class Representatives for the Settlement Class and Capozzi Adler, P.C., as Class Counsel for the Settlement Class.

5. The Court hereby finds that the Settlement Class has received proper and adequate notice of the Settlement, the Fairness Hearing, Class Counsel's application for attorneys' fees and reimbursement of litigation costs and for Case Contribution Awards to the Named Plaintiffs, and the Plan of Allocation, such notice having been given in accordance with the Preliminary Approval Order. Such notice included individual notice to all members of the Settlement Class who could be identified through reasonable efforts, as well as notice through a dedicated Settlement website on the internet, and provided valid, due, and sufficient notice of these proceedings and of the matters set forth in this Order, and included sufficient information regarding the procedure for the making of objections. Such notice constitutes the best notice practicable under the circumstances and fully satisfies the requirements of FED. R. CIV. P. 23 and the requirements of due process.

6. The Court hereby approves the Settlement and hereby orders that the Settlement shall be consummated and implemented in accordance with its terms and conditions.

7. Pursuant to FED. R. CIV. P. 23(e), the Court finds that the Settlement embodied in the Settlement Agreement is fair, reasonable and adequate to the Plan and the Settlement Class, and more particularly finds that:

(a) The Settlement was negotiated vigorously and at arm's-length, under the auspices of the Mediator, by Defense Counsel, on the one hand, and the Named Plaintiffs and Class Counsel on behalf of the Settlement Class, on the other hand;

(b) Plaintiffs and Defendants had sufficient information to evaluate the settlement value of the Action;

(c) If the Settlement had not been achieved, Named Plaintiffs and the Settlement Class faced the expense, risk, and uncertainty of extended litigation;

(d) The amount of the Settlement – two million, five hundred fifty thousand dollars (\$2,550,000.00) is fair, reasonable, and adequate, taking into account the costs, risks, and delay of trial and appeal. The method of distributing the Class Settlement Amount is efficient and requires no filing of claims. The Settlement terms related to attorneys' fees do not raise any questions concerning fairness of the Settlement, and there are no agreements, apart from the Settlement, required to be considered under FED. R. CIV. P. 23(e)(2)(C)(iv). The Class Settlement Amount is within the range of settlement values obtained in similar cases;

(e) At all times, the Named Plaintiffs and Class Counsel have acted independently of Defendants and in the interest of the Settlement Class; and

(f) The Court has duly considered and overruled any filed objection(s) to the Settlement to the extent there were any.

8. The Plan of Allocation is finally approved as fair, reasonable, and adequate. The Settlement Administrator shall distribute the Net Settlement Amount in accordance with the Plan of Allocation and the Settlement Agreement. The Settlement Administrator shall have final authority to determine the share of the Net Settlement Amount to be allocated to each Class Member in accordance with the Plan of Allocation approved by the Court.

9. All requirements of the Class Action Fairness Act, 28 U.S.C. § 1711, *et seq.*, have been met.

10. The releases and covenants not to sue set forth in the Settlement Agreement, including but not limited to Article 7 of the Settlement Agreement, together with the definitions contained in the Settlement Agreement relating thereto, are expressly incorporated herein in all respects. The Releases are effective as of the Settlement Effective Date. Accordingly, the Court orders that, as of the Settlement Effective Date, the Plan, the Class Representatives, and the Class Members (and their respective heirs, beneficiaries, executors, administrators, estates, past and present partners, officers, directors, predecessors, successors, assigns, agents, and attorneys) hereby fully, finally, and forever settle, release, relinquish, waive, and discharge all Released Parties (including Defendants) from all Released Claims, regardless of whether or not such Class Member may discover facts in addition to or different from those which the Class Members or Class Counsel now know or believe to be true with respect to the Class Action and the Released Claims and regardless of whether such Class Member receives a monetary benefit from the Settlement, actually received the Settlement Notice, filed an objection to the Settlement or to any application by Class Counsel for an award of Attorneys' Fees and Costs, and whether or not the objections or claims for distribution of such Class Member have been approved or allowed.

11. The Class Representatives, Class Members, and the Plan hereby settle, release, relinquish, waive, and discharge any and all rights or benefits they may now have, or in the future may have, under any law relating to the releases of unknown claims, including without limitation, Section 1542 of the California Civil Code, which provides: "A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that if known by him or her would have materially affected his or her settlement with the debtor or released party." The Class Representatives, Class Members,

and the Plan with respect to the Released Claims also hereby waive any and all provisions, rights and benefits conferred by any law or of any State or territory within the United States or any foreign country, or any principle of common law, which is similar, comparable or equivalent in substance to Section 1542 of the California Civil Code.

12. The Class Representatives, the Class Members, and the Plan acting individually or together, or in combination with others, are hereby permanently and finally barred and enjoined from suing the Released Parties in any action or proceeding alleging any of the Released Claims.

13. Each Class Member hereby releases the Released Parties, Defense Counsel, and Class Counsel for any claims, liabilities, and attorneys' fees and expenses arising from the allocation of the Gross Settlement Amount or Net Settlement Amount and for all tax liability and associated penalties and interest as well as related attorneys' fees and expenses.

14. The operative complaint and all claims asserted therein in the Action are hereby dismissed with prejudice and without costs to any of the Settling Parties and Released Parties other than as provided for in the Settlement Agreement.

15. The Court shall retain exclusive jurisdiction to resolve any disputes or challenges that may arise as to the performance of the Settlement Agreement or any challenges as to the performance, validity, interpretation, administration, enforcement, or enforceability of the Settlement Notice, Plan of Allocation, this Final Order and Judgment, or the Settlement Agreement or the termination of the Settlement Agreement. The Court shall also retain exclusive jurisdiction and rule by separate Order with respect to all applications for awards of attorneys' fees and Case Contribution Awards to the Named Plaintiffs, and reimbursements of litigation costs, submitted pursuant to the Settlement Agreement.

16. Any motion to enforce this Final Order and Judgment or the Settlement Agreement, including by way of injunction, may be filed in this Court, and the provisions of the

Settlement Agreement and/or this Final Order or Judgment may also be asserted by way of an affirmative defense or counterclaim in response to any action that is asserted to violate the Settlement Agreement.

17. In the event that the Settlement Agreement is terminated, in accordance with its terms, this Final Order and Judgment shall be rendered null and void, ab initio, and shall be vacated nunc pro tunc, and this Action shall for all purposes with respect to the Parties revert to its status as of the day immediately before the day the Settlement was reached. The Parties shall be afforded a reasonable opportunity to negotiate a new case management schedule.

18. With respect to any matters that arise concerning the implementation of distributions to Class Members who have an Active Account (after allocation decisions have been made by the Settlement Administrator in its sole discretion), all questions not resolved by the Settlement Agreement shall be resolved by the Plan administrator or other fiduciaries of the Plan, in accordance with applicable law and the governing terms of the Plan.

19. Within twenty-one (21) calendar days following the issuance of all settlement payments to Class Members as provided by the Plan of Allocation approved by the Court, the Settlement Administrator shall prepare and provide to Class Counsel and Defense Counsel a list of each person who received a settlement payment or contribution from the Qualified Settlement Fund and the amount of such payment or contribution.

20. Upon entry of this Order, all Settling Parties, the Settlement Class, and the Plan shall be bound by the Settlement Agreement and this Final Order and Judgment.

SO ORDERED this ____ day of _____, 2021.

Mark A. Kearney
United States District Judge