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Plaintiffs' Co-Lead Counsel

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN DIEGO

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

17 CIPRO CASES I and II
18

Judicial Council Coordination Proceeding Nos.
4154 and 4220

CLASS ACTION

The Honorable Ronald L. Styn

19
20 This Document Relates To:

21 ALL ACTIONS
22

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT WITH
BARR LABORATORIES, INC.**

Date: February 17, 2017

Time: 8:30 a.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 between Plaintiffs and Barr Laboratories, Inc. (“Barr”). The settlement resolves
8 Plaintiffs’ claims against Barr.

9 The Settlement Agreement, which is modeled on the previously approved settlement
10 agreements with Bayer Corporation and Bayer AG (together “Bayer”) and Hoechst Marion
11 Roussel, Inc., The Rugby Group, Inc., and Watson Laboratories, Inc. (collectively “HMR” or the
12 “HMR Defendants”), creates an all-cash fund of \$225,000,000 (the “Settlement Fund”). Plaintiffs
13 and Barr reached this agreement through arm’s length negotiations after more than sixteen years of
14 litigation, the granting of a motion to certify a class of California indirect purchasers, an affirmance
15 of that order by the Court of Appeal, several dispositive motions, including the granting of
16 Defendants’ summary judgment motion and its subsequent unanimous reversal by the California
17 Supreme Court (*In re Cipro Cases I and II* (2015) 61 Cal.4th 116), denial, *inter alia*, of Barr’s
18 motions for summary judgment, to decertify the Class, and to exclude Dr. Scott Hemphill
19 (Plaintiffs’ principal economic expert), the granting of the majority of Plaintiffs’ motions in limine,
20 and substantial fact and expert discovery.

21 The Court previously approved the Bayer and HMR settlements, which total \$174 million.
22 If the Court approves the \$225 million settlement with Barr, the Class’s total recovery is
23 \$399 million. The amount exceeds, by approximately \$68 million, Plaintiffs’ highest single
24 damage estimate. It is an extraordinary result for the Class.

25 Plaintiffs allege that Bayer, Barr, and the HMR Defendants violated California’s antitrust
26 and consumer protection laws in connection with the sale in California of Cipro, injuring and
27 damaging Plaintiffs and the Class. (Barr and the HMR Defendants are referred to as the “Generic
28 Defendants.” Together, Bayer, Barr, and the HMR Defendants are referred to as the

1 “Defendants.”) The Settlement Agreement provides compensation to all consumer and third-party
2 payor Class members who made (or reimbursed) California purchases of Cipro—the brand-name
3 form of the anti-infection drug ciprofloxacin hydrochloride.

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

8 **II. CASE HISTORY**

9 **A. Plaintiffs’ Factual Allegations and Claims.**

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

15 On June 2, 1987, the United States Patent and Trademark Office granted Bayer a patent for
16 Cipro. On October 22, 1991, Barr filed an application with the United States Food and Drug
17 Administration to market and sell a generic version of Cipro, triggering litigation between the two
18 companies. During this litigation, Barr challenged the validity and enforceability of Bayer’s patent,
19 while Bayer claimed Barr’s generic formulation infringed its patent.

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

27 Bayer later filed a motion for partial summary judgment in its patent infringement suit
28 concerning only Barr’s invalidity defense. On June 5, 1996, the district court denied Bayer’s

1 motion. The case was set for trial for early 1997.

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

7 After negotiating an agreement in December 1996 to delay the trial (Bayer paid \$3 million
8 solely for an agreement to delay the trial for three weeks), Bayer entered settlement agreements
9 ("Cipro agreements") with each of the Generic Defendants on January 8, 1997. Under the
10 agreements, each Generic Defendant agreed to abandon all challenges to the validity or
11 enforceability of Bayer's Cipro patent. In exchange, Bayer agreed, in addition to other valuable
12 consideration, to make total payments of \$398.1 million to Barr, including an initial payment of
13 \$49.1 million and quarterly payments until the Cipro patent expired in December 2003.

14 Plaintiffs and the Class claim that the Cipro agreements unlawfully restrained competition
15 in California in violation of the Cartwright Act and the Unfair Competition Law. As alleged, the
16 Cipro agreements allowed Bayer to avoid competition from the Generic Defendants and to preserve
17 its monopoly over the market for ciprofloxacin—together with high monopoly prices.
18 Consequently, Bayer was able to extract monopoly profits far longer than would have been
19 possible, absent the illegal Cipro agreements. Indeed, Bayer's pricing patterns for Cipro show that
20 prices increased at much higher rates after the Cipro agreements—when the threat of market entry
21 was minimal or nonexistent—than before the agreements. Just as Bayer reaped the benefits of a
22 prolonged monopoly, so did the Generic Defendants come out far better under the terms of the
23 Cipro agreements than they otherwise would have: Barr received more in settlement than it could
24 have reasonably expected to gain through competition. While Bayer and the Generic Defendants
25 benefited from the Cipro agreements, purchasers paid supra-competitive prices. Thus, Plaintiffs
26 allege that Bayer and the Generic Defendants entered an agreement to unlawfully restrain trade in
27 violation of California antitrust and unfair competition laws.

1 **B. Procedural History and Negotiations.**

2 Beginning in 2000, approximately eight indirect purchaser complaints were filed in various
3 courts throughout California against the Defendants in connection with the Cipro Agreements.
4 Following Defendants’ removal and transfer to the coordinated multidistrict litigation proceedings
5 pending in the United States District Court for the Eastern District of New York, Judge David
6 Trager remanded the cases to the California Superior Court. (*In re Ciprofloxacin Hydrochloride*
7 *Antitrust Litig.* (E.D.N.Y. 2001) 166 F.Supp.2d 740, 746-757.) The cases were subsequently
8 coordinated pursuant to Judicial Council Coordination Proceedings in the San Diego Superior
9 Court. Plaintiffs filed their consolidated amended complaint on August 5, 2002, alleging violations
10 of the Cartwright Act, the UCL, and the common law doctrine prohibiting monopolistic acts. They
11 filed a second consolidated amended complaint on April 9, 2003.

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

22 During the pendency of this litigation, extensive discovery occurred. Dozens of depositions
23 were taken. Extensive expert opinions were developed. This case was originally set for trial in
24 2005, before being stayed on April 13, 2005 to allow related federal cases to proceed.

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

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

6 The California Supreme Court granted review on February 15, 2012. (*In re Cipro Cases I*
7 *and II* (2012) 269 P.3d 653.) The Court, on its own motion, stayed further proceedings pending
8 action by the United States Supreme Court in *Merck & Co. v. Louisiana Wholesale Drug Co.*,
9 No. 12-245, and *Upsher-Smith Laboratories, Inc. v. Louisiana Wholesale Drug Co.*, No. 12-265.
10 (*In re Cipro Cases I and II* (Cal. Sept. 12, 2012) No. S198616.)

11 On June 7, 2013, the Plaintiffs and Bayer entered into an agreement resolving all of the
12 claims of Plaintiffs and the Plaintiff Class against Bayer (the "Bayer Settlement Agreement").
13 Plaintiffs agreed to release all of their claims against Bayer in exchange for \$74,000,000 in cash
14 and other valuable consideration. The Bayer Settlement Agreement represented only a partial
15 settlement of the claims; Plaintiffs continued to prosecute their claims against the Generic
16 Defendants, which were jointly and severally liable for treble damages with respect to Plaintiffs'
17 Cartwright Act claims. (See Bus. & Prof. Code § 16720, *et seq.*; *Roth v. Rhodes* (1994) 25
18 Cal.App.4th 530, 544.)

19 On June 26, 2013, the California Supreme Court entered an order vacating its stay and
20 setting a schedule for briefing in light of the decision of the United States Supreme Court in *FTC v.*
21 *Actavis, Inc.* (2013) 570 U.S. _ [133 S.Ct. 2223]. (*In re Cipro Cases I and II* (Cal. June 26, 2013)
22 No. S198616.) However, on July 10, 2013, the Supreme Court again stayed the appeal, upon
23 Plaintiffs' Application, ordering that the Superior Court "may evaluate and effectuate" Plaintiffs'
24 settlement with Bayer. (*In re Cipro Cases I and II* (Cal. July 10, 2013) No. S198616.) The Superior
25 Court on August 12, 2013 granted preliminary approval to the Bayer Settlement Agreement. (*In re*
26 *Cipro Cases I and II*, slip. op (Aug. 12, 2013).) Notice of the settlement was provided. On
27 November 18, 2013 the Superior Court granted final approval to the Bayer Settlement Agreement.
28 (*In re Cipro Cases I and II*, slip. op. (Nov. 18, 2013).) The settlement proceeds were distributed to

1 the Class in accordance with the Court-approved plan of allocation. With the settlement with Bayer
2 final, on October 1, 2014, the Supreme Court dismissed Bayer from the appeal pending in that
3 Court. (*In re Cipro Cases I and II* (2014) 334 P.3d 687.)

4 On December 11, 2013, the Supreme Court ordered the parties, and any amici, to file
5 supplemental briefs discussing the relevance of the U.S. Supreme Court's *Actavis* decision. (*In re*
6 *Cipro Cases I and II* (Cal. Dec. 11, 2012) No. S198616.) In addition to the parties' briefs, seven
7 amici submitted briefs discussing *Actavis*. The parties briefed responses. On March 3, 2015, the
8 Supreme Court heard oral argument, and on May 7, 2015, the Court unanimously reversed the
9 Court of Appeal's affirmance of the Superior Court's order granting summary judgment for the
10 Defendants. (*Cipro, supra*, (2015) 61 Cal.4th 116.)

11 But proceedings in the Supreme Court did not stop then. On May 21, 2015, Watson filed a
12 petition for rehearing, claiming it deserved a summary judgment affirmance because the Supreme
13 Court's opinion did not definitively address its separate summary judgment. Plaintiffs answered
14 Watson's petition on May 29, 2015, arguing the Court's decision indeed addressed and disposed of
15 Watson's arguments. The Court denied the petition on July 8, 2015, and issued the remittitur to the
16 Court of Appeal the same day. (*In re Cipro Cases I and II* (Cal. Oct. 1, 2014) No. S198616.)

17 On July 21, 2015, the Court of Appeal received the remittitur from the Supreme Court and
18 issued an order reversing the judgment of the Superior Court and remanding the case for further
19 proceedings consistent with the Supreme Court's opinion. Two days later, Watson filed a motion
20 to recall the remittitur, which the Court granted on July 27, 2015. Watson and Plaintiffs again
21 briefed the issue of whether the Supreme Court disposed of Watson's separate summary judgment,
22 and accordingly whether Watson should be dismissed from the case. On August 24, 2015, the
23 Court of Appeal denied Watson's request that the Court affirm the summary judgment. The Court
24 reinstated its order reversing the summary judgment and the same day remanded the case to the
25 Superior Court.

26 Upon return to this Court, the parties agreed to a schedule for additional fact discovery,
27 expert discovery, summary motions and motions in limine, and the Court set the case for trial call
28 on October 14, 2016. In addition to pursuing the fact discovery (which required some motion

1 practice before this Court), expert discovery began anew. The Plaintiffs disclosed seven experts,
2 and the Generic Defendants disclosed nine. Each expert submitted an outline of their expert
3 testimony and all sixteen were deposed.

4 Defendants filed an omnibus motion for summary judgment, Watson again filed a separate
5 motion for summary judgment, and Plaintiffs opposed both. Plaintiffs filed a motion for summary
6 adjudication of many of the Generic Defendants' affirmative defenses, and the Defendants opposed
7 that.

8 On August 12, 2016, the Plaintiffs and the HMR Defendants entered into an agreement
9 resolving all of the claims of Plaintiffs and the Plaintiff Class against the HMR Defendants (the
10 "HMR Settlement Agreement"). Plaintiffs agreed to release all of their claims against the HMR
11 Defendants in exchange for \$100,000,000 in cash and other valuable consideration. The HMR
12 Settlement Agreement represented an additional partial settlement of the claims; Plaintiffs
13 continued to prosecute their claims against Barr.

14 Upon agreeing to the settlement, the HMR Defendants withdrew their joinder in the
15 omnibus summary judgment motion, Watson withdrew its separate summary judgment motion,
16 and Plaintiffs withdrew their summary adjudication motion only against the HMR Defendants. The
17 Court on August 15, 2016 denied Barr's motion for summary judgment and granted Plaintiffs'
18 motion for summary adjudication.

19 On September 12, 2016, the Court denied Barr's motion to decertify the Class, and on
20 September 1, 2016 granted in part and denied in part Plaintiffs' motion to exclude evidence of
21 Barr's alleged procompetitive justifications for the *Bayer v. Barr* settlement. On the same day, the
22 Court also granted Plaintiffs' motion to exclude evidence of subsequent challenges to, and the
23 Patent and Trademark Office's re-examination of, Bayer's '444 Cipro patent.

24 Beginning on October 24, 2016, the Court heard two weeks of argument on Barr's and
25 Plaintiffs' over twenty-five motions in limine. The Court heard live testimony pursuant to
26 Rule 402 from Plaintiffs' expert Dr. Scott Hemphill and Barr's experts Dr. Jerry Hausman and
27 Dr. Gregory Bell. The Court denied Barr's motion to exclude Dr. Hemphill and granted in part
28 Plaintiffs' motion to exclude some of the opinions proffered by Dr. Hausman and Dr. Bell.

1 The Court denied Plaintiffs' motion to exclude testimony from Barr's former CEO, Bruce
2 Downey, pursuant to a waiver of the attorney-client privilege, and the Court of Appeal on
3 December 12, 2016 denied the petition for a writ of mandate. On January 6, 2017, the Court denied
4 Barr's request to revisit the Court's order granting Plaintiffs' motion to preclude Barr from
5 presenting evidence of the '444 patent's subsequent generic challenges and re-examination. The
6 case was set for trial on January 20, 2017, and the parties were prepared to pick the jury beginning
7 on January 23, 2017.

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

9 The Settlement Agreement resolves all claims of Plaintiffs and the Class against Barr. The
10 details of the Settlement are contained in the Settlement Agreement attached as Exhibit A to the
11 accompanying Fastiff Declaration. A summary is provided below.

12 **A. The Class.**

13 The Class is defined in the Court's October 14, 2004 Order Modifying the November 23,
14 2003 Class Certification Order, and as with the HMR settlement, adding an end date of
15 December 31, 2005:

16 All natural persons, sole proprietorships, partnerships, limited
17 partnerships, corporations, and other entities, in the State of
18 California who indirectly purchased, paid and/or reimbursed for
19 Cipro intended for consumption by themselves, their families, or
20 their members, participants, employees or insureds (the "Class")
21 during the period from January 8, 1997 through December 31, 2005
22 (the "Class Period"). Excluded from the class are all persons who
23 obtained Cipro through the MediCal Prescription Drug Program;
24 governmental entities; the Defendants, their co-conspirators, along
25 with all of their respective parents, subsidiaries, and/or affiliates; all
26 persons or entities that purchased Cipro for purposes of resale; any
27 purchaser of Cipro who paid a flat co-payment and who would have
28 paid the same co-payment for a generic substitute under the terms of
their health insurance coverage; and any and all judges and justices
assigned to hear any aspect of this litigation.

24 Plaintiffs and their experts have determined that the anticompetitive effects ended on December 31,
25 2005 following entry of generic forms of ciprofloxacin hydrochloride after the expiration of
26 Bayer's '444 Cipro patent.

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

28 Barr will pay \$225,000,000 into an escrow account (the "Settlement Fund"), held and

1 administered by an escrow agent with approval of the Court. Class Counsel and Barr recommend
2 Citibank, N.A., which was the escrow agent for the Bayer and HMR Settlements, be appointed the
3 escrow agent. The Settlement Fund will be the source for disbursements to Class members, as well
4 as for notice and claims administration costs, service awards for Class Representatives, and
5 Court-approved attorneys' fees and reimbursement of costs.

6 **C. 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 As detailed in the proposed Notices, Class Counsel will seek attorneys' fees and costs in an
12 amount not to exceed 33 1/3% of the Settlement Fund. This request is consistent with the common
13 fund doctrine and is in step with attorney fee awards in similar California class actions. Class
14 Counsel here, who have conferred a substantial benefit upon Class members, intend to seek an
15 appropriate portion of the common fund as compensation. Class Counsel will apply for attorneys'
16 fees and expenses in a separate motion.

17 **D. Service Awards for Class Representatives.**

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

28 (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394, citation omitted.)

1 Plaintiffs' Co-Lead Class Counsel will include in the motion for final approval a request for
2 reasonable incentive award payments.

3 **E. No Contribution Clause.**

4 The Settlement Agreement provides that Barr may not seek contribution, indemnity, or any
5 other form of monetary judgment against the HMR Defendants. (See Settlement Agreement ¶ 7.)
6 Such a provision is consistent with Code of Civil Procedure sections 875(d) and 877(b), and was
7 included in the Bayer and HMR Settlements.

8 **F. Release of All Claims.**

9 In exchange for Barr's monetary and cooperation consideration, Plaintiffs agree to release
10 Barr of all claims related to any of the alleged conduct giving rise to these Actions. (Settlement
11 Agreement ¶ 12.)

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

13 The settlement of a class action requires approval of the Court. (Cal. Rules of Court, rule
14 3.769.) Settlement approval is a three-step process, where the court first rules on a preliminary
15 approval motion, making a preliminary finding that the terms and conditions are fair, adequate, and
16 reasonable; notice is then given to the class members; and finally the court holds a final approval
17 hearing. (See generally Judicial Council of California, *Deskbook on the Management of Complex*
18 *Civil Litigation* § 3.76[2] (2012).) In determining whether to approve or reject a proposed
19 settlement, the Court has broad discretion. (*Wershba v. Apple Computer, Inc.* (2001) 91
20 Cal.App.4th 224, 234-235; *Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 434, 438.) At the
21 preliminary approval stage—which precedes dissemination of notice to class members and a
22 formal fairness hearing—the Court need only decide whether the proposed settlement falls within a
23 range of possible final approval. (*Koz v. Kellogg Co.* (S.D.Cal. 2013) No. 09-1786, 2013 U.S. Dist.
24 LEXIS 64577, at *13; *In re Tableware Antitrust Litig.* (N.D.Cal. 2007) 484 F.Supp.2d 1078,
25 1079-1080.)

26 A class settlement will be approved if the settlement is found to be fair, adequate, and
27 reasonable. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) In making this
28 determination, courts consider several factors, including “the strength of the plaintiffs’ case, the

1 risk, expense, complexity and likely duration of further litigation, the risk of maintaining class
2 action status through trial, the amount offered in settlement, and the extent of discovery completed
3 and the stage of the proceedings, the experience and views of counsel, the presence of a
4 governmental participant, and the reaction of the class members to the proposed settlement.”
5 (*Ibid.*) The above factors are not exhaustive, and the court “is free to engage in a balancing and
6 weighing of factors depending on the circumstances of each case.” (*Wershba, supra*,
7 91 Cal.App.4th at p. 245.)

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

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

14 Given the large value of the settlement sum, the strengths and weaknesses of Plaintiffs’
15 claims, the procedural posture, and the fact that this hard-fought, complex litigation has been
16 pending for over sixteen years, the Settlement Agreement is well within the range of
17 reasonableness. As noted above, Barr will pay \$225,000,000 into the Settlement Fund for the
18 benefit of the Class of California Cipro indirect purchasers. Furthermore, this high-value, all-cash
19 payment is being made by only one defendant. The overall benefit provided to the Class by the
20 three settlements is \$399 million, which is \$900,000 more than Bayer paid Barr and the HMR
21 Defendants not to sell a competing ciprofloxacin hydrochloride.

22 The Barr Settlement is particularly fair and reasonable considering the long history and the
23 current procedural posture of the case. The trial court previously granted Defendants’ motion for
24 summary judgment, and the Court of Appeal affirmed. Plaintiffs persuaded a unanimous
25 California Supreme Court to reverse the decisions below. Moreover, multiple federal courts
26 rejected federal antitrust challenges to the Cipro agreements. (*In re Ciprofloxacin Hydrochloride*
27 *Antitrust Litigation* (Fed.Cir. 2008) 544 F.3d 1323 [granting summary judgment to Bayer and
28 generic defendants against non-California indirect Cipro purchasers], cert. denied (2009) 129 S.Ct.

1 2828; *Arkansas Carpenters Health & Welfare Fund v. Bayer AG* (2d Cir. 2010) 604 F.3d 98 [same
2 as against direct Cipro purchasers], cert. denied (2011) 131 S.Ct. 1606.) Trial was set to begin on
3 January 20, 2017 when the parties settled less than two weeks before.

4 As explained above, Plaintiffs first persuaded the California Supreme Court to accept their
5 Petition, briefed the appeal, provided supplemental briefing following the U.S. Supreme Court's
6 *Actavis* decision, responded to Amici briefs, presented oral argument, and then opposed in both the
7 Supreme Court and the Court of Appeal Watson's Petitions for Rehearing. Even after defeating
8 Barr's renewed motion for summary judgment, motion to de-certify the Class, and numerous
9 motions in limine, Barr still had several defenses available. Indeed, Barr prevailed on the
10 Plaintiffs' motion to strike the "bridging the gap" procompetitive justification defense. The parties
11 estimated trial of this matter was at least five weeks, and was uncertain in outcome. While Class
12 Counsel were confident that Plaintiffs would eventually prevail, counsel do not take the above risks
13 and the case's posture lightly. Weighed against these risks, Class Counsel believe that the
14 Settlement Agreement is quite reasonable and warrants preliminary approval.

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

16 A presumption of fairness generally applies to a class settlement that resulted from arm's
17 length bargaining. (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) The Settlement here is the product of
18 arm's length negotiations between attorneys who are highly experienced in complex antitrust cases
19 and who are well-informed about the facts and legal issues of this case. Having litigated this case
20 for over sixteen years, Class Counsel are very well positioned to evaluate the relative strengths and
21 weaknesses as well as the benefits of this Settlement. Likewise, Class Counsel engaged in
22 extensive negotiations to arrive at the ultimate settlement terms.

23 There were settlement discussions in this case over the course of the many years during
24 which it has been pending. (Fastiff Decl. ¶ 3.) The parties are well-versed in the evidentiary record
25 upon which Plaintiffs' claims are based, including thousands of pages of business records, detailed
26 analyses by economists and other experts, dozens of depositions of percipient and expert witnesses,
27 extensive law and motion practice, and multiple appeals. (*Id.* ¶ 5.) Intermittent settlement
28 discussions with Barr continued for over five months after Plaintiffs, Barr, and the

1 HMR Defendants held a mediation in New York City on August 2, 2016. (*Id.* ¶ 3.)

2 Following the agreement in principle, the parties negotiated the Settlement Agreement
3 which memorializes the terms of the agreement. (*Id.* ¶ 4.) Drafts were exchanged before the parties
4 came to final agreement regarding the documentation of the proposed Settlement to be submitted to
5 the Court.

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

8 Another factor reinforcing the presumption of fairness is whether sufficient investigation
9 and discovery have occurred to allow counsel and the court to act based on sufficient information.
10 (*Dunk, supra*, 48 Cal.App.4th at p. 1802.) As noted above, this case has been litigated for more
11 than sixteen years. In that time period, Plaintiffs engaged in voluminous discovery—a sampling of
12 which filled eleven record volumes on appeal. Plaintiffs propounded several rounds of
13 interrogatories and production requests, resulting in extensive productions from all Defendants.
14 Plaintiffs deposed dozens of witnesses. Additionally, Plaintiffs have worked closely with seven
15 experts to develop a substantial understanding of the liability and damage issues. Among other
16 topics, Plaintiffs’ experts have provided estimates of the impact and damages to the Class. (See
17 Fastiff Decl. ¶ 7.) Because the parties have engaged in such significant discovery efforts and have
18 thoroughly developed the record, including a two-week hearing to argue and resolve the over 25
19 motions in limine Plaintiffs and Barr filed, the parties and the Court have more than enough
20 information to evaluate and confirm the fairness of Plaintiffs’ settlement with Barr.

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

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

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

2 The balance of the Settlement Fund after payment of taxes, service awards, costs of notice
3 and administration of the Settlement and Settlement Fund, and attorneys' fees, costs, and expenses,
4 and pursuant to the procedures set forth in the Plan of Allocation (attached as Exhibit B to the
5 Fastiff Declaration), shall be distributed to Class members who timely submit claims that are
6 accepted by the Claims Administrator and approved by the Court ("Authorized Claimants"). The
7 Plan of Allocation provides redress of all claims filed by Class members for purchases or
8 reimbursements of Cipro between January 8, 1997 and December 31, 2005. (The claim period for
9 the Bayer settlement ended on October 31, 2004.)

10 As more fully explained in the Plan of Allocation, after the expenses of notice and claims
11 administration have been deducted or set aside, payment of Class Counsel's attorneys' fees and
12 reimbursement of their expenses, and payment of the Class Representatives' services awards, the
13 Settlement Fund will be disbursed to Class members who timely submit valid Proofs of Claim.
14 Once the Claims Deadline has passed and all received Proofs of Claim have been processed and
15 Authorized Claimants identified, the Claims Administrator shall pay Settlement proceeds as
16 follows: (a) in the full amount claimed, for all valid and timely Proofs of Claim accompanied by
17 Claim Documentation, or (b) at a rate of 80% of the full amount claimed, for otherwise valid and
18 timely Proofs of Claim submitted without Claim Documentation. Authorized Claimants need not
19 resubmit their claims for purchases (or reimbursements) made between January 8, 1997 and
20 December 31, 2005.

21 Should claims exceed the sums available in the Settlement Fund, as with the Bayer and
22 HMR Settlements' allocation plans, payment of Settlement proceeds for all Proofs of Claim shall
23 be proportionately reduced. If the total value of all valid and timely claims is less than the amount
24 remaining in the Settlement Fund, or if for any reason there exists an unclaimed remainder in the
25 Settlement Fund after the Claims Administrator has paid all valid and timely claims, then the
26 Claims Administrator may make a subsequent *pro rata* distribution, if practicable, provided that in
27 no event shall any Authorized Claimant receive a greater distribution of Settlement proceeds than
28 three times the total dollars that Claimant spent on unreimbursed out-of-pocket Cipro expenses

1 during the Claims Period, plus interest.

2 Furthermore, the proposed Plan of Allocation establishes a minimum recovery of \$25 for
3 each authorized claimant. (Fastiff Decl., Ex. B.) This amount is both sensible, as \$25
4 approximates the lowest co-pay most consumer Class members paid, and is cost-effective given the
5 administrative costs of processing and distributing the claims.

6 If funds remain in the Settlement Fund after the Claims Administrator has paid all valid and
7 timely claims, and a subsequent *pro rata* distribution of Settlement Funds would be impracticable
8 or would result in Authorized Claimants receiving distributions of Settlement Fund proceeds in
9 amounts greater than three times their total dollars spent on unreimbursed out-of-pocket Cipro
10 expenses during the Claims Period, plus interest, then the funds remaining in the Settlement Fund
11 shall be distributed in a manner to be approved by the Court pursuant to a motion to be brought by
12 Class Counsel.

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

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

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

26 The notice plan is substantially similar to the plan the Court approved for both the Bayer
27 and HMR Settlements and after the Court certified the Class. (See *Cipro Cases I and II*, Order
28 Disseminating Class Notice, slip op. (Oct. 14, 2004); Order Granting Preliminary Approval, slip

1 op. at ¶¶ 7-9 (Aug. 12, 2013).) The proposed notice plan for the Barr settlement is attached as
2 Exhibit 4 to the accompanying Declaration of Linda Young.

3 The Claims Administrator will maintain a website that provides the detailed and summary
4 notice forms, claims forms, frequently asked questions with answers, and other pertinent
5 information related to these Actions. Class Members may electronically file a claim from this
6 website. If requested by a Class Member, the Claims Administrator will send by U.S. mail or email
7 the detailed notice.

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

15 In addition to the direct mailing, the Claims Administrator will publish a summary notice,
16 substantially in the form as attached to the Young Declaration as Exhibit 4, in the 43 English and
17 foreign language publications identified in the plan for media distribution of the notice (attached as
18 Exhibit 1 to the Young Declaration). The publications have been chosen in order to reach
19 consumers who may have paid for all or part of a prescription for Cipro in California during the
20 Class Period. In selecting publications for notice, the Plaintiffs and the Claims Administrator
21 sought not only to provide the general California consumer population with notice of the
22 Settlement, but also to reach those who were more likely to have paid the total cost of Cipro, *i.e.*,
23 those without health insurance. In general, low income individuals and families, between the ages
24 of 18 and 34, as well as members of certain racial and ethnic groups, are more likely to be
25 uninsured. (See, e.g., *Overview of the Uninsured in the United States: An Analysis of the 2005*
26 *Current Population Survey*, ASPE Issue Brief (September 22, 2005) United States Department of
27 Health & Human Services, Office of the Assistant Secretary for Planning and Evaluation, available
28 at [http://aspe.hhs.gov/health/reports/05/uninsured-cps/.](http://aspe.hhs.gov/health/reports/05/uninsured-cps/))

1 Further, the notice plan targets California consumers who use the internet. As set forth in
2 Young Declaration Exhibit 1, certain on-line methods will be employed to reach Class Members,
3 such as banner ads and ads placed in on-line editions of local and state-wide circulation
4 newspapers. Communication of notice on the internet will provide an additional benefit in that, in
5 most circumstances, clicking on the internet notice will send users directly to the Settlement
6 website where claims may be made electronically.

7 The settlement notices provide a brief explanation of the case, the terms of the proposed
8 Settlement, the maximum amount Class Counsel may seek for attorneys' fees, the amount that
9 named Plaintiffs may seek as service awards, the date, time, and place of the final approval hearing,
10 and the procedures for Class members to follow in submitting comments on and objections to the
11 Settlement and in arranging to appear at the settlement hearing to state any objections. (See Young
12 Decl., Ex. 4.) The settlement notice does not provide the opportunity for Class members to opt out
13 of the Class because they already received notice of such an opportunity and the time to opt out
14 expired. (The opt-out period expired on December 15, 2004.)

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

16 The last step in the settlement approval process is a final approval hearing. Pursuant to
17 California Rules of Court, rule 3.769(e), should the Court grant preliminary approval, its order must
18 state the time, date, and place of the final approval hearing. This hearing allows the Court to hear
19 all evidence and the arguments necessary to determine whether the settlement is fair, adequate, and
20 reasonable. Plaintiffs request that the Court grant preliminary approval and set the date, time, and
21 place for a final approval hearing.

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

Event	Date
Notice of Class Action Settlement to Be Mailed and Posted on Case Website	Within 15 days of Preliminary Approval Order [March 4, 2017]
Notice of Class Action Settlement to Be Published	To begin no later than 14 days of Preliminary Approval Order [March 3, 2017]

Event	Date
Declaration of Compliance with Notice Requirements	To be filed 5 court days prior to the Final Approval Hearing [April 14, 2017]
Postmark/Filing Deadline for Filing Claims	May 31, 2017 (87 days after Notice publication begins)
Motions for Final Approval, Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Be Filed by Plaintiffs' Counsel	21 court days before Final Approval Hearing [March 22, 2017]
Service/Filing of Notices of Appearance at Final Approval Hearing	16 court days prior to Final Approval Hearing [March 29, 2017]
Receipt/Filing Deadline for Comments and Objections; Responses to Final Approval Motion	33 days after Notice publication begins; 12 court days before Final Approval Hearing [April 5, 2017]
Replies in Support of Motions for Final Approval, Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Be Filed by Plaintiffs' Counsel	5 court days before Final Approval Hearing [April 14, 2017]
Final Approval Hearing—Proposed	April 21, 2017 (63 days after the February 17, 2017 preliminary approval hearing)

VIII. CONCLUSION

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

Dated: January 25, 2017

Respectfully Submitted,

By: /s/ Eric B. Fastiff
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