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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: BAYER CORP. COMBINATION ASPIRIN PRODUCTS MARKETING AND SALES PRACTICES LITIGATION THIS PLEADING RELATES TO: ALL CASES	09-md-2023 (BMC)(JMA) **COGAN**, District Judge

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

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I. INTRODUCTION

Plaintiffs seek final approval of their Settlement Agreement and Release[1] with Bayer HealthCare LLC ("Bayer" or "Defendant"). Under Rule 23, final approval of a class action settlement is appropriate if that settlement is fair, reasonable, and adequate. The Settlement was achieved after particularly hard-fought litigation that included a motion to dismiss, extensive written and oral discovery involving 2.5 million pages of documents and dozens of depositions, a fully briefed motion for class certification, which were combined with five motions to strike expert declarations. Moreover, the Settlement was reached after negotiations before two mediators, and only after a failed mediation attempt. Given the nature of the litigation and risks to the Parties, the Settlement will provide Class Members with monetary relief now without the delay and risk associated with continued litigation.

Bayer has agreed to pay $15 million to create the Settlement Account for this case. Class Members with proof of purchase will have the opportunity to receive up to $6.00 for each purchase of Bayer Women's Low Dose Aspirin + Calcium and/or up to $4.00 for each purchase of Bayer Aspirin With Heart Advantage. Moreover, Class Members lacking proof of purchase remain eligible to receive a one-time total cash payment of up to $6.00 for each purchase of Bayer Women's Low Dose Aspirin + Calcium and/or up to $4.00 for each purchase of Bayer Aspirin With Heart Advantage.[2]

On July 23, 2012, the Court preliminarily certified two Settlement Classes, for settlement purposes only:

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[1] All capitalized terms have the same meaning as defined in the Settlement Agreement. The Settlement is attached as Exhibit 1 to the Declaration of Daniel J. Kurowski in Support of Plaintiffs' Motion for Final Approval of Class Settlement.

[2] All amounts are subject to pro-rata reductions should Initial Authorized Payments to Authorized Claimants exceed the amounts available in the Individual Settlement Fund. *See* Settlement Agreement, § III.G.

> **"Bayer Aspirin With Heart Advantage" Class:** All persons who from January 1, 2008 to [July 23, 2012], purchased Bayer® Aspirin With Heart Advantage in the United States for personal, family or household uses. Excluded from the Settlement Class are any Judges to whom this Action is assigned and any member of their immediate families.
>
> **"Bayer Women's Low-Dose Aspirin + Calcium" Class:** All persons who from January 1, 2000 to [July 23, 2012], purchased Bayer® Women's Low Dose Aspirin + Calcium in the United States for personal, family or household uses. Excluded from the Settlement Class are any Judges to whom this Action is assigned and any member of their immediate families.

Doc. # 181, ¶ 2; Settlement Agreement, § I. In addition, the Court approved the form of the Published Notice, Official Notice, Claim Form, as well as the Settlement Class Notice Program. Doc. # 181, ¶ 6(a). As further described below, Notice was issued to the Settlement Class in accordance with the Court's Order. Declaration of Tricia M. Solorzano on Behalf of Settlement Administrator Regarding Notice and Administration ("Solorzano Decl."), ¶ 3; *see infra* at Section I.V.

As correctly and recently observed by this Court in *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *1 (E.D.N.Y. Oct. 23, 2012) (Cogan, J.), courts within the Second Circuit determining whether a settlement is fair, reasonable, and adequate look first to the procedural fairness of a settlement, examining the circumstances surrounding the settlement. *Id*. at *3-5. And, they also look to the substantive fairness of a settlement, as embodied in the nine-factor test set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). *Id*.

This Court should grant final approval of the Settlement. To start, the Settlement is procedurally fair, reached only after years of litigation, extensive discovery, and vigorous arm's-length negotiations by skilled attorneys before two mediators. In addition, the Settlement is substantively fair, satisfying the *Grinnell* factors. First, final approval is appropriate given the

complexity, expense and time needed to litigate through trial and subsequent appeals. Second, the Class has favorably reacted to the Settlement, with only 32 timely opt-outs and no objections. Third, the Parties reached Settlement only after extensive oral and documentary discovery – and fully briefing class certification – providing them with the pertinent information to evaluate their cases and assess the settlement proposal against that evaluation. Next, the continued litigation risks involved in establishing liability, damages and maintaining the class action through trial all favored Settlement here. While Plaintiffs are confident about the evidence they uncovered would result in a trial victory, the trier of fact could ultimately disagree. And, despite a strong liability case, procedural roadblocks related to class certification could have limited recovery to only the Class Plaintiffs. Further, Plaintiffs' damages theories were challenged by Bayer, adding a further layer of risk. Lastly, while there "is no reason … why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery," *Grinnell*, 495 F.2d at 455 n.2, Plaintiffs have recovered $15 million here. This fund, affording aggregate recovery between 9.63 and 87.14% depending on the damage calculation considered, again favors settlement, falling well within the range of reasonableness in light of the best possible recovery and in light of all litigation risks.

As further described below, Plaintiffs and Class Counsel believe the Settlement is fair, adequate and reasonable for the Settlement Class – it offers individual monetary recovery addressing the issues underlying Plaintiffs' claims. Plaintiffs thus respectfully request that this Court grant their Motion.

II. PROCEDURAL HISTORY

In late 2008 and 2009, numerous consumers filed class action suits against Bayer nationwide for violations of state consumer protection statutes, breaches of express and implied warranties, and unjust enrichment in connection with the sale and marketing of Bayer Heart

Advantage and Bayer Women's. The Judicial Panel on Multi-District Litigation centralized these cases before this Court on April 14, 2009. *See generally In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 609 F. Supp. 2d 1379 (J.P.M.L. 2009). On June 8, 2009, this Court appointed Michael London of Douglas and London, P.C. and Elizabeth Fegan of Hagens Berman Sobol Shapiro LLP as Class Counsel to represent both the putative Bayer classes. Doc. # 17. Plaintiffs filed their Master Complaint against Bayer on July 13, 2009 (Doc. # 29) and on September 15, 2009, Bayer promptly moved for a dismissal, arguing that as a matter of law the complaint should be dismissed. Doc. # 44. Ultimately, the Court denied Bayer's motion in its entirety. *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356 (E.D.N.Y. 2010).

During discovery, Class Counsel conducted an extensive investigation into the facts and law. Class Counsel, aided by other Plaintiffs' Counsel, reviewed approximately 2.5 million pages of documents produced by the Defendant and third parties, conducting fifteen depositions of fact witnesses, depositions of all four Named Plaintiffs, and another nine depositions of former Named Plaintiffs in this action. Settlement Agreement, p. 6. And, the Parties exchanged reports from eight expert witnesses, conducting depositions of seven of the witnesses. *Id.*

In moving for class certification in February 2011, Plaintiffs provided the Court with an extensive factual record with which it could make the findings necessary to certify litigation classes. Indeed, Plaintiffs filed an extensive 68-page Proffer of Facts in Support of Class Certification describing Plaintiffs' view of the evidence they uncovered in discovery. Doc. # 112. On June 7, 2011, Bayer challenged Plaintiffs' claims of class certification, including each of Plaintiffs allegations in the Proffer of Facts. *See* Doc. # 145-146. As part of Bayer's opposition strategy, it also relied on testimony and opinions from five witnesses. *See* Doc.

145. However, Plaintiffs moved to exclude the report and testimony of all five witnesses, relying on Fed. R. Evid. 702, *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and its progeny. *See* Doc. # 151-156.

Thus, with both sides primed for a factual and evidentiary battle, and well aware of the strengths and weaknesses of their respective positions, the Parties met individually and before two different independent mediators, conducting extensive negotiations leading to a favorable, negotiated resolution avoiding the risk and expense of continued litigation. With class certification papers on file, on August 11, 2011, the Parties engaged in an unsuccessful in-person mediation session before mediator Antonio Piazza. Settlement Agreement, p. 6. Approximately seven months later, on February 8, 2012, the Parties returned to the negotiating table, engaging in a second session before Hon. Edward Infante (Ret.). *Id*. Ultimately, through follow-up negotiations mediated by Judge Infante over the next three months, the Parties were able to agree to a settlement, finalizing it on May 16, 2012. *Id*. Throughout these settlement negotiations and formal mediation sessions, Class Counsel and Bayer conducted arm's-length settlement negotiation sessions, yielding tangible and immediate class benefits. *Id*.

III. MATERIAL TERMS OF SETTLEMENT

A. Class Benefits

Under the Settlement, Bayer will provide money to two Settlement Classes in amounts reflecting the price differences between the Combination Aspirin Products and 81 mg of Bayer Aspirin:

> **"Bayer Aspirin With Heart Advantage" Class (Class 1)**
> All persons who from January 1, 2008 to July 23, 2012 purchased Bayer Aspirin with Heart Advantage in the United States for personal, family or household uses. Excluded from the settlement class are any Judges to whom this Action is assigned and any member of their immediate families.

> **"Bayer Women's Low Dose Aspirin + Calcium" Class (Class 2)**
> All persons who from January 1, 2000 to July 23, 2012 purchased Bayer Women's Low Dose Aspirin + Calcium in the United States for personal, family or household uses. Excluded from the settlement class are any Judges to whom this Action is assigned and any member of their immediate families.

See Settlement Agreement, § I(A)-(B). Class Members who have valid proofs of purchase (such as packaging, bottles, and/or receipts) and who file valid, sworn, and timely claims are entitled to a cash settlement payment of $6.00 for each bottle of Bayer Heart Advantage purchased during the Class Period, and $4.00 for each bottle of Bayer Women's purchased during the Class Period. *See id.*, § III(E)(2)(a). And Class Members who do not have valid proofs of purchase but who file valid, sworn, and timely claims are entitled to a one-time cash settlement payment of $6.00 for Bayer Heart Advantage and $4.00 for Bayer Women's. *See id.*, § III(E)(2)(b).

In total, Bayer will be required to pay $15 million into the Settlement Fund. *See id.*, § III(C). The Bayer Heart Advantage Settlement Class will receive a 40% allocation from the Net Settlement Fund and the Bayer Women's Settlement Class will receive a 60% allocation from the Net Settlement Fund. *See id.*, § III(E)(1). These percentages were the result of weeks of arm's-length negotiations conducted by Allocation Counsel, Daniel Mogin of The Mogin Law Firm P.C. and Melanie Muhlstock of Parker Waichman LLP, appointed by Lead Counsel for the Settlement Classes. *See id.*, §§ II(B), III(E)(1). *See also* Declaration of Daniel J. Mogin in Support of Allocation to Bayer Women's Class, ¶ 8 ("Mogin Decl.") (filed separately); Declaration of Melanie H. Muhlstock in Support of Allocation to Bayer Heart Advantage Class, ¶ 2 ("Muhlstock Decl.") (filed separately).

The Settlement Fund will be distributed to pay eligible claims, subject to any pro rata reductions if the total dollar of the claims exceed the money available for distribution. *See* Settlement Agreement, § III(E)(2)(a)-(b). Other costs to be paid from the Settlement Fund

include any taxes on the fund; notice and settlement administration costs; service awards; and Plaintiffs' attorneys' fees and costs. *See id.*, § III(F). If there are Excess Amounts remaining after all payments ordered by the Court have been made, the parties will request the Court's approval to distribute the Final Excess Amount as *cy pres* to two charities agreed to by the Parties. *See id.*, § III(E)(3)(b). *See also infra* at Section V.D.

B. Attorneys' Fees and Service Awards

Since this case was first filed in 2008, Class Counsel and Plaintiffs' Counsel have not received any payment for their services in prosecuting the lawsuit, nor have they been reimbursed for any case expenses. Under the Settlement, Bayer has agreed not to oppose Plaintiffs' request for reimbursement of Class Counsel's attorneys' fees not to exceed 30% of the Settlement Fund and expenses not to exceed $600,000, payable from the Settlement Fund. *See* Settlement Agreement, § IV(B). These amounts, subject to Court approval under Rule 23(h), will compensate Class Counsel and Plaintiffs' Counsel for the time, risk and expense they incurred pursuing Class Members' claims on their behalf. Bayer has also agreed to reasonable service awards of $2,500 to each of the four Named Plaintiffs serving as Class Representatives in this matter. *See id*. Class Counsel concurrently move for service awards, fees, and expenses.

IV. FORM AND MANNER OF CLASS NOTICE

The Court should conclude that distribution of the Class Notice was adequate. The Parties selected and the Court appointed Gilardi & Co. LLC/Larkspur Design Group as the qualified third-party Claims Administrator, to update Class Members' addresses, mail notice of the settlement to Class Members,[3] receive opt-out requests, process Class Members' claims,

[3] In addition to the notice of the Settlement mailed to Class Members by the Settlement Administrator, Costco sent mail notice to Class Members in its records that purchased either Combination Aspirin. *See generally* Declaration of Dan Ross ("Ross Decl.") (filed separately). The text of this notice was identical to the Summary Notice approved by the Court. *Id*. at Ex. 1.

respond to Class Member inquiries, issue settlement checks to claimants, and conduct other activities relating to class notice and settlement administration under the Parties' supervision. *See* Settlement Agreement, §§ II(H), IV(A).

This case involved an extensive notice program. Gilardi, through its in-house advertising agency, Larkspur Design Group ("LDG"), caused the Summary Notice to be published in the following media outlets: *AARP Bulletin* in October 2012; *Cooking Light* in the November 2012 issue; *Good Housekeeping* in the November 2012 issue; *People Magazine* in their October 1 and October 8, 2012 issues; *Reader's Digest* in the October 2012 issue; *TIME Magazine* in their October 2012 issue, *Women's Day* in their November 2012 issue; *USA Today* on September 10, 17, 24, October 1, 8, 15, 22, and 29, 2012; *The Wall Street Journal* on September 7, 2012, *The National Enquirer* on October 1, 8, 15 and 22, 2012, *The Smithsonian Magazine* in their November 2012 issue; and a press release to PR Newswire on September 7, 2012 and November 1, 2012. Solorzano Decl., ¶ 4.

Additionally, Gilardi, through LDG utilized sponsored links and text ads through Google and Bing, display ads through Yahoo, Facebook, Google, and contextual banners through PulsePoint to provide Internet notice of the Settlement beginning on September 7, 2012. *Id*. at ¶ 5. And, on or before June 13, 2012, Gilardi caused a copy of the Class Notice to be posted on the internet at www.BayerCombinationAspirinSettlement.com, where Class Members can view and print copies of the Long-Form Notice, Preliminary Approval Order, Settlement Agreement, Complaint, and consult Frequently Asked Questions. Class Members can also file an electronic claim on the website. *Id*. at ¶ 6. Further, Class Counsel have posted links to the Settlement on their respective websites. *See* Hagens Berman Sobol Shapiro LLP, Case Page, Bayer HealthCare, at http://www.hbsslaw.com/cases-and-investigations/cases/bay (last visited

January 22, 2013); Douglas & London PC, Case News, at http://www.douglasandlondon.com/legal-news/bayer-combination-aspirin-multidistrict-litigation/ (last visited January 22, 2013).

With an eye toward providing direct notice to Class Members, Plaintiffs engaged in significant non-party discovery efforts to obtain Class Member contact information. Plaintiffs identified, then subpoenaed, the top ten retailers selling the Combination Aspirins, requesting, *inter alia*, Class Member lists.[4] Doc. # 182. Five of these top-ten retailers (K-Mart, Rite-Aid, Target, Walgreens and Winn Dixie) did not have Class Member lists. *Id*. However, five retailers did keep Class Member lists. *Id*. Without issue, Plaintiffs' obtained Class Member lists from Wal-Mart's Sam's Club Division,[5] and CVS. *Id*. Costco, while not willing to produce Class Member information directly to Plaintiffs, agreed to provide notice itself rather than turn over the information to Class Counsel. *See* Ross Decl., ¶ 4. Plaintiffs later obtained Class Member information from BJ's Wholesale Club and Safeway, following Plaintiffs' request for relief from the Court and the Court's directive compelling each to do so. *See* Doc. # 183 (letter brief); 184 (order granting Plaintiffs' motion to compel). Notably, Safeway objected to the Court's order, filing a motion for reconsideration, which this Court granted in part and denied in part, affirming its earlier order that Safeway should produce such materials. *See* Doc. # 188 (granting in part and denying in part Safeway's motion for reconsideration).

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[4] In reviewing 2008 and 2009 combined data, the ten retailers subpoenaed by Plaintiffs represented approximately 58.7% of the total net value of shipments of Bayer Women's and 76.8% of the total net value of shipments of Bayer Heart Advantage. *See* Doc. # 182 at 1 n.1. The ten retailers included: BJ's Wholesale Club, Costco Wholesale, Inc., CVS Caremark Corp., K-Mart Holding Corp., Rite-Aid Corp., Safeway, Inc., Target Corp., Walgreens Co., Wal-Mart Stores, Inc. (including Sam's Club) and Winn Dixie Corp. *Id.* at 1. Plaintiffs did not subpoena Duane Reed. Based on a review of sales data, Bayer's sales to Duane Reed constituted approximately 0.26% of the total net value of Bayer Heart Advantage shipments during 2008 and 2009 and a de minimis number of Bayer Women's. *Id.*

[5] Wal-Mart itself did not have Class Member lists.

As a result of these efforts, nearly 700,000 postcards, containing the same information as presented in the Summary Notice published throughout the country, were mailed to Class Member addresses. Beginning on or before September 7, 2012, Gilardi caused a Postcard Notice to be mailed to 454,036 mailing addresses using data received from CVS and Wal-Mart's Sam's Club division. Solorzano Decl., ¶ 7. On or before September 10, 2012, Gilardi caused a Postcard Notice to be mailed to 62,898 mailing addresses using data received from BJ's Wholesale Club. *Id*. On or about September 25, 2012, Costco caused a Postcard Notice to be mailed to 129,474 Class Member mailing addresses using its own data. Ross Decl., ¶ 7. Then, on or before November 5, 2012, Gilardi caused Postcard Notice to be mailed to 49,686 mailing addresses using data received from Safeway. Solorzano Decl., ¶ 7.

The Long-Form Notice described the lawsuit, the material terms of the Settlement and the procedures for each Class Member to receive the benefits under the Settlement. The Notice also described the procedures for Class Members to exclude themselves from the Settlement and to provide comments in support of or in objection to the Settlement. *See* Settlement Agreement, Ex. D. Any Class Member who wishes to be excluded from the Settlement were presented the opportunity to opt-out by making a timely request. The procedures for opting-out are those commonly used in class action settlements and are straightforward and clearly described in the Class Notice. *See id*.

Class Members had until December 20, 2012, to postmark requests for exclusion from the Settlement. *See* Preliminary Approval Order at 8.b. In addition, Class Members have until February 5, 2013 to object to the Settlement. *See* Preliminary Approval Order at 9. Only 32 Class Members have timely opted out of the Settlement. Solorzano Decl., ¶ 12. To date, no objections have been filed. *Id*. at ¶ 13.

If the Court grants final approval of the Settlement after Class Members are notified and the time period for opt-out requests and objections expires, all Class Members who do not request exclusion from the Class will be deemed to have released all claims as set forth in the Settlement against Bayer related to their purchase(s) of Bayer Heart Advantage or Bayer Women's that could have been asserted in this litigation. *See* Settlement Agreement, § IV. The Released Claims do not include claims for personal injury. *See id.*, § VI(A). As such, the Court should conclude that the distribution of the Class Notice was adequate.

V. ARGUMENT

Final approval of the Settlement is appropriate here because it is fair, adequate and reasonable. Under Rule 23(e), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). And, "[i]f the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

Importantly, courts and public policy considerations favor settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. "The compromise of complex litigation is encouraged by the courts and favored by public policy," and is particularly encouraged for the compromise of class actions. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 117 (2d Cir. 2005) (internal quotation omitted). Indeed, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is particularly true in class actions." *In re Luxottica Group S.p.A. Secs. Litig*. 233 F.R.D. 306, 310 (E.D.N.Y. 2006).

A. The Settlement is Procedurally Fair, Reasonable, and Adequate

First, the circumstances surrounding the Settlement support the finding that the settlement is procedurally fair. Courts examining the procedural fairness of a settlement do so "in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009) (internal quotations omitted).

Here, the negotiations leading to Settlement were conducted by highly qualified counsel, who respectively sought to obtain the best possible result for their clients. The Settlement, reached only after extensive discovery involving millions of pages of documents and dozens of depositions, remained at all times arm's length and non-collusive. In such situations, courts, including the Second Circuit, adopt "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 11:41 (4th ed. 2002); *see also McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) ("We have recognized a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. Such a presumption is consistent with the strong judicial policy in favor of settlements, particularly in the class action context.") (alteration in original, internal citations and quotations omitted); Preliminary Approval Tr. at 44 (correctly noting that "[c]early

this was a hard fought case. Settlement negotiations were extensive. They were at arms length.").[6]

Another important fact confirming the procedural fairness here involves the fact that the negotiations and eventual settlement was supervised by two independent mediators. "This Circuit has recognized that the involvement of a mediator in pre-certification settlement negotiations helps to ensure that the proceedings are free of collusion and undue pressure." *Farinella v. PayPal, Inc.*, 611 F. Supp. 2d 250, 264 (E.D.N.Y. 2009) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)). *See also Willix v. Healthfirst, Inc.*, No. 07 CIV. 1143 ENV RER, 2011 WL 754862, at *3 (E.D.N.Y. Feb. 18, 2011) ("Arm's-length negotiations involving counsel *and a mediator* raise a presumption that the settlement they achieved meets the requirements of due process.") (citing *Wal-Mart*, 396 F.3d at 116) (emphasis added).

Against this backdrop, this Settlement satisfies the procedural fairness requirement.

B. The Settlement is Also Substantively Fair, Reasonable and Adequate

In addition to being procedurally fair, the Settlement is also substantively fair, reasonable, and adequate. "Courts in the Second Circuit evaluate the substantive fairness, adequacy, and reasonableness of a settlement according to the factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)." *In re Vitamin C*, 2012 WL 5289514 at *4. The nine *Grinnell* factors include: "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of defendants to

[6] The Preliminary Approval Transcript is attached as Exhibit 2 to the Declaration of Daniel J. Kurowski in Support of Plaintiffs' Motion for Final Approval of Class Settlement (filed separately).

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 risks of litigation." *Id*. (quoting *Grinnell*, 495 F.2d at 463). However, in reviewing and approving a settlement, "a court need not conclude that all of the *Grinnell* factors weigh in favor of a settlement," rather courts '"should consider the totality of these factors in light of the particular circumstances." *Id*. (quotation omitted). The *Grinnell* factors favor final approval.

1. Factor One: Given the Complexity, Expense and Likely Duration of the Litigation, Final Approval Is Appropriate.

The first factor requires the Court to consider "the complexity, expense and likely duration of the litigation." *In re Vitamin C*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). This factor weighs in favor of final approval.

This litigation has been filed since 2008, pending before this Court since 2009, and involves complex legal and factual issues, with an added layer of complexity given that this case is a class action as opposed to ordinary litigation. The completed briefing on Plaintiffs' Motion for Class Certification, as well as Plaintiffs' motions to strike the reports offered by Defendant's experts in opposition to class certification, reflects this reality. However, class certification represents only one milestone on the road to final resolution of the case on the merits. For example, if the Court granted, in whole or in part, Plaintiffs' Motion for Class Certification, an appeal under Rule 23(f) would inevitably have followed, requiring the Parties to incur additional time and expense re-litigating class certification issues. Additionally, if the Second Circuit reversed certification, an additional round of certification briefing may have taken place. Further, if the litigation continued, additional time would have been implicated in preparing and opposing any motions for summary judgment. And, depending on the scope of the Court's class

certification order, additional, follow-up discovery efforts may have been required in order to finally prepare the case for the jury. Simply put, "[l]itigation through trial would be complex, expensive, and long." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-5669 (BMC), 2012 WL 5874655, at *3 (E.D.N.Y. Nov. 20, 2012) (Cogan, J.). The Settlement satisfies the first *Grinnell* factor.

2. Factor Two: The Class' Favorable Reaction to the Settlement.

With the second *Grinnell* factor, the Court judges "the reaction of the class to the settlement." *In re Vitamin C*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). "It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 333 (E.D.N.Y. 2010) (citations omitted). This "significant" factor thus weighs heavily in favor of final approval.

Here, the reaction of the Class Members to the Settlement has been overwhelmingly positive. Even though the Notice informed Class Members that they could object to or exclude themselves from the Settlement, and explained how to object or opt-out, few chose to do so. Following a nation-wide notice campaign, which included the direct mailing of nearly 700,000 postcards to Class Members, only 32 Class Members have timely opted out of the Settlement and no objections have been lodged as of this filing.[7] Solorzano Decl., ¶¶ 12-13. In entering final approval, this Court has recognized that "[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness. *Massiah*, 2012 WL 5874655, at *4 (citations omitted).

[7] The deadline for postmarking objections to the lawsuits is February 5, 2013. *See* Preliminary Approval Order, ¶ 10.a. Should any objections be timely lodged, Plaintiffs will respond to any objections by February 19, 2013, as directed by the Preliminary Approval Order. *See id.*

Further, on May 25, 2012, Gilardi mailed notice of the proposed class action settlement of this matter, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1711, *et seq.* ("CAFA Notice"), to the U.S. Attorney General and the Attorneys General of all fifty States and the District of Columbia. Solorzano Decl., ¶ 2. In addition to the letter, a CD containing the documents listed on the letter in a PDF format was included in the mailing to each recipient. *Id.* To date, neither Gilardi, nor the Defense Counsel identified as the attorney to contact regarding the CAFA Notice, have received any objections from service of that CAFA Notice. *See id.*; Declaration of James P. Muehlberger, ¶ 6 (filed separately). This second factor weighs in favor of final approval.

3. Factor Three: The Parties Reached Settlement Only After Extensive Oral and Documentary Discovery and Full Class Certification Briefing.

The third factor, "the stage of the proceedings and the amount of discovery completed," also calls for final approval. *In re Vitamin C*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). "Extensive discovery ensures that the parties have had access to sufficient material to evaluate their case and to assess the adequacy of the settlement proposal in light of the strengths and weaknesses of their positions." *MetLife*, 689 F. Supp. 2d at 333-34 (citation omitted). This factor weighs in favor of final approval.

Here, the record confirms the Parties' extensive investigation into the facts and law. The Parties litigated multiple discovery disputes. *See, e.g.*, Doc. # 42, 60, 79, 87, 94-95, 131, 132, 177, 183. They nearly completed full merits discovery, (1) producing and/or reviewing approximately 2.5 million pages of documents from Bayer and non-parties, (2) conducting and defending fifteen depositions of fact witnesses, (3) conducting and defending depositions of each of the four Class Representatives, and (4) conducting and defending depositions of nine former Named Plaintiffs. Settlement Agreement, at p. 6. And, Class Counsel fully briefed Plaintiffs'

Motion for Class Certification, supported by an extensive Proffer of Facts. Doc. # 112-117, 121, 162-165. In addition, Class Plaintiffs filed detailed motions to strike the reports and/or testimony of Bayer's expert witnesses. Doc. # 151-156, 170.

Because "[t]he parties have completed enough discovery to recommend settlement" the answer to "[t]he pertinent question [of] whether counsel had an adequate appreciation of the merits of the case before negotiating," is undeniably 'yes.' *Massiah*, 2012 WL 5874655, at *4 (internal quotation omitted). After years of heavy litigation, the Parties "have 'had sufficient information to act intelligently.'" *MetLife*, 689 F. Supp. 2d at 334 (quoting *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997)). This factor has been met.

4. Factors Four, Five and Six: The Continued Litigation Risks Related to Establishing Liability, Damages and Maintaining the Class Action Through Trial Support Settlement.

"The fourth, fifth, and sixth *Grinnell* factors all relate to continued litigation risks," *i.e.*, the risks of establishing liability, damages and maintaining the class action through trial. *In re Vitamin C*, 2012 WL 5289514, at *4, 5 (citing *Grinnell*, 495 F.2d at 463). "Litigation inherently involves risks." *Willix*, 2011 WL 754862, at *4 (quoting *In re Painewebber*, 171 F.R.D. at 126). "One purpose of a settlement is to avoid the uncertainty of a trial on the merits." *Id*. (quotation omitted).

To be sure, this case involved significant risks related to establishing, on a nationwide basis, that Bayer engaged in unfair, deceptive, or unlawful conduct in marketing the Combination Aspirin Products. While Plaintiffs believe the evidence uncovered in the case would aid the trier of fact in reaching a favorable decision for Plaintiffs and the Class Members, which they collected and offered to the Court in their Proffer of Facts, the reality remains that the trier of fact could nevertheless disagree with Plaintiffs' well-supported analyses. Moreover, even if class certification was granted, the Class could later be decertified. Thus, "[t]he risk of

obtaining and maintaining class status throughout trial also weighs in favor of final approval," particularly where "[a] motion to certify and/or decertify the class would likely require more extensive discovery and briefing, possibly followed by an appeal, which would require additional rounds of briefing." *Massiah*, 2012 WL 5874655, at *5. And, the risk of establishing damages existed where the damage analyses conducted by Plaintiffs' damages expert, Dr. Jeffrey Harris, were disputed by Bayer.

The Court's comments at the Preliminary Approval hearing further confirm the risks favoring settlement. While the Court found the Rule 23(a) factors were satisfied, the Court cited possible certification risks in connection with the predominance inquiry for certifying a litigation class under Rule 23(b)(3): "Predominance is a trickier question here. I thought the defendants really wrote an excellent brief in opposing class certification." Preliminary Approval Tr. at 43.[8]

At the Preliminary Approval hearing, the Court also questioned whether it could certify a nationwide Settlement Class if it would not have certified all the states requested in a litigation class. Preliminary Approval Tr. at 15-16, 44. As set forth below in Section VI.B, while the answer to that question is yes, the Court's colloquy demonstrates the potential risks Plaintiffs faced in seeking certification of a nationwide class under New Jersey law in the first instance.

Accordingly, the fourth, fifth, and sixth *Grinnell* factors weigh in favor of the Settlement.

5. Factor Seven: Bayer's Ability to Withstand a Greater Judgment.

Regarding the seventh factor, the Court considers Bayer's ability "to withstand a greater judgment." *In re Vitamin C*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). This factor is not at issue here.

[8] As discussed further in Section VI.B, issues related to predominance that a court considers in determining whether to grant *litigation* class certification do not apply in the context of *settlement* class certification.

Here, there is no evidence on record that Bayer could not withstand a greater judgment. However, "this fact alone does not undermine the reasonableness of the instant settlement.'" *Id.* at 6 (quoting *Weber v. Gov't Emps. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009)). *Cf. MetLife*, 689 F. Supp. 2d at 339-40 ("Courts have recognized that the defendant's ability to pay is much less important than other factors, especially where the other Grinnell factors weigh heavily in favor of settlement approval….") (internal quotation and citations omitted).

6. Factors Eight and Nine: the Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery.

With the last two *Grinnell* factors, courts look to "the range of reasonableness of the settlement fund in light of the best possible recovery" as well as "the range of reasonableness of the settlement fund in light of all the attendant risks of litigation." *In re Vitamin C*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). However, "[t]he determination of a reasonable settlement is not susceptible of a mathematical equation yielding a particularized sum, but turns on whether the settlement falls within a range of reasonableness." *MetLife*, 689 F. Supp. 2d at 340 (citing *PaineWebber*, 171 F.R.D. at 130) (internal quotations omitted). "This range of reasonableness recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Id.* (citing *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.1972)) (internal quotations omitted). Thus, there "is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* (quoting *Grinnell*, 495 F.2d at 455 n.2). This factor weighs in favor of final approval.

Here, the Settlement provides reasonable monetary relief and substantially fulfills the purposes and objectives of this class action. Plaintiffs have obtained a $15 million recovery. As described in the chart below, and using standard formulas and data from Bayer and publicly

available sources and the damages models created by Plaintiffs' expert, Dr. Jeffrey Harris, the Settlement recovers significant percentages of the claimed damages. Specifically, the recovery represents significant percentages of recovery: (1) between 9.63% and 87.14% of the damages alleged for Bayer Women's Class Members, and (2) between 13.05% and 78.597% of the damages alleged for Bayer Heart Advantage Class Members.

	Full Refund Theory (% recovery of settlement)	**Out of Pocket Loss Theory (% recovery of settlement)**	**Benefit of the Bargain Theory (% recovery of settlement)**	**Unjust Enrichment Theory (% recovery of settlement)**
Bayer Women's ($9 million allocation)	$57.351[9] (15.69%)	$32.113 (28.02%)	$93.409 (9.63%)	$10.328 (87.14%)
Bayer Heart Advantage ($6 million allocation)	$33.241 (18.04%)	$23.934 (25.06%)	$45.942 (13.05%)	$7.634 (78.59%)
Total	$90.592 (16.55%)	$56.047 (26.76%)	$139.351 (10.76%)	$17.962 (83.51%)

See generally Memorandum of Law in Support of Plaintiffs' Motion for Class Certification at 11-12 (Doc. # 112); *see also Velez v. Novartis Pharms. Corp*., 2010 U.S. Dist. LEXIS 125945, at *40-41 (S.D.N.Y. Nov. 30, 2010) (noting courts in the Second Circuit "often approve class settlements even where the benefits represent only a fraction of the potential recovery" and collecting Second Circuit district and appellate court decisions approving settlements ranging from 1.6% to 12% of claimed damages). The substantial amount of the settlement weighs strongly in favor of final approval. *See* Preliminary Approval Tr. at 44 (noting "for plaintiffs they are getting a substantial recovery"). Thus, taking into account the risks of continued litigation, and the fact that the Settlement was reached after intensive, arm's-length negotiations by experienced counsel, the eighth and ninth *Grinnell* factors favor final approval.

[9] All dollar values are in millions of dollars.

C. This Court Should Also Approve the Proposed Allocation Plan, Which is Fair, Reasonable and Adequate

In addition, the Court should approve the proposed allocation plan of this $15 million dollar Settlement, which allocates 60% to the "Bayer Women's Low-Dose Aspirin + Calcium" Class, and 40% to the "Bayer Aspirin With Heart Advantage" Class.

'"As a general rule, the adequacy of an allocation plan turns on … whether the proposed apportionment is fair and reasonable under the particular circumstances of the case.'" *In re Vitamin C*, 2012 WL 5289514, at *7 (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d at 518). '"An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *Id*. (quoting *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001)). And, "[a]s numerous courts have held, a plan of allocation need not be perfect." *In re EVCI Career Colleges Holding Corp. Secs. Litig.*, No. 05 Civ. 10240(CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007).

This Court should find that the proposed allocation is fair and reasonable. Here, the Settlement provides monetary benefits to two settlement classes, the "Bayer Women's Low-Dose Aspirin + Calcium" Class and the "Bayer Aspirin With Heart Advantage" Class. The proposed allocation is derived as the result of arm's-length negotiations conducted by separately appointed Allocation Counsel, Daniel Mogin of The Mogin Law Firm P.C. (representing the Bayer Women's Class) and Melanie Muhlstock of Parker Waichman LLP (representing the Bayer Heart Advantage Class). *See* Settlement Agreement, §§ II(B), III(E)(1). Each counsel, experienced in complex actions like this case, conducted arm's-length negotiations over the course of a month, arriving at the 60%/40% allocation values. *See generally* Mogin Decl.; Muhlstock Decl. Generally, the Plan of Allocation provides for the distribution of the Net

Settlement Fund after payment required expenses and payments due from any Fee and Expense Reward. Each Class Member is eligible for payment based on his or her purchases during the relevant time period. And, Class Members can be members of both Classes.

D. The Parties Request Approval of Two Organizations as Potential *Cy Pres* Recipients, Should Settlement Funds Remain

Next, the Parties request approval of the AARP Foundation and the American Heart Association as potential recipients of unclaimed settlement funds. Under Section III.E of the Settlement Agreement, should "any Excess Amounts remain[] after all payments ordered by the Court have been made ('Final Excess Amount'), the Claims Administrator shall notify Lead Class Counsel and counsel for Bayer of the Final Excess Amount." Thereafter, "[t]he parties shall then apply to the Court for an order pursuant to Section III.G of the Agreement to distribute the Final Excess Amount as *cy pres* payments to charities agreed to by the parties and approved by the Court." Settlement Agreement § III.E.3.b. The Settlement also requires that "[t]he charities shall be not-for-profit organizations exempt from federal taxation as charitable organizations under Internal Revenue Code Section 501(c)(3)." *Id.*, at § III.G.

'"[T]he purpose of Cy Pres distribution is to put the unclaimed fund to its *next best* compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-cv-5238(JG), 2011 WL 5029841, at *9 (E.D.N.Y. Oct. 24, 2011) (quoting *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007)) (internal quotation marks and alterations omitted; emphasis in original). "*Cy pres* distributions are appropriate" in multiple situations, including "'where class members are difficult to identify' or in 'circumstances in which direct distribution to individual class members is not economically feasible' or 'where proof of individual claims would be burdensome or

distribution of damages costly.'" *In re Vitamin C*, 2012 WL 5289514, at *7 (quoting *Masters*, 473 F.3d at 436).[10]

Under the facts presented here, a *cy pres* distribution is appropriate to ensure that the Final Excess Amount prospectively benefits Class Members. Here, while Plaintiffs conducted multiple efforts to obtain existing class contact information, contact information does not exist for every Class Member purchasing the Combination Aspirin Products. Accordingly, the Parties have selected two not-for-profit organizations, AARP Foundation and the American Heart Association to ensure that the funds will go to organizations devoting "resources to issues that are closely related to the interests of the members of [the Classes]." *In re Visa Check/MasterMoney Antitrust Litig*., 2011 WL 5029841, at *9. The Parties request the Court's approval of these organizations as recipients of unclaimed funds, should such funds remain. Here, the proposed recipients of potential unclaimed funds meet this test. Moreover, both organizations have nationwide missions.

Throughout this litigation, Plaintiffs have maintained that Bayer overcharged consumers for the Combination Aspirin Products or that these products should not have been sold because these products were not FDA-approved, could not provide all advertised health benefits and were inappropriate for long term use. Each organization's work corresponds with this prevailing

[10] *See also* 3 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 10:17 (4th ed. 2002) ("When a litigated or settled aggregate class recovery cannot feasibly be distributed to individual class members or when a balance of a class recovery remains following individual distribution, the court is faced with the issue of how to dispose of the common fund or the remaining balance thereof. Several options exist. The court may determine that recovery funds that are not distributed to class members to compensate them for their claims should be returned to the defendant, or the court may direct that such undistributed funds be applied prospectively to the indirect benefit of the class. Alternatively, the court may declare that the funds, being unclaimed, shall be placed in escrow for a given period, following which they shall escheat to the state, to the United States Treasury pursuant to 28 U.S.C.A. §§ 2041, *et seq*., or the court may use a combination of these approaches.").

theme. AARP will utilize any *cy pres* award to fund education about how to prevent and manage osteoporosis, high cholesterol, and/or heart disease. *See generally* http://www.aarp.org/health/ (last visited January 21, 2013). Moreover, issues associated with osteoporosis, high cholesterol and/or heart disease disproportionally impact Americans 50 years of age and older, confirming an overlap between the Class Members and AARP's audience/membership. And, given the multiple heart health issues involved here, the selection of the American Heart Association, with its dedicated mission "to build healthier lives, free of cardiovascular diseases and stroke," which "drives all we do," is also appropriate. *See generally* http://www.heart.org (last visited January 21, 2013).

VI. THE PROPOSED CLASSES SHOULD BE CERTIFIED FOR SETTLEMENT

Finally, the Court should determine, for settlement purposes only, whether the Settlement Classes proposed for settlement is appropriate under Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). To proceed as a class action, the litigation must satisfy the four prerequisites of Rule 23(a), otherwise known as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a). In addition, at least one of the three requirements of Rule 23(b) must be met. Fed. R. Civ. P. 23(b). In certifying a settlement class, however, the Court is not required to determine whether the action, if tried, would present intractable management problems, "for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620; *see also* Fed. R. Civ. P. 23(b)(3)(D). Here, the proposed Class meets all of the requirements of Rule 23(a) and satisfies the requirements of Rule 23(b)(3).

A. The Numerosity, Commonality, Typicality, and Adequacy Requirements are Met

1. Numerosity.

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1)). "A finding of numerosity may be

supported by common sense assumptions… ." *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998). Further, the Second Circuit has commented that "numerosity is presumed at a level of 40 members." *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Since the members of the Classes included in the Settlement purchased Bayer's Combination Aspirins across the country, there can be no doubt that the number of Class Members far exceeds the Second Circuit's low threshold for satisfying the numerosity standard. *See* Preliminary Approval Tr. at 43 ("Clearly, there's no question about numerosity."). Indeed, postcards were mailed to approximately 700,000 Class Member addresses. Solorzano Decl., ¶ 7; Ross Decl., ¶ 7. *Cf. Ersler v. Toshiba Am., Inc.*, No. CV-07-2304(SMG), 2009 WL 454354, at *4 (E.D.N.Y. Feb. 24, 2009) ("[T]here are approximately 265,000 class members, and almost 90,000 of the them have been identified and sent hard copy or electronic mail notice. Clearly, the class is so numerous that joinder of all members is impracticable."). Numerosity is met.

2. Commonality and Typicality.

The Settlement Classes also meet the commonality requirement of Rule 23(a)(2), which requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). And, it meets Rule 23(a)(3)'s requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "As a practical matter, the two requirements [of commonality and typicality] merge in the Second Circuit's inquiry." *Alleyne v. Time Moving & Storage, Inc.*, 264 F.R.D. 41, 48 (E.D.N.Y. 2010) (citing *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999)). The commonality and typicality requirements are satisfied "when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Here, each of Plaintiffs' and the Class Members' claims arise from the same course of events: their purchase of Bayer's Combination Aspirins that Plaintiffs allege do not provide the touted benefits over aspirin alone. Each Plaintiff and Class Member allegedly paid more for the Combination Aspirins than they would have either for aspirin alone or for aspirin and a separate supplement, *i.e.*, calcium or phytosterols. These conclusions are further reflected in this Court's previous ruling denying Bayer's motion to dismiss. There, in reviewing Plaintiffs' allegations, the Court highlighted two common questions: (1) that Bayer misrepresented the efficacy of the products, *i.e.*, the products "were incapable of delivering the health benefits touted on their packaging" and (2) Bayer misrepresented the safety of the products, *i.e.*, the products were "inappropriate for long-term use." *In re Bayer*, 701 F. Supp. 2d at 362. Moreover, using information that Bayer has designated as confidential, Plaintiffs demonstrated how common evidence supports the resolution of such common questions on a class-wide basis in their Proffer of Facts and other materials offered in support of class certification. Doc. # 112 (Proffer of Facts). And, during the Preliminary Approval hearing, the Court correctly identified the question of "[w]as there a false statement on this product?" as "a common question that would apply to every member of the class." *See* Preliminary Approval Tr. at 43.

The Plaintiffs proposed to serve as Class Representatives, like every other Class Member, purchased Combination Aspirins within the Class Period, and have claims typical of those of the Class. *See* Preliminary Approval Tr. at 43 ("As to typicality, I really don't have any question about that at all for preliminary purposes. All the plaintiffs seem to have that."). Commonality and typicality have been met.

3. Adequacy.

The fourth and final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Here, the

proposed Class Representatives must "demonstrate that they have no interests that are antagonistic to the proposed class members" and "class counsel must be qualified." *Myers v. Hertz Corp.*, No. 02 Civ. 4325 (BMC) (MLO), 2007 WL 2126264, at *6 (E.D.N.Y. July 24, 2007) (Cogan, J.).

The requirements of Rule 23(a)(4) are satisfied here. Plaintiffs do not have any unique relationships with Defendant, do not have interests that are antagonistic to the Class' claims, and are fully aligned with the interests of other Class Members. In addition, each proposed Class Representative has demonstrated their willingness and ability to take the required role in the litigation and to protect the interests of those they seek to represent. Plaintiffs' effort is reflected in their respective consultations with counsel, preparing for and sitting for their depositions, responding to interrogatories, gathering documents and more. And, Class Counsel have and will continue to fairly and adequately represent the interests of the Classes. Like the other Rule 23(a) prerequisites, the adequacy standard is satisfied here. *See* Preliminary Approval Tr. at 43 ("Nor do I have any question about fairness and adequacy of the representatives or their attorneys.").

B. Common Questions Predominate, and a Class Action is the Superior Method to Adjudicate Class Members' Claims

Finally, the proposed Class meets the requirements of Rule 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. This test is "readily met in certain cases alleging consumer or securities fraud." *Id*. at 625. In reviewing a settlement class certification, "the certifying court must … determine whether the 'the legal or factual questions that qualify each class member's case as a genuine controversy' are sufficiently similar as to yield a cohesive class," focusing its "analysis is on 'questions that preexist any settlement.'" *In*

re Am. Int'l Group, Inc. Sec. Litig., 689 F.3d 229, 240 (2d Cir. 2012) (quoting *Amchem*, 521 U.S. at 623).

As previously discussed above as to commonality and typicality, all Class Members share a common legal grievance arising from Bayer's practice of selling Combination Aspirins that allegedly could not provide the touted benefits over aspirin alone. Common legal and factual questions are central to all Class Members' claims and predominate over any individual questions that may exist. These include the questions of whether there were false statements on Bayer's products and/or whether Bayer violated state statutory and common laws when it misrepresented, concealed and/or failed to disclose material facts that the Combination Aspirins were not effective as advertised. Thus, '"[i]ssues of predominance and fairness do not undermine this settlement. All plaintiffs here claim injury that by reason of defendants' conduct … has caused a common and measurable form of economic damage…. All claims arise out of the same course of defendants' conduct; all share a common nucleus of operative fact, supplying the necessary cohesion.'" *In re Am. Int'l Group, Inc. Sec. Litig.*, 689 F.3d at 240 (quoting *Sullivan*, 667 F.3d at 338).

Likewise, resolution of these common legal and factual claims through a class-wide settlement and claims process is the superior way to proceed. Rule 23(b)(3) lists four factors for courts to consider in determining whether a class action is superior, and each of these factors support a class-wide resolution. First, Class Members have little interest in individually controlling separate lawsuits and settlement given the relatively small individual economic injuries involved, and the few that may have been presented the opportunity to opt-out of the

Settlement.[11] Second, it appears that no individual Class Members have chosen to commence litigation concerning this controversy except through class litigation, further suggesting that a collective action is indeed the superior method of recovery. Third, the Judicial Panel on Multidistrict Litigation has already determined that this Court is an appropriate forum in which to concentrate Class Members' claims. Lastly, there will be no difficulties in managing a class-wide trial, "for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Resolution of all Class Members' claims, which arise from a common course of conduct by Bayer and depend on the resolution of common legal issues, through a class-wide settlement is a practical and legally proper course of action.

To be clear, the existence of individual issues which might otherwise preclude *litigation* class certification (such as those that Bayer emphasized in its opposition to litigation class certification, *i.e.*, reliance and causation) do not bar *settlement* class certification. Instructive is *In re Am. Int'l Group, Inc. Secs. Litig.*, in which the Second Circuit recently "face[d] a rare joint appeal from a district court's order" where, "[a]fter the parties arrived at a settlement agreement, the district court denied plaintiffs' motion to certify a settlement class." 689 F.3d at 232. The district court did so because it believed predominance was not met since the plaintiffs "[did] not establish or even [plead] that the [settling defendants] made any public misstatement or omission'" in order to avail themselves of the fraud-on-the-market presumption. *Id.* at 236 (quoting *In re Am. Int'l Grp., Inc. Sec. Litig.*, 265 F.R.D. 157, 175 (S.D.N.Y. 2010)). The Second Circuit analyzed the effect of such a decision, explaining "[i]n the context of a litigation class, the fraud-on-the-market presumption spares the plaintiff class from the extremely laborious – and often impossible task – of proving at trial that each individual plaintiff was aware

[11] Furthermore, there is no release of claims for personal injury. Settlement Agreement, § IV.A.

of and specifically relied on the defendant's false statement … Therefore, a litigation class's failure to qualify for [the presumption] typically renders trial unmanageable, precluding a finding that common issues predominate." *Id*. at 241.

However, the Second Circuit reversed and remanded the district court, holding "a securities fraud class's failure to satisfy the fraud-on-the-market presumption primarily threatens class certification by creating intractable management problems at trial." *Id*. at 232. But "[b]ecause settlement eliminates the need for trial, a settlement class ordinarily need not demonstrate that the fraud-on-the-market presumption applies to its claims in order to satisfy the predominance requirement." *Id*. (internal citation and quotation omitted). In doing so, the court confirmed that manageability issues, such as those invoked when issues of reliance arise, do not preclude settlement class certification.

Further, while Bayer also opposed finding predominance in certifying a litigation class on the ground that application of the laws of multiple states would be unmanageable, this too is no bar to settlement class certification. While this nationwide class action involved the potential for the Court to apply laws of various states, courts, including at least one court in this district, recognize that any claimed difference among the laws of such states does not bar settlement certification of nationwide classes under Rule 23(b)(3). *See generally Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (affirming settlement and noting that "three guideposts that direct the predominance inquiry: first, that commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members; second, that variations in state law do not necessarily defeat predominance; and third, that concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class"), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1876, 1822 L. Ed. 2d 646 (2012);

Ersler, 2009 WL 454354, at *6 ("Finally, while case management difficulties might arise if this case had proceeded to trial and jury verdicts under the laws of fifty states and the District of Columbia were required, the case does not pose serious management difficulties in its current settlement posture."). Ultimately, while the Parties disputed predominance for purposes of litigation class certification, here "Bayer conditionally agrees and consents to certification of the Settlement classes for settlement purposes only." Settlement Agreement, § III.A.

Moreover, this Court asked whether it could certify a nationwide settlement class if it would not have certified all the states requested in a litigation class, inquiring about whether doing so would be "diluting the recovery of those class members who are in states I would have included in a contested class certification order, and diluting them for the benefit of consumers who would not necessarily have participated in the outcome of the contested class certification." Preliminary Approval Tr. at 16. The law confirms that nationwide classes can be certified, even where the court might not otherwise recognize an individual claim.

The Third Circuit's reasoned decision in *Sullivan* addresses this question. There, the parties reached a nationwide settlement in an antitrust class action, including for claims on behalf of indirect purchasers. In the majority opinion, the en banc panel dismissed the dissenting and settlement objectors' argument. The dissenters and objectors argued that the district court's certification of a settlement class was improper:

> because approximately twenty-five states have not extended antitrust standing to indirect purchasers through *Illinois Brick* repealer statutes or judicial edict; likewise, some uncertain number of states do not permit an end-run around antitrust standing through claims based on consumer protection and/or unjust enrichment statutes.

Sullivan, 667 F.3d at 304-05. While the objectors and en banc minority insisted "that a district court must undertake a thorough review of applicable substantive law to assure itself that each

class member has 'at least some colorable legal claim' or 'has a valid claim' before certifying a settlement," the majority rejected such "focus" as "misdirected." *Id*. at 305 (internal citations omitted). The Court explained:

> The question is not what valid claims can plaintiffs assert; rather, it is simply whether common issues of fact or law predominate. Contrary to what the dissent and objectors principally contend, there is no 'claims' or 'merits' litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof.

Id.

In reaching its conclusion, the *Sullivan* court recognized, as this Court should here, the justifications behind achieving a settlement of substantially all claims in an action. The *Sullivan* court stated: "Finally, were we to mandate that a class include only those alleging 'colorable' claims, we would effectively rule out the ability of a defendant to achieve 'global piece' by obtaining releases from all those who might wish to assert claims, meritorious or not." *Id.* at 310. Noting that "global peace is a valid, and valuable, incentive to class action settlements," *id.* at 311, the Third Circuit reasoned that adopting the position of the objectors/dissenters would impose:

> immense administrative costs [and] would make it increasingly difficult to approve nationwide settlements entailing predominantly common issues but arising under varying state laws. The resulting framework would likely siphon the various state law claims from federal class actions, and defendants seeking to settle in such suits would always be concerned that a settlement of the federal class action would leave them exposed to countless suits in state court despite settlement of the federal class claims.

Id. at 312 (quotation omitted). The court further explained that rejecting certification of a nationwide settlement class "would serve to frustrate the core purpose of Rule 23(b)(3), which is

to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation." *Id.* (internal quotations and citations omitted).

The Third Circuit's reasoning is directly applicable here. As the Settlement confirms, were Bayer unable to obtain a global settlement here, it is possible that the parties would not have resolved this matter: "Bayer's willingness to enter into the Agreement is conditioned upon the Agreement's providing adequate protections that the Settlement Amount will resolve substantially all Class Member claims against Bayer." Settlement Agreement, § IX.A. Thus, like in *Sullivan*, the Settlement may include individuals whose claims were contested by Bayer in the litigation phase.

Ultimately, the relevant question remains whether the Settlement is fair, reasonable, and adequate under Rule 23 and *Grinnell.* And, settlements remain fair, reasonable and adequate even where class members do not achieve 100% recovery as this conclusion can be and has been reached "even where the benefits represent only a fraction of the potential recovery." *Velez*, 2010 U.S. Dist. LEXIS 125945, at *40-41 (collecting Second Circuit district and appellate court decisions approving settlements ranging from 1.6% to 12% of claimed damages). Accordingly, "[c]ourts are wary of disturbing settlements, because they represent compromise and conservation of judicial resources, two concepts highly regarded in American jurisprudence." *Anita Founds., Inc. v. ILGWU Nat'l Ret. Fund*, 902 F.2d 185, 190 (2d Cir. 1990).

Given that Rule 23(a) and Rule 23(b)(3) have been satisfied as applicable in settlement class certification, Plaintiffs respectfully request that the Court certify the Classes for settlement purposes only.

VII. CONCLUSION

For the reasons stated above, Plaintiffs request that the Court (1) finally approve the Settlement as fair reasonable, and adequate, (2) approve the allocation proposed here, including the distribution of excess amounts, if any, to the AARP Foundation and the American Heart Association, (3) conclude that the distribution of the Class Notice was adequate, and (4) certify for purposes of settlement two Settlement Classes under Rule 23(a) and (b)(3). Plaintiffs further request the Court grant all such other relief that the Court deems necessary and appropriate.

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Respectfully submitted,

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