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26 SUPERIOR COURT OF THE STATE OF CALIFORNIA
27 COUNTY OF SAN DIEGO

28 Coordination Proceeding Special Title
(Rule 1550(b)):

CIPRO CASES I and II

Judicial Council Coordination Proceeding Nos.
4154 and 4220

CLASS ACTION

The Honorable Ronald L. Styn

This Document Relates To:

ALL ACTIONS

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT WITH BAYER
DEFENDANTS**

Date: August 9, 2013

Time: 2:30 p.m.

Courtroom: Department 62

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1 **I. INTRODUCTION**

2 Plaintiffs Karyn McGaughey, Barbara Cohen, Deborah Patane, Donna Moore, IUOE
3 Stationary Engineers Local 39 Health and Welfare Plan, and Sheet Metal Workers Health and
4 Welfare Plan of Southern California, Arizona, and Nevada (collectively “Plaintiffs” or “Class
5 Plaintiffs”), individually and as representatives of a certified Class (the “Class”) submit this
6 Memorandum in support of their motion for preliminary approval of the proposed settlement
7 agreement (the “Settlement Agreement”) between Plaintiffs and Bayer Corporation and Bayer AG
8 (collectively, “Bayer”).

9 The Settlement Agreement creates an all-cash fund of \$74,000,000 (the “Settlement
10 Fund”). Plaintiffs and Bayer reached this agreement through arm’s length negotiations after more
11 than eleven years of litigation, the granting of a motion to certify a class of California indirect
12 purchasers, several dispositive motions, including the granting of Defendants’ summary judgment
13 motion, multiple appeals, substantial investigation, and extensive discovery. The Settlement
14 Agreement provides compensation to all consumer and third-party payor Class members who made
15 (or reimbursed) California purchases of Cipro—the brand-name form of the anti-infection drug
16 ciprofloxacin hydrochloride. Plaintiffs allege that Bayer and the non-settling defendants (Barr
17 Laboratories Inc., Hoechst Marion Roussel Inc., The Rugby Group, Inc., and Watson
18 Pharmaceuticals Inc. (the “Generic Defendants,”) ¹ which, together with Bayer, comprise the
19 “Defendants”) violated California’s antitrust and consumer protection laws in connection with the
20 sale in California of Cipro, injuring and damaging Plaintiffs and the Class.

21 By this motion, Plaintiffs request that the Court: (1) grant preliminary approval of the
22 Settlement Agreement, (2) approve the proposed plan of notice and notices to the Class, (3) set a
23 schedule for disseminating notice to Class members, as well as deadlines to comment on or object
24 to the Settlement, and (4) schedule a final approval hearing.

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27 _____
28 ¹ Bayer is the only Defendant to enter the Settlement Agreement. The Generic Defendants have not
settled any claims.

1 **II. CASE HISTORY**

2 **A. Plaintiffs' Factual Allegations and Claims.**

3 This case involves California state law antitrust and unfair competition claims brought by
4 individuals and entities who purchased Cipro in California (for third-party payors, they either paid
5 for or reimbursed plan members for their California Cipro purchases). Plaintiffs' claims arise from
6 agreements entered into between Bayer and the Generic Defendants under which the Generic
7 Defendants dropped challenges to Bayer's Cipro patent in exchange for cash payments by Bayer.

8 On June 2, 1987, the United States Patent and Trademark Office (PTO) granted Bayer a
9 patent for Cipro. On October 22, 1991, Barr filed an application with the United States Food and
10 Drug Administration to market and sell a generic version of Cipro, triggering litigation between the
11 two companies. During this litigation, Barr challenged the validity and enforceability of Bayer's
12 patent, while Bayer claimed Barr's generic formulation infringed its patent.

13 On January 4, 1995, the FDA granted tentative approval to Barr's Abbreviated New Drug
14 Application, authorizing Barr to sell its generic version of Cipro but for Bayer's patent
15 infringement suit, then pending in the United States District Court for the Southern District of New
16 York. On March 29, 1996, Barr, Rugby, and Rugby's subsidiary HMR entered into an agreement
17 to jointly manufacture, sell, and distribute generic ciprofloxacin. Under this agreement, HMR and
18 Rugby would help cover Barr's litigation costs in exchange for half the profits from selling generic
19 ciprofloxacin, or half of any settlement payment from Bayer.

20 Bayer later filed a motion for partial summary judgment in its patent infringement suit
21 concerning only Barr's invalidity defense. On June 5, 1996, the district court denied Bayer's
22 motion. The case was set for trial for early 1997.

23 After the district court denied Bayer's motion for partial summary judgment, Bayer's Board
24 of Directors agreed to try to settle the infringement litigation. During settlement negotiations in the
25 summer of 1996, the Generic Defendants, on multiple occasions, proposed that Bayer grant them a
26 license. Bayer countered by offering a cash payment of approximately \$50 million, which was
27 rejected.

28

1 After negotiating an agreement in December 1996 to delay the trial,² Bayer entered
2 settlement agreements (“Cipro agreements”) with each of the Generic Defendants on January 8,
3 1997. Under the agreements, each Generic Defendant agreed to abandon all challenges to the
4 validity or enforceability of Bayer’s Cipro patent. In exchange, Bayer agreed to make total
5 payments of \$398.1 million to Barr, including an initial payment of \$49.1 million and quarterly
6 payments until the Cipro patent expired in December 2003.

7 The Cipro agreements lie at the heart of the present antitrust class action suit. Plaintiffs and
8 the Class claim that the Cipro agreements unlawfully restrained competition in California in
9 violation of the Cartwright Act, the UCL, and California common law. According to Plaintiffs and
10 the Class, the Cipro agreements allowed Bayer to avoid competition from the Generic Defendants
11 and preserve its monopoly over the market for ciprofloxacin—together with high monopoly prices.
12 Consequently, Bayer was able to extract monopoly profits far longer than warranted. Indeed,
13 Bayer’s pricing patterns for Cipro show that prices increased at much higher rates after the Cipro
14 agreements—when the threat of market entry was minimal or nonexistent—than before the
15 agreements. Just as Bayer reaped the benefits of a prolonged monopoly, so did the Generic
16 Defendants come out far better under the terms of the Cipro agreements than they otherwise would
17 have: Barr received between 3.3 and 4 times the profits it could have reasonably expected to gain
18 through competition. While Bayer and the Generic Defendants fared well under the Cipro
19 agreements, purchasers paid much higher prices. Thus, Plaintiffs allege that Bayer and the Generic
20 Defendants entered an agreement to unlawfully restrain trade in violation of state antitrust and
21 unfair competition laws.

22 **B. Procedural History and Negotiations.**

23 Beginning in 2000, approximately eight indirect purchaser complaints were filed in various
24 courts throughout California against the Defendants in connection with the Cipro Agreements.
25 Following Defendants’ removal and transfer to the coordinated multidistrict litigation proceedings
26 pending in the United States District Court for the Eastern District of New York, Judge David

27 _____
28 ² Bayer paid \$3 million solely for an agreement to delay the patent trial.

1 Trager remanded the cases to the California Superior Court. (*In re Ciprofloxacin Hydrochloride*
2 *Antitrust Litig.* (E.D.N.Y. 2001) 166 F.Supp.2d 740, 746-757.) The cases were subsequently
3 coordinated pursuant to Judicial Council Coordination Proceedings in the San Diego Superior
4 Court. Plaintiffs filed their operative consolidated amended complaint on August 5, 2002, alleging
5 violations of the Cartwright Act, the UCL, and the common law doctrine prohibiting monopolistic
6 acts.

7 The Superior Court overruled Defendants' demurrer to all claims on November 26, 2002.
8 Discovery commenced in January 2003. On November 25, 2003, the Superior Court certified a
9 Class of the "hundreds of thousands" of California consumers and third-party payors who
10 purchased Cipro (or reimbursed for its purchase) during the Class Period, which began on January
11 8, 1997, and ended when the effects of Defendants' illegal conduct ceased. (*In re Cipro Cases I*
12 *and II*, Order Certifying Plaintiff Class, slip op. at 12 (Nov. 25, 2003).) The Court of Appeal
13 affirmed the class certification decision on July 21, 2004, and remanded for a slight modification of
14 the Class definition. (*In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402.) The Superior Court
15 thereafter entered an Order Modifying November 25, 2003 Class Certification Order. (*In re Cipro*
16 *Cases I and II*, slip op. (Oct. 14, 2004).)

17 During the pendency of this litigation, extensive discovery occurred. Dozens of depositions
18 were taken. Extensive expert opinions were developed. This case was originally set for trial on
19 January 21, 2005, before being stayed on April 13, 2005 to allow related federal cases to proceed.

20 On August 21, 2009, after the stay of this case had been lifted, and after the related federal
21 cases had been dismissed and the U.S. Supreme Court denied *certiorari* petitions, the Superior
22 Court granted Defendants' motions for summary judgment, finding federal authority dispositive.
23 (*In re Cipro Cases I and II*, slip. op. at 4 (Aug. 21, 2009).)

24 Following briefing and argument, the Court of Appeal affirmed, in an opinion issued on
25 October 31, 2011. (*In re Cipro Cases I and II* (2011) 200 Cal.App.4th 442.) Like the Superior
26 Court, the Court of Appeal concluded that the Cipro Agreements did not violate the Cartwright Act
27 because they did not restrain competition beyond the exclusionary scope of the Cipro patent. The
28 Court also held that federal law preempted Plaintiffs' California claims. Plaintiffs appealed.

1 The California Supreme Court granted review on February 15, 2012. (*In re Cipro Cases I*
2 *and II* (Cal. Feb. 15, 2012) No. S198616, 2012 Cal. LEXIS 1740.) The Court, on its own motion,
3 stayed further proceedings pending action by the United States Supreme Court in *Merck & Co. v.*
4 *Louisiana Wholesale Drug Co.*, No. 12-245, and *Upsher-Smith Laboratories, Inc. v. Louisiana*
5 *Wholesale Drug Co.*, No. 12-265. (*In re Cipro Cases I and II* (Cal. Sept. 12, 2012) No. S198616,
6 2012 Cal. LEXIS 8596.)

7 On June 7, 2013, the Plaintiffs and Bayer entered into an agreement resolving all of the
8 claims of Plaintiffs and the Plaintiff Class against Bayer (the “Settlement Agreement”).
9 (Declaration of Joseph R. Saveri in Support of Plaintiffs’ Motion for Preliminary Approval
10 (“Saveri Decl.”) ¶ 4.) As described in further detail in Section II, *infra*, Plaintiffs agree to release
11 all of their claims against Bayer in exchange for \$74,000,000 in cash and other valuable
12 consideration. The settlement represents only a partial settlement of the claims; Plaintiffs will
13 continue to prosecute their claims against the Generic Defendants, which are jointly and severally
14 liable for treble damages with respect to Plaintiffs’ Cartwright Act claims. (See Bus. & Prof. Code
15 § 16720, *et seq.*; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 544.)

16 On June 26, 2013, the California Supreme Court entered an order vacating its stay and
17 setting a schedule for briefing in light of the decision of the United States Supreme Court in *Federal*
18 *Trade Commission v. Actavis, Inc.* (June 17, 2013) 133 S.Ct. 2223. (*In re Cipro Cases I and II* (Cal.
19 June 26, 2013) No. S198616, 2012 Cal. LEXIS 8596.) On July 1, 2013, Plaintiffs filed an
20 Application with the California Supreme Court, requesting that the Supreme Court issue an order
21 staying further briefing and consideration of the pending appeal and allowing the Superior Court,
22 pursuant to California Rules of Court, rule 3.769, to undertake settlement approval proceedings in
23 connection with the Bayer settlement. On July 10, 2013, the Supreme Court granted the
24 Application, staying the appeal and stating that the Superior Court “may evaluate and effectuate”
25 Plaintiffs’ class action settlement with Bayer. (*In re Cipro Cases I and II* (Cal. July 10, 2013) No.
26 S198616). A copy of this July 10 order is annexed as Exhibit F to the Saveri Declaration.

27 **III. SUMMARY OF THE SETTLEMENT TERMS**

28 The Settlement Agreement resolves all claims of Plaintiffs and the Class against Bayer.

1 The details of the Settlement are contained in the Settlement Agreement attached as Exhibit A to
2 the Saveri Declaration. A summary is provided below.

3 **A. The Class.**

4 The Class is defined in the Court's October 14, 2004 Order Modifying the November 23,
5 2003 Class Certification Order:

6 All natural persons, sole proprietorships, partnerships, limited
7 partnerships, corporations, and other entities, in the State of
8 California who indirectly purchased, paid and/or reimbursed for
9 Cipro intended for consumption by themselves, their families, or
10 their members, participants, employees or insureds (the "Class")
11 during the period from January 8, 1997 through such time in the
12 future as the effects of Defendants' illegal conduct, as alleged herein,
13 have ceased (the "Class Period"). Excluded from the class are all
14 persons who obtained Cipro through the MediCal Prescription Drug
15 Program; governmental entities; the Defendants, their
16 co-conspirators, along with all of their respective parents,
17 subsidiaries, and/or affiliates; all persons or entities that purchased
18 Cipro for purposes of resale; any purchaser of Cipro who paid a flat
19 co-payment and who would have paid the same co-payment for a
20 generic substitute under the terms of their health insurance coverage;
21 and any and all judges and justices assigned to hear any aspect of this
22 litigation.

23 **B. Settlement Sum and Additional Consideration.**

24 Bayer will pay \$74,000,000 into an escrow account (the "Settlement Fund"), held and
25 administered by an escrow agent to be selected by Class Counsel with consent of Bayer and
26 approval of the Court. Class Counsel and Bayer recommend Citibank, N.A. be appointed the
27 escrow agent. The Settlement Fund will be the source for disbursements to Class members, as well
28 as for notice and claims administration costs, service awards for Class Representatives, and
Court-approved attorneys' fees and costs.

As additional consideration, Bayer agrees to cooperate with the settling Class Plaintiffs in
the further prosecution of their claims against the Generic Defendants. Specifically, Bayer agrees
to make available employees and/or representatives to establish the foundational requirements for
admitting certain Bayer business records at trial. This obligation may entail affidavits, depositions,
or appearances at trial, as reasonably required by Class Plaintiffs.

C. Generic Defendants Are Jointly and Severally Liable.

Under settled law, the Generic Defendants are jointly and severally liable for all of the

1 provable damages to the Class, including interest as provided by law. (See *Roth v. Rhodes* (1994)
2 25 Cal.App.4th 530, 544; *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th
3 1143, 1148, citing Bus. & Prof. Code § 16750(a).) Under the Settlement Agreement, the Generic
4 Defendants remain liable for all their damages, including damages resulting from Bayer's sales of
5 Cipro. (See Settlement Agreement ¶ 14.)

6 **D. Attorneys' Fees and Costs.**

7 The Settlement Agreement recognizes that Class Counsel intend to seek attorneys' fees and
8 reimbursement of costs and expenses incurred in the prosecution of these Actions. In accordance
9 with the Settlement Agreement, Plaintiffs will look to the Settlement Fund for satisfaction of such
10 fees and costs.

11 Pursuant to the Settlement Agreement, and as detailed in the Proposed Notices, Class
12 Counsel will seek attorneys' fees and costs in an amount not to exceed thirty-three and one-third
13 percent (33 1/3%) of the Settlement Fund. This request is consistent with the common fund
14 doctrine and is in step with attorney fee awards in similar California class actions. Class Counsel
15 here, who have conferred a substantial benefit upon Class members, intend to seek an appropriate
16 portion of the common fund as compensation. Class Counsel will apply for attorneys' fees in a
17 separate motion, and at that point will fully brief the issue and provide documentation of hours
18 worked to support the request.

19 **E. Service Awards for Class Representatives.**

20 Class Counsel will also seek reasonable incentive award payments to each of the named
21 Plaintiffs for their services as Class representatives, which in this case included preparing and
22 sitting for depositions and responding to written discovery. In accordance with the Settlement
23 Agreement, Plaintiffs will look to the Settlement Fund for satisfaction of such awards. The amount
24 sought for each named Plaintiff who is a consumer will not exceed \$2,500; and for each named
25 Plaintiff that is a third-party payor, the amount sought will not exceed \$15,000. Service awards are
26 commonly awarded in class action litigation to those who have devoted the time and effort to
27 represent a class of similarly situated victims of alleged wrongdoing. "The rationale for making
28 enhancement or incentive awards to named plaintiffs is that they should be compensated for the

1 expense or risk they have incurred in conferring a benefit on other members of the class.”
2 (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394, citation omitted.)

3 **F. Potential Subsequent Settlement Agreements with Generic Defendants.**

4 As indicated above, the present Settlement Agreement acknowledges that Plaintiffs will
5 continue pursuing their claims against the Generic Defendants and are free to settle the Actions.
6 The agreement further provides that if Plaintiffs settle with any or all Generic Defendant(s), that
7 settlement agreement must contain a provision that the Generic Defendant(s) may not seek
8 contribution, indemnity, or any other form of monetary judgment against Bayer relating to that
9 settlement. Such a provision is consistent with Code of Civil Procedure sections 875(d) and 877(b).
10 The Settlement Agreement also provides that if Plaintiffs settle with any or all Generic
11 Defendant(s) for an amount that equals or exceeds \$227,000,000, taken together with the current
12 Settlement Amount, Bayer will pay an additional sum of \$8,000,000 to Plaintiffs and the Class. In
13 the event that a fully executed settlement agreement with any or all Generic Defendant(s) is not
14 delivered to Counsel for Bayer by December 31, 2014, Bayer will have no obligation to pay the
15 subsequent amount.

16 **G. Release of All Claims.**

17 In exchange for Bayer’s monetary and cooperation consideration, Plaintiffs agree to release
18 Bayer of all claims related to any of the alleged conduct giving rise to these Actions.

19 **IV. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

20 The settlement of a class action requires approval of the Court. (Cal. Rules of Court, rule
21 3.769.) In determining whether to approve or reject a proposed settlement, the Court has broad
22 discretion. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*);
23 *Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 434, 438.) At the preliminary approval stage—which
24 precedes dissemination of notice to class members and a formal fairness hearing—the Court need
25 only decide whether the proposed settlement falls within a range of possible final approval. (*Koz v.*
26 *Kellogg Co.* (S.D.Cal. 2013) No. 09-1786, 2013 U.S. Dist. LEXIS 64577, at *13; *In re Tableware*

1 *Antitrust Litig.* (N.D.Cal. 2007) 484 F.Supp.2d 1078, 1079-1080.³)

2 A class settlement will be approved if the settlement is found to be fair, adequate, and
3 reasonable. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (*Dunk*)). In making this
4 determination, courts consider several factors, including “the strength of the plaintiffs’ case, the
5 risk, expense, complexity and likely duration of further litigation, the risk of maintaining class
6 action status through trial, the amount offered in settlement, and the extent of discovery completed
7 and the stage of the proceedings, the experience and views of counsel, the presence of a
8 governmental participant, and the reaction of the class members to the proposed settlement.”
9 (*Ibid.*) The above factors are not exhaustive, and the court “is free to engage in a balancing and
10 weighing of factors depending on the circumstances of each case.” (*Wershba, supra*, 91
11 Cal.App.4th at p. 245.)

12 Generally, a presumption of fairness exists where: (1) the settlement is reached through
13 arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
14 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
15 objectors is small. (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) The proposed settlement here
16 satisfies the above requirements.

17 **A. This Settlement Is Within the Range of Reasonableness.**

18 Given the large value of the settlement sum, the strengths and weaknesses of Plaintiffs’
19 claims, the procedural posture, and the fact that this hard-fought, complex litigation has been
20 pending for over eleven years, the Settlement Agreement is well within the range of
21 reasonableness. As noted above, Bayer will pay \$74,000,000 into the Settlement Fund for the
22 benefit of the Class of California Cipro purchasers. Furthermore, this high-value, all-cash payment
23 is being made by only one defendant; the overall benefit provided to the Class could ultimately be
24 substantially higher, either through a settlement with the Generic Defendants or a final judgment

25 ³ (See generally Judicial Council of California, *Deskbook on the Management of Complex Civil*
26 *Litigation* § 3.76[2] (2012) [settlement approval is a three-step process, where the court first rules
27 on a preliminary approval motion, making a preliminary finding that the terms and conditions are
28 fair, adequate, and reasonable; notice is then given to the class members; and finally the court holds
a final approval hearing].)

1 for Plaintiffs.

2 The Bayer Settlement is particularly fair and reasonable considering the long history and
3 the current procedural posture of the case. The trial court previously granted Defendants' motion
4 for summary judgment, and the Court of Appeal affirmed. Even though the California Supreme
5 Court accepted the case, there is no guarantee that the Court will reverse the decisions below.
6 Moreover, multiple federal courts rejected federal antitrust challenges to the Cipro agreements. (*In*
7 *re Ciprofloxacin Hydrochloride Antitrust Litigation* (Fed.Cir. 2008) 544 F.3d 1323 [granting
8 summary judgment to Bayer and generic defendants against non-California indirect Cipro
9 purchasers], cert. denied (2009) 129 S.Ct. 2828; *Arkansas Carpenters Health & Welfare Fund v.*
10 *Bayer AG* (2d Cir. 2010) 604 F.3d 98 [same as against direct Cipro purchasers], cert. denied (2011)
11 131 S.Ct. 1606.)

12 Further complicating matters at the time of the Bayer Settlement were the impending
13 decisions by the United States Supreme Court in *Federal Trade Commission v. Actavis, Inc.*, No.
14 12-416 (U.S. June 17, 2013), *Merck & Co. v. Louisiana Wholesale Drug Co.*, No. 12-245 (U.S.
15 June 24, 2013), and *Upsher-Smith Laboratories, Inc. v. Louisiana Wholesale Drug Co.*, No. 12-265
16 (U.S. June 24, 2013). These cases all involved similar "reverse" payments between pharmaceutical
17 companies to end patent litigation. During settlement negotiations, it was unclear if or how those
18 decisions would affect the legal issues pending before the California Supreme Court.

19 Even assuming that the California Supreme Court ultimately reverses the summary
20 judgment, uncertainty would persist as the parties would likely be returned to this Court to continue
21 litigating the matter. In that event, Defendants, in all likelihood, would still have several defenses
22 available. The continued litigation of this matter would be costly, time-consuming, and uncertain
23 in outcome. While Class Counsel are confident that Plaintiffs will eventually prevail, counsel do
24 not take the above risks and the challenging posture lightly. Weighed against these risks, Class
25 Counsel believe that the Settlement Agreement is quite reasonable and warrants preliminary
26 approval.

27 **B. The Settlement Is the Product of Arm's Length and Informed Negotiations.**

28 A presumption of fairness generally applies to a class settlement that resulted from arm's

1 length bargaining. (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) The Settlement here is the product of
2 arm's length negotiations between attorneys who are highly experienced in complex antitrust cases
3 and who are well-informed about the facts and legal issues of this case. Having litigated this case
4 for over a decade, Class Counsel are very well positioned to evaluate the relative strengths and
5 weaknesses as well as the benefits of this Settlement. Likewise, Class Counsel engaged in
6 extensive negotiations to arrive at the ultimate settlement terms.

7 There were numerous settlement discussions in this case over the course of the many years
8 during which it has been pending. (Saveri Decl. ¶ 5.) The parties are well-versed in the evidentiary
9 record upon which Plaintiffs' claims are based, including thousands of pages of business records,
10 detailed analyses by economists and other experts, dozens of depositions of percipient and expert
11 witnesses, extensive law and motion practice, and multiple appeals. (Saveri Decl. ¶ 3.) Settlement
12 discussions with Bayer began in earnest in March 2013. (Saveri Decl. ¶ 5.)

13 After weeks of negotiations and numerous back-and-forth telephone conversations, on May
14 14, 2013, Plaintiffs and Bayer reached a tentative agreement. (Saveri Decl. ¶ 6.) Following the
15 agreement in principal, the parties drafted and negotiated the Settlement Agreement which
16 memorializes the terms of the agreement. (Saveri Decl. ¶ 6.) There were substantial negotiations
17 between Plaintiffs and Bayer regarding those terms. Several drafts were exchanged before the
18 parties came to final agreement regarding the documentation of the proposed Settlement to be
19 submitted to the Court.

20 C. **Sufficient Investigation and Discovery Have Been Conducted to Allow Counsel**
21 **and the Court to Evaluate the Fairness of the Settlement.**

22 Another factor reinforcing the presumption of fairness is whether sufficient investigation
23 and discovery have occurred to allow counsel and the court to act based on sufficient information.
24 (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) As noted above, this case has been litigated for more
25 than a decade. In that time period, Plaintiffs engaged in voluminous discovery—a sampling of
26 which filled eleven record volumes on appeal. Plaintiffs propounded several rounds of
27 interrogatories and production requests, resulting in extensive productions from all Defendants.
28 Plaintiffs deposed dozens of witnesses. Additionally, Plaintiffs have worked closely with experts

1 to develop a substantial understanding of the liability and damage issues. Plaintiffs' experts have
2 provided estimates of the impact and damages to the Class. (See Saveri Decl. ¶ 9.) Because the
3 parties have engaged in such significant discovery efforts and have thoroughly developed the
4 record, the parties and the Court have more than enough information to evaluate and confirm the
5 fairness of Plaintiffs' Settlement with Bayer.

6 **D. Class Counsel Are Highly Experienced Antitrust Attorneys.**

7 Also weighing in favor of preliminary approval are Class Counsel's experience and success
8 in similar class actions. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) Class Counsel have worked
9 on large, complex cases for decades, with a particular focus on antitrust and consumer protection
10 claims. Class Counsel also have a track record of success in similar cases, obtaining verdicts and
11 reaching settlements that have provided substantial benefits to numerous classes of consumers.
12 Drawing from these experiences, Class Counsel executed the Settlement Agreement confident that
13 it constitutes a fair and adequate outcome.

14 **V. THE PROPOSED PLAN OF ALLOCATION IS APPROPRIATE**

15 The balance of the Settlement Fund after payment of taxes, service awards, costs of notice
16 and administration of the Settlement and Settlement Fund, and attorneys' fees, costs, and expenses,
17 and pursuant to the procedures set forth in the Plan of Allocation (attached as Exhibit E to the
18 Saveri Declaration), shall be distributed to Class members who timely submit claims that are
19 accepted by the Claims Administrator and approved by the Court ("Authorized Claimants"). The
20 Plan of Allocation provides redress of all claims filed by Class members for purchases or
21 reimbursements of Cipro between January 8, 1997 and October 31, 2004 (the latter representing the
22 approximate date when the effects of the conduct alleged in these Actions ceased, based upon
23 publicly available pricing data and record evidence concerning the Cipro market).

24 As more fully explained in the Plan of Allocation, after the expenses of notice and claims
25 administration have been deducted or set aside, payment of Class Counsel's attorneys' fees and
26 reimbursement of their expenses, and payment of the Class Representatives' services awards, the
27 Settlement Fund will be disbursed to Class members who timely submit valid Proofs of Claim.
28 Once the Claims Deadline has passed and all received Proofs of Claim have been processed and

1 Authorized Claimants identified, the Claims Administrator shall pay Settlement proceeds to
2 Authorized Claimants (a) in the full amount claimed, for all valid and timely Proofs of Claim
3 accompanied by Claim Documentation, or (b) at a rate of 80% of the full amount claimed, for
4 otherwise valid and timely Proofs of Claim submitted without Claim Documentation.

5 Should claims exceed the sums available in the Settlement Fund, then payment of
6 Settlement proceeds for all Proofs of Claim shall be proportionately reduced. If the total value of
7 all valid and timely claims is less than the amount remaining in the Settlement Fund, or if for any
8 reason there exists an unclaimed remainder in the Settlement Fund after the Claims Administrator
9 has paid all valid and timely claims, then the Claims Administrator may make a subsequent *pro*
10 *rata* distribution, if practicable, provided that in no event shall any Authorized Claimant receive a
11 greater distribution of Settlement proceeds than three times the total dollars that Claimant spent on
12 unreimbursed out-of-pocket Cipro expenses during the Claims Period. The proposed Plan of
13 Allocation establishes a minimum recovery of \$25 for each authorized claimant. (Saveri Decl.,
14 Ex. E, ¶ 2(e).) This amount is both sensible, as \$25 approximates the lowest co-pay most consumer
15 Class members paid, and cost-effective given the administrative costs of processing and
16 distributing the claims.

17 If funds remain in the Settlement Fund after the Claims Administrator has paid all valid and
18 timely claims, and a subsequent *pro rata* distribution of Settlement Funds would be impracticable
19 or would result in Authorized Claimants receiving distributions of Settlement Fund proceeds in
20 amounts greater than three times their total dollars spent on unreimbursed out-of-pocket Cipro
21 expenses during the Claims Period, then the funds remaining in the Settlement Fund shall be
22 distributed *cy pres* in a manner to be approved by the Court pursuant to a motion to be brought by
23 Class Counsel in accordance with Code of Civil Procedure section 384.

24 Court approval shall be required prior to any disbursement or distribution from the
25 Settlement Fund, other than for any fees and expenses incurred to administer the Escrow Account,
26 costs associated with the Settlement Notice and claims administration, and taxes on the Settlement
27 Fund.

28

1 **VI. THE PROPOSED CLASS NOTICE SHOULD BE APPROVED**

2 Plaintiffs request that the Court approve the notice forms and the notice dissemination plan.
3 Should the Court grant preliminary approval, its order must include the notice to be given to the
4 Class. (Cal. Rules of Court, rule 3.769(e).) The trial court “has virtually complete discretion as to
5 the manner of giving notice to class members.” (*7-Eleven Owners for Fair Franchising v.*
6 *Southland Corp.* (2000) 85 Cal.App.4th 1135, 1164, citation omitted.) The manner of giving notice
7 and the content of the notice should “fairly apprise the prospective members of the class of the
8 terms of the proposed settlement and of the options that are open to them in connection with the
9 proceedings.” (*Ibid.*, citation omitted.)

10 The notice plan is substantially similar to the plan the Court approved after it certified the
11 Class. (See *Cipro Cases I and II*, Order Disseminating Class Notice, slip op. (Oct. 14, 2004).) The
12 proposed notice plan for the Bayer settlement is attached as Exhibits B and C.

13 The Claims Administrator will maintain a website that provides the detailed and summary
14 notice forms, claims forms, frequently asked questions with answers, and other pertinent
15 information related to these Actions. If requested by a Class Member, the Claims Administrator
16 will send the detailed notice to that Class Member. Class Members may electronically file a claim
17 from this website.

18 Notice will be sent via postcard within thirty calendar days of the preliminary approval date
19 via first-class regular U.S. Mail to all Class Members reasonably identifiable. This group consists
20 largely of third-party payors who have paid (or caused to be paid) all or part of the cost of Cipro
21 purchased in California during the Class Period. While it is not known which third-party payors are
22 Class members, contact information for most third-party payors is available to the Claims
23 Administrator, thus facilitating the dissemination of notice directly to a large portion of the Class.

24 In addition to the direct mailing, the Claims Administrator will publish a summary notice,
25 substantially in the form as attached as Exhibit B, in the over 60 English and foreign language
26 publications identified in the plan (attached as Exhibit C) for media distribution of the notice. The
27 publications have been chosen in order to reach consumers who may have paid for all or part of a
28 prescription for Cipro in California during the Class Period. In selecting publications for notice, the

1 Plaintiffs and the Claims Administrator sought not only to provide the general California consumer
2 population with notice of the Settlement, but also to reach those who were more likely to have paid
3 the total cost of Cipro, *i.e.*, those without health insurance. In general, low income individuals and
4 families, between the ages of 18 and 34, as well as members of certain racial and ethnic groups, are
5 more likely to be uninsured. (See, e.g., *Overview of the Uninsured in the United States: An*
6 *Analysis of the 2005 Current Population Survey*, ASPE Issue Brief (September 22, 2005) United
7 States Department of Health & Human Services, Office of the Assistant Secretary for Planning and
8 Evaluation, available at <http://aspe.hhs.gov/health/reports/05/uninsured-cps/>.)

9 Further, the notice plan targets California consumers who use the internet. As set forth in
10 Exhibit C, certain on-line methods will be employed to reach Class Members, such as banner ads
11 and ads placed in on-line editions of local and state-wide circulation newspapers. Communication
12 of notice on the internet will provide an additional benefit in that, in most circumstances, clicking
13 on the internet notice will send users directly to the Settlement website where claims may be made
14 electronically.

15 The settlement notices provide a brief explanation of the case, the terms of the proposed
16 Settlement, the maximum amount Class Counsel may seek for attorneys' fees, the amount that
17 named Plaintiffs may seek as service awards, the date, time, and place of the final approval hearing,
18 and the procedures for Class members to follow in submitting comments on and objections to the
19 Settlement and in arranging to appear at the settlement hearing to state any objections. (See Saveri
20 Decl., Ex. B.) The settlement notice does not provide the opportunity for Class members to opt out
21 of the Class because they already received notice of such an opportunity and the time to opt out
22 expired.⁴

23 **VII. THE FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

24 The last step in the settlement approval process is a final approval hearing. Pursuant to
25 California Rules of Court, rule 3.769(e), should the Court grant preliminary approval, its order must
26 state the time, date, and place of the final approval hearing. This hearing allows the Court to hear

27 _____
28 ⁴ The opt-out period expired on December 15, 2004.

1 all evidence and the arguments necessary to determine whether the settlement is fair, adequate, and
2 reasonable. Plaintiffs request that the Court grant preliminary approval and set the date, time, and
3 place for a final approval hearing.

4 Plaintiffs suggest the Court enter the following schedule governing the dissemination of
5 notice, a settlement objection deadline, schedule for the final approval and attorneys' fee motions,
6 and the final approval hearing date:

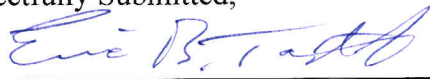
Event	Date
Notice of Class Action Settlement to Be Mailed and Posted on Internet	Within 30 days of Preliminary Approval Order
Notice of Class Action Settlement to Be Published	To be completed 45 days prior to the Final Approval Hearing
Affidavit of Compliance with Notice Requirements	To be filed 30 days prior to the Final Approval Hearing
Receipt/Filing Deadline for Comments and Objections	30 days prior to Final Approval Hearing
Postmark/Filing Deadline for Filing Claims	By March 31, 2014
Motions for Final Approval, Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Be Filed by Plaintiffs' Counsel	45 days prior to Final Approval Hearing
Replies in Support of Motions for Final Approval, Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Be Filed by Plaintiffs' Counsel	14 days prior to Final Approval Hearing
Service/Filing of Notices of Appearance at Final Approval Hearing	30 days prior to Final Approval Hearing
Final Approval Hearing	November 15, 2013

23 **VIII. CONCLUSION**


24 For the above reasons, Plaintiffs respectfully request that the Court grant preliminary
25 approval, approve the proposed Notice, and set a hearing for final approval of the present
26 Settlement.

1 Dated: July 11, 2013

Respectfully Submitted,

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