Lisa J. Rodriguez
DILWORTH PAXON LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
Phone: (856) 675-1926
ljrodriguez@dilworthlaw.com

Liaison Counsel for the Proposed End-Payor Classes

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE LIPITOR ANTITRUST LITIGATION This Document Relates To: All End-Payor Class Actions	MDL No. 2332 Case No. 3:12-cv-2389-ZNQ-JBD

END-PAYOR PLAINTIFFS' REPLY IN FURTHER SUPPORT OF END-PAYOR PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND OTHER RELIEF

TABLE OF CONTENTS

Page

I. INTRODUCTION....1

II. ARGUMENT....3

A. The Objector Health Plans Lack Standing to Object to the Settlement on Behalf of Their Unidentified TPP Clients....3

B. The Objector Health Plans' Objection Is Meritless. 6

1. The Requirements for Submitting Claims Are Not Onerous. 8

2. The Requirements for Opting Out Are Not Onerous. 11

3. Class Members Are Not Treated Disparately. 19

4. The Medicare Part D and Medicaid Exclusions Are Not Vague or Unclear....21

5. The Claims Process Will Be Manageable and Protective of Class Members' Interests....23

6. Only the Objector Health Plans Have Objected to EPPs' Proposed Settlement....24

III. CONCLUSION....25

TABLE OF AUTHORITIES

Page(s)

Cases

In re Aggrenox Antitrust Litig.,
812 F. App'x 26 (2d Cir. 2020) ..... *passim*

Arena v. Intuit Inc.,
2021 WL 834253 (N.D. Cal. Mar. 5, 2021) 19

Byrd v. Aaron's Inc.,
784 F.3d 154 (3d Cir. 2015) 21

In re Cendant Corp. Litig.,
264 F.3d 201 (3d Cir. 2001) 25

In re Cendant Corp. Sec. Litig.,
109 F. Supp. 2d 273 (D.N.J. 2000) 5

Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.,
504 F.3d 229 (2d Cir. 2007) 5

In re Drexel Burnham Lambert Grp., Inc.,
130 B.R. 910 (S.D.N.Y. 1991) 5

In re Fine Paper Litig. State of Wash.,
632 F.2d 1081 (3d Cir. 1980) 5

In re GSE Bonds Antitrust Litig.,
414 F. Supp. 3d 686 (S.D.N.Y. 2019) 24

Landsman & Funk, P.C. v. Skinder-Strauss Assocs.,
2015 WL 2383358 (D.N.J. May 18, 2015) 6

In re Lidoderm Antitrust Litig.,
No. 3:14-md-02521 (N.D. Cal. Dec. 28, 2017) 13

In re Linerboard Antitrust Litigation,
223 F.R.D. 357 (E.D. Pa. 2004) 15, 16

McCubbrey v. Boise Cascade Home & Land Corp.,
71 F.R.D. 62 (N.D. Cal. 1976).....16

In re Nasdaq Market-Makers Antitrust Litig.,
176 F.R.D. 99 (S.D.N.Y. 1997).....19

In re Niaspan Antitrust Litig.,
67 F.4th 118 (3d Cir. 2023) 2

In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions,
148 F.3d 283 (3d Cir. 1998).....7, 23

Shapiro v. JPMorgan Chase & Co.,
2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014).....17

Sullivan v. DB Invs., Inc.,
667 F.3d 273 (3d Cir. 2011).....7

In re Xyrem (sodium oxybate) Antitrust Litig.,
2024 WL 4023561 (N.D. Cal. Aug. 26, 2024) 5

Federal Rules & Statues

Fed. R. Civ. P. 23(e) .....*passim*

Other Authorities

Authorized Agent Bulk TPP Name Upload Template, https://www.lipitorantitrustsettlement.com/Content/Documents/Authorized%20Agent%20Bulk%20TPP%20Name%20Upload%20Template.xlsx (last visited Sept. 16, 2024).....9

Long Form Notice,
https://www.lipitorantitrustsettlement.com/Content/Documents/Notice.pdf (last visited Sept. 16, 2024) 8

Third-Party Payor Transaction Data Template,
https://www.lipitorantitrustsettlement.com/Content/Documents/Third-Party%20Payor%20Transaction%20Data%20Template.xlsx (last visited Sept. 16, 2024).....11

I. INTRODUCTION

On May 3, 2024, End-Payor Plaintiffs ("EPPs") filed their unopposed motion seeking preliminary approval of their proposed Settlement[1] with Defendants Pfizer Inc., Pfizer Ireland Pharmaceuticals, Warner-Lambert Company, and Warner-Lambert Company LLC (collectively, "Pfizer"). Dkt. 1398.[2] On June 3, 2024, this Court preliminarily approved the Settlement and ordered a final fairness hearing on October 1, 2024. Dkt. 1412.

On August 16, 2024, nineteen (19) entities, self-described as "Objector Health Plans,"[3] all represented by the same counsel, filed a single objection to the Settlement.[4] Dkt. 1461. Importantly, the Objector Health Plans do not object to the terms of the Settlement itself. Instead, the Objector Health Plans object to certain

---

[1] Unless otherwise specified, capitalized terms have the same meaning as those same terms contained in EPPs' Memorandum of Law in Support of Final Approval. Dkt. 1465-1.

[2] All citations to docket entries herein, unless otherwise specified, refer to the above-captioned matter and to the court-generated pagination.

[3] Aetna, Inc., CIGNA Corporation, Elevance Health, Humana, Inc., Blue Cross Blue Shield Association, BCBSM, Inc. d/b/a Blue Cross Blue Shield of Minnesota, BlueCross Blue Shield of South Carolina, BlueCross BlueShield of Tennessee, Harvard Pilgrim Health Care, Inc., Tufts Health Maintenance Organization, Inc., Point32Health, Inc., Blue Cross Blue Shield of North Dakota, Capital Blue Cross, EmblemHealth, Inc., Blue Cross and Blue Shield of North Carolina, California Physicians' Service d/b/a Blue Shield of California, Health Alliance Plan of Michigan, Highmark Western and Northeastern New York, Inc. d/b/a Highmark Blue Cross Blue Shield of Western New York and Highmark Blue Shield of Northeastern New York. *See* Dkt. 1461 at 5.

[4] No other objections to the Settlement have been received to date.

procedural requirements, arguing that the Settlement's claims and opt-out procedures impose undue burdens because non-class members—such as third-party administrators ("TPAs") and administrative services only ("ASOs") entities[5]—filing a claim or opt-out request on behalf of a TPP Class Member must provide written proof of their authority to do so. *See id.* at 5-8.

The Objector Health Plans' objection, which does not claim any infirmity in the form and manner of Notice, instead challenges reasonable and widely implemented practices that prevent fraud, mistake, and erroneous diversion or dilution of the Settlement Fund. The objection should be rejected. *First*, the objection is procedurally improper because the Objector Health Plans, in their capacity as non-class member TPAs and ASOs, lack standing to lodge the objection on behalf of their unidentified TPP clients. *Second*, the objections to the Settlement and the claims and opt-out procedures thereunder are meritless. The challenged requirements protect TPP Class Members from being excluded from the Settlement without their express authorization or having their Settlement funds diverted to non-

[5] Inexplicably, when describing their relationship with their TPP clients, the Objector Health Plans erroneously refer to themselves as "TPAs" and their clients as "ASOs." *See* Dkt. 1461 at 9; *contra In re Niaspan Antitrust Litig.*, 67 F.4th 118, 123 (3d Cir. 2023) (explaining that an "ASO" is an insurer that "provides TPA services [*i.e.*, managing group plan benefits and assisting with claims adjudication and reimbursement] to another entity but does not provide a fully insured health plan"). Consistent with the facts and other briefing in this litigation, EPPs' motion refers to the Objector Health Plans as "ASOs and TPAs" and their clients as "TPP clients." *See* Dkt. 1465-1 at 22-23.

class members. EPPs respectfully submit that the Court should finally approve EPPs' proposed Settlement with Pfizer. *See* Dkt. 1465-1.[6]

II. ARGUMENT

A. The Objector Health Plans Lack Standing to Object to the Settlement on Behalf of Their Unidentified TPP Clients.

Because it is settled law that only class members have standing to object to a settlement, *see* Fed. R. Civ. P. 23(e)(5)(A), the Objector Health Plans, in their capacity as non-class member TPAs and ASOs, do not have legal standing to object to the terms of the Settlement or to the notice, claims, or opt-out procedures thereunder.

In their objection, the Objector Health Plans identify themselves as "large health insurance and health benefit companies" that provide ASO and TPA services to small- or mid-sized self-insured employers or health and welfare funds, *i.e.*, TPPs. *See* Dkt. 1461 at 5, 8-9; *see also* Dkt. 1465-1 at 12-13 (defining the TPP Class). They further claim they provide "day-to-day administration" services to these TPP clients, including "coordinating benefits between health plans; asserting subrogation and reimbursement claims arising from injuries to plan members; and . . . evaluating

[6] EPPs note that two members of the Consumer Class submitted tardy requests for exclusion from the Settlement and seek the Court's permission to allow their late opt-outs under the "excusable neglect" standard. Dkt. 1469. EPPs take no position on this request for relief. Similarly, Koniag, Inc. filed a timely opt-out request but did not produce data to substantiate that it is a member of the TPP Settlement Class. EPPs take no position on this request for exclusion either.

settlements, asserting claims on behalf of the individual ASOs, and receiving and disbursing settlement funds to them."[7] *Id.* at 9-10. But the Objector Health Plans do not identify any TPP clients on whose behalf they purportedly are objecting, they present no evidence of their authority to assert claims on behalf of any TPP clients, and they submit no evidence of the right to receive settlement funds on behalf of any TPPs, let alone evidence that such funds will ultimately be disbursed to those TPPs. Instead, the Objector Health Plans represent, without any evidentiary basis, that they have the authority to act on behalf of numerous TPP Class Members, and they ask this Court to find they need not produce any proof of that authority before exercising fundamental, due-process-protected rights on behalf of those Class Members.

EPPs do not dispute that the Objector Health Plans' TPP clients *themselves* may be members of the TPP Class. But the Objector Health Plans, as ASOs and TPAs, are separate entities from their TPP clients and unquestionably are *not* class members while serving in such capacities. *See* Dkt. 1412 (Preliminary Approval

[7] The Objector Health Plans repeatedly suggest that, in their roles as ASOs and TPAs for their purported TPP clients, they must provide notice of the Settlement to such TPPs and explain to them the Settlement's terms and merits. *See, e.g.*, Dkt. 1461 at 15 (suggesting they must "inform [the TPP clients] of the settlement terms"); *id.* at 22 (suggesting they must "determine[e] which [TPP clients] are members of the class"). But that ignores the fact that EPPs already provided notice to approximately 55,000 potential TPP Class members under the Court-approved notice plan. *See* Dkt. 1412 (Preliminary Approval Order), ¶¶ 21-24. As with each objection rebutted below, the Objector Health Plans' arguments misrepresent the Settlement's procedures. The Objector Health Plans are not required to give notice of the Settlement to anyone; EPPs already have given such notice.

Order) ¶ 4 (requiring, *inter alia*, TPP Class Members to have "purchased, paid, and/or provided reimbursement for some or all of the purchase price of branded Lipitor or generic atorvastatin calcium"). As such, the Objector Health Plans do not have standing to object to the Settlement on behalf of those TPP clients. *See, e.g.*, *In re Fine Paper Litig. State of Wash.*, 632 F.2d 1081, 1087 (3d Cir. 1980) (noting "the general rule that a nonsettling party may not object to the terms of a settlement which do not affect its own rights"); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 273, 277 (D.N.J. 2000) ("[A]s a general rule, only class members have standing to object to a proposed class settlement." (quoting *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 459 (E.D. Pa. 1990))); *In re Drexel Burnham Lambert Grp., Inc.*, 130 B.R. 910, 923 (S.D.N.Y. 1991) (noting "[o]bjectors who are non-Class members lack standing to object to the fairness, reasonableness and adequacy of the Settlement"); *see also In re Aggrenox Antitrust Litig.*, 812 F. App'x 26, 29 (2d Cir. 2020) (concluding that TPAs lacked standing to appeal entry of final approval of class-action settlement on behalf of their TPP clients because, in part, they had not established their authority to represent TPPs in that manner); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007) (noting that a TPA that did "not have an affected interested in the class Plaintiffs' claims against [Defendant]" did not have standing to "assert its objections" to the class settlement); *In re Xyrem (sodium oxybate) Antitrust Litig.*, 2024 WL 4023561,

at *16 (N.D. Cal. Aug. 26, 2024) ("The ASO Providers do not have antitrust standing to sue on behalf of non-party clients because the ASO Providers (for such clients only) have not paid overcharges for Xyrem prescriptions and thus do not bear any risk related to the overcharges.").

That is particularly the case where, as here, the Objector Health Plans have not identified any TPP client that endorses the objections lodged or authorized the Objector Health Plans to make such objections on its behalf.[8] In fact, *no* TPP has filed an objection to the proposed Settlement. *See* Dkt. 1465-1 (Motion for Final Approval) at 20-21.

Thus, the Court should reject the Objector Health Plans' procedurally impermissible objection to the Settlement.

B. The Objector Health Plans' Objection Is Meritless.

Even assuming the Objector Health Plans have standing to object on behalf of

[8] In support of their objection, the Objector Health Plans provide a declaration prepared by Mark Fischer, Chairman of Rawlings & Associates, PLLC ("Rawlings"). *See* Dkt. 1461-2. Notably, although Mr. Fischer describes in general terms that Rawlings "has been retained by its health plan clients to identify claims for filing," *id.* ¶ 5, nowhere does he identify any existing relationship with the Objector Health Plans' purported TPP clients or, more importantly, any authority to object, submit claims, or seek exclusion from the TPP class on their behalf. Like the Objector Health Plans, Mr. Fischer and Rawlings have no standing to lodge objections on behalf of unidentified TPPs with which they have no verifiable relationship. *See Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 2015 WL 2383358, at *2 (D.N.J. May 18, 2015) ("Importantly, '[a]s Rule 23 confers the right to object upon class members, the Rule itself does not confer standing upon nonclass members.'" (quoting *Newberg on Class Actions* § 13:22 (5th ed.))).

their purported TPP clients, the Court should reject their objection on the merits. As discussed herein, the Objector Health Plans' objection ignores how the challenged provisions protect the rights of absent class members, consistent with Rule 23(e) of the Federal Rules of Civil Procedure, and how commonplace the challenged provisions are in practice. The terms and the notice, claims, and opt-out procedures of EPPs' proposed Settlement are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 295 (3d Cir. 2011); Dkt. 1465-1 (Motion for Final Approval) at 19-31 (detailing how the *Girsh* and *Prudential* factors for determining whether a proposed class settlement is fair, reasonable, and adequate "weigh heavily in favor of approving the Settlement"). None of the Objector Health Plans' meritless arguments alters this analysis.

As a preliminary matter, it is important to underscore the robustness of the Notice Plan implemented in connection with the Settlement. On June 3, 2024, the Court approved the form and manner of Notice to the TPP Class and the Consumer Class. Dkt. 1412 at 9-11. The Notice Plan subsequently was implemented, and Epiq (the Claims Administrator) successfully sent direct notice that reached 99% of its TPP Database.[9] Dkt. 1465-1 at 20-21. Epiq also implemented the media aspect of the Notice Plan, both with respect to the TPP and Consumer Classes, extending the

[9] This Database is composed of contact data for TPPs that paid for prescription drugs and thus includes the TPPs the Objector Health Plans claim they represent.

reach of the Notice even further. *See id.* at 15. The Notice was written in plain English and was easily understandable by TPPs and Consumers alike. According to each Notice, TPP and Consumer Class Members had until August 16, 2024, to object to the Settlement or request exclusion therefrom. *See, e.g.*, Long Form Notice, https://www.lipitorantitrustsettlement.com/Content/Documents/Notice.pdf (last visited Sept. 16, 2024). As of this filing, only one TPP Class member has attempted to exercise its right to opt-out, and none has objected to the Settlement. The Notice Plan unquestionably was successful.

1. The Requirements for Submitting Claims Are Not Onerous.

The Objector Health Plans argue that the Settlement's claims procedures are unduly burdensome and will deter participation in the Settlement. *See* Dkt. 1461 at 10-16. This ignores the fact that the TPP Class Members received notice of the Settlement, meaning they had the right to object or exclude themselves if they so desired. As noted above, no TPP Class Member exercised its right to object, and only one would-be TPP Class Member attempted to exercise its right to opt out.

Nevertheless, the Objector Health Plans object to two requirements that apply *only* to third parties seeking to file claims on behalf of TPP Class Members.[10] Specifically, the Objector Health Plans object to the requirements that (1) the third

[10] The challenged requirements do not apply to TPP Class Members filing their own claims.

party must provide evidence of its "prior written authorization to submit th[e] Claim Form" on behalf of the TPP, *id.* at 14-15 (quoting Dkt. 1398-14); and (2) the third party must complete the "Authorized Agent Bulk TPP Name Upload Template" spreadsheet when doing so, *id.* at 19-20; *see also* Authorized Agent Bulk TPP Name Upload Template, https://www.lipitorantitrustsettlement.com/Content/Documents/Authorized%20Agent%20Bulk%20TPP%20Name%20Upload%20Template.xlsx (last visited Sept. 16, 2024). Those criticisms both ignore the rights of TPPs to act on their own behalf and exaggerate the burden of such requirements. They should be rejected.

First, requiring a third party seeking to submit a claim on behalf of a TPP Class member to provide evidence of its written authorization to do so protects—rather than impedes—the rights of absent class members. When evaluating a class settlement's claims procedures, the Court should "scrutinize [its] method . . . to ensure that it facilitates filing legitimate claims." Fed. R. Civ. P. 23(e)(2)(C)-(D) advisory committee's note to 2018 amendments. Specifically, "[a] claims processing method should deter or defeat unjustified claims," *id.*, and "[r]equiring potential class members to attest that they are eligible for recovery is not unreasonable," 4 Newberg & Rubenstein on Class Actions § 13:53 (6th ed.). By requiring ASOs or TPAs submitting claims on behalf of their TPP clients to provide evidence of their authority to do so, the Settlement's claims procedure ensures that such ASOs and

TPAs are authorized to receive funds that belong to class members and are not erroneously filing improper claims that would diminish the ultimate recovery of valid TPP claimants. Numerous courts thus have employed similar requirements when authorized agents file claims on behalf of TPPs. *See, e.g.*, Declaration of Kenneth A. Wexler in Support of End-Payor Plaintiffs' Reply in Further Support of Motion for Final Approval of Settlement and Other Relief ("Wexler Decl."), Ex. A at 1 (*Suboxone* claim form) (prohibiting an authorized agent from "submit[ting] a Claim Form on behalf of any End Payor Class member unless that End Payor Class member provided [the agent] with prior written authorization to submit th[e] Claim Form," and requiring "[s]uch written authorization [to] accompany th[e] Claim Form"); Wexler Decl., Ex. B at 1 (*Zetia* claim form) (same).[11]

Second, upon closer inspection, the Objector Health Plans' objection to completing the Authorized Agent Bulk TPP Name Upload Template rings hollow. The Court need only briefly glance at the spreadsheet to confirm that for each TPP client, columns A through J will be populated with the *same* information about the authorized agent, and columns M and N will be populated with the *same* information populated in the companion "Third-Party Payor Transaction Data Template." *See*

[11] The Objector Health Plans' argument that other cases have not imposed the requirement of proving authorization to file bulk claims is irrelevant. Each settlement is negotiated on its own, in the context of unique cases and circumstances, and there is no rule, law, or other requirement that ASOs and TPAs be given carte blanche to file claims for others without proving their authority to do so.

Third-Party Payor Transaction Data Template, https://www.lipitorantitrustsettlement.com/Content/Documents/Third-Party%20Payor%20Transaction%20Data%20Template.xlsx (last visited Sept. 16, 2024) (requiring that the TPP Class Member's name and FEIN be provided in Columns A and H).[12] Thus, the *only* information an authorized agent must newly provide—via a dropdown menu of responses in Column K—is a description of its relationship with the TPP on whose behalf it is submitting a claim.[13] Such information should be trivially easy for an authorized agent or representative to provide, and, more importantly, protects against fraudulent or mistaken filings of claims. Alternatively, a TPP Class Member can obtain the relevant data from their TPA or ASO and file a claim on its own behalf. *See* Dkt. 1252-11 (NMUFCW data obtained from its TPA, Southwest Services Administrators Inc.); Dkt. 1252-3 (Declaration of Eric J. Miller, A.B. Data) ¶¶ 10-22 (noting ASOs and TPAs' role in the claims-filing process).

2. The Requirements for Opting Out Are Not Onerous.

Next, the Objector Health Plans argue that the Settlement's opt-out procedures are "impractical and unnecessary" and "designed to force class members to remain

[12] The Objector Health Plans concede that ASOs and TPAs provide this information during the claims process. Dkt. 1461 at 11.

[13] Column L permits the authorized agent to provide a written description if an appropriate description is unavailable in the dropdown menu of pre-completed responses (*i.e.*, if the agent is an entity other than an ASO, TPA, or pharmacy benefit manager).

in the settlement." Dkt. 1461 at 20. Specifically, they challenge the requirements (1) that third parties submit written proof of their authority to opt out other TPP Class members from the Settlement; (2) that third parties "cannot file an aggregated opt-out form"; and (3) that TPPs "must provide data to prove class membership." None of these requirements is unduly burdensome; rather, each is reasonably designed to protect the rights and interests of absent TPP Class members.

First, the Objector Health Plans do not explain why an ASO or TPA must opt out on behalf of a TPP Class Member, when opting out simply requires the entity seeking exclusion from the TPP Class to send an email or letter including the entity's contact information, "a statement that [it] want[s] to be excluded from th[e] class-action lawsuit," and a signature, along with data "(i) sufficient to establish Class membership, and (ii) reflecting [its] purchases of, and payments for, branded and generic Lipitor." Dkt. 1398-15 at 7-8. This process is standard and is employed in virtually every pharmaceutical class action.[14]

Second, the written authorization requirement protects the rights of actual TPP Class Members, ensuring they can be opted out of the Settlement by a non-class member—and thereby not participate in the Settlement—only if the third party opting it out verifiably has the authority to do so. After all, each TPP with a valid

[14] Significantly, to the extent the Objector Health Plans also have transactions for which they are TPPs themselves, none has opted out of the Settlement.

claim is a class member with an individual property interest in the Settlement. *See* 3 Newberg and Rubenstein on Class Actions § 9:49 (6th ed.) (noting that absent class members' due process rights require that their claims cannot be litigated through the class-action vehicle "without notice, an opportunity to participate or opt out, and adequate representation," such that any opt-out procedures must be "consistent with the same due process protections"); *see also* Order at 6-8, *In re Lidoderm Antitrust Litig.*, No. 3:14-md-02521 (N.D. Cal. Dec. 28, 2017), Dkt. 946 (denying TPAs' attempt to opt out their supposed TPP clients where there was insufficient evidence that TPAs had the authority to do so). Requiring purported agents of TPPs to provide substantive, written proof of their authorization to opt out other TPP Class Members protects absent class members' due-process interests in the Settlement and guards against inequitable distribution of the Settlement Fund. *See In re Aggrenox Antitrust Litig.*, 812 F. App'x at 29 (affirming that similar opt-out procedures "preserv[e] the rights of absent class members and protect[] the Defendants from duplicative liability").

Thus, contrary to the Objector Health Plans' assertion that the procedures here have some sort of unicorn status, numerous class settlements have required third parties seeking to exclude TPPs from class settlements to provide similar written

proof of those third parties' authorization to do so.[15] *See, e.g.*, Wexler Decl., Ex. C at 10-11 (*Aggrenox* long-form notice) (requiring ASOs seeking to opt out the claims of TPP class members to provide a "statement, signed by an authorized representative, that [the opting-out TPP is] a member of the Settlement Class and wish[es] to be excluded from the Settlement Class" as well as "a Declaration from an authorized representative of the [TPP] . . . executed specifically in connection with this litigation, attesting to the [requesting entity's] authority to opt the [TPP's] claims out of the Class"); Wexler Decl., Ex. D at 4-5 (*Loestrin 24 Fe* long-form notice) (same); Wexler Decl., Ex. E at 5 (*Effexor XR* long-form notice) (requiring a class member's authorized agent or representative to provide "proof of the [legal] representative's legal authority and authorization to act and request exclusion on behalf of" the class member); Wexler Decl., Ex. F at 5-6 (*Restasis* long-form notice) (requiring any third party seeking to opt out class members to "provide a declaration under oath from an authorized representative of each such Class Member attesting to the entity's authority to opt the Class Member's claims out of the Class, and [to] include the language in any written agreement that provides the entity with such authority"); *see also, e.g.*, Wexler Decl., Ex. G at 5-6 (*Thalomid & Revlimid* long-form notice) (requiring each opting-out TPP to separately submit an opt-out request

[15] Indeed, the same counsel representing the Objector Health Plans previously appealed a similar requirement to the Second Circuit and lost, *see Aggrenox*, 812 F. App'x at 29, a fact they conspicuously conceal here.

including "a statement, signed by an authorized representative, that your entity is a Settlement Class Member and you wish it to be excluded from the Settlement Class"); Wexler Decl., Ex. H at 5 (*Skelaxin* long-form notice) (same).[16]

The Objector Health Plans misread *In re Linerboard Antitrust Litigation*, 223 F.R.D. 357 (E.D. Pa. 2004), to argue that "contemporaneous authorization" flatly is not required for a third party to opt out a class member. *See* Dkt. 1461 at 21. In that multi-defendant case, the court was forced to determine whether certain opt-outs that unknowingly were opted out of class settlements by third parties nevertheless should be bound by the settlements. *See id.* at 360-62 (explaining that 13 companies, "without [the] authority to do so," opted out 79 other companies either "inadvertently or based on mistaken knowledge about the nature of the relationship with the . . . companies they opted out").[17] Deciding how to treat opt-outs *ex post facto*, the Court rejected defendants' suggestion that only those opt-outs that exhibited some "contemporaneous authorization" of their previous, improper exclusion should be treated as "proper opt-outs," concluding instead that all 79 opt-

[16] The Objector Health Plans argue that because some settlements have not included this requirement, EPPs must do the same here. *See* Dkt. 1461 at 6 & n1. This ignores that, as detailed herein: (1) some settlements have included these requirements; (2) there are valid reasons for these requirements; (3) there are differences between the cases, counsel, and the classes at issue; and (4) imposing such requirements is well within the discretion of the Court.

[17] The Settlement's opt-out procedures are designed to prevent exactly this sort of predicament.

outs should be given a new opportunity to "ratify" their previous, unauthorized opt-out requests. *Id.* at 365-68. That ruling does not repudiate the proposition that "contemporaneous authorization" may be used to determine *ex ante* whether certain class members in fact wish to be excluded from the class.

To the contrary, *Linerboard* and other cases relied upon by the Objector Health Plans support the adoption of the Settlement's opt-out procedures. As the court in *Linerboard* observed, opt-out procedures should embody "considerable flexibility" to discern whether a *class member* has "effective[ly] express[ed]" a "desire to exclude [it]self." *Id.* at 365 (quoting 7A Wright, Miller & Kane, Federal Practice & Procedure § 1787 (1972)); *see also McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 70-71 (N.D. Cal. 1976) ("[W]e look beyond formalistic procedures to evaluate whether a *class member* has reasonably expressed a desire to be excluded from a class suit." (emphasis added)). In contrast to the Objector Health Plans' suggestion, the Settlement's opt-out procedures require a third party to provide evidence of its own authority to request the exclusion of a TPP class member from the Settlement, thereby confirming that the *class member*—*i.e.*, the TPP—wishes to be excluded.[18] Such procedures are widely used and are protective of class

[18] Thus, Objector Health Plans' reference to the A.B. Data representative's statement that he has "never seen a PBM, TPA or ASO . . . claim to be a member of a pharmaceutical antitrust class consisting of consumers and third-party payors," Dkt. 1461 at 16-17, is inapposite.

members' due-process rights.

Second, the Objector Health Plans complain that they cannot file aggregated opt-out forms on behalf of their TPP clients. *See* Dkt. 1398-15 at 7 (requiring exclusion requests to be submitted on an individual basis). But the alternative they ostensibly seek—filing a single opt-out form on behalf of numerous, putative TPP clients all at once—is expressly foreclosed by established law. Indeed, "[t]he right to opt out in a Rule 23(b)(3) class action is considered an *individual right*. . . . [A] plaintiff . . . may not also opt out a group *en masse* without the express consent of each individual." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *9 n.51 (S.D.N.Y. Mar. 24, 2014) (quoting 3 Newberg on Class Actions § 9:49 (5th ed.)). The Objector Health Plans' apparent wish to be able to opt out of the Settlement numerous of their TPP clients in one fell swoop, without any proof of their authority to do so, is contrary to law. Numerous class settlements have thus similarly prohibited aggregated opt-out procedures. *See, e.g.*, Wexler Decl., Ex. C at 10 (*Aggrenox* long-form notice) ("A separate exclusion request must be submitted by each Third-Party Payor electing to be excluded from the Settlement Class in the settlement with Defendants."); Wexler Decl., Ex. D at 4-5 (*Loestrin 24 Fe* long-form notice) (same); Wexler Decl., Ex. E at 5 (*Effexor XR* long-form notice) ("A request for exclusion must be submitted by each Class member on an individual basis . . . .").

Third, the Objector Health Plans complain, only in passing, that they must

"provide data to prove [the] class membership" of their purported TPP clients that the Objector Health Plans might seek to opt out of the Settlement. *See* Dkt. 1461 at 22. The Objector Health Plans do not explain in what ways such a requirement is burdensome. Nor could they, as such data similarly is required to demonstrate that an entity truly is a TPP Class member that is eligible to receive a payment from the Settlement. *See* Dkt. 1398-13 at 3 ("Transaction data supporting claims is mandatory."). This data requirement guarantees that entities seeking to opt out of the settlement in fact are TPP Class members, preventing confusion about who ultimately is in or out of the Settlement.[19]

In their objection, the Objector Health Plans show their hand when they argue the challenged procedures "are unnecessarily burdensome for *TPAs* that wish to opt their [TPP clients] out of the class." Dkt. 1461 at 23 (emphasis added). What matters is not whether *TPAs* wish to opt their TPP clients out of the Settlement, but rather whether *TPPs* wish to opt out of the Settlement and have authorized a third party to do so on their behalf. In keeping with this, the Settlement's opt-out procedures protect TPP Class members by preventing them from being opted out of the Settlement by third parties without their express consent. *See In re Aggrenox Antitrust Litig.*, 812 F. App'x at 29 (endorsing opt-out procedures that "preserv[ed]

[19] The Objector Health Plans' concerns also seem feigned in that they do not explain why the Objector Health Plans cannot simply provide their TPP clients' relevant data and/or assist their TPP clients with filing their own opt-out requests.

the rights of absent class members"). The Objector Health Plans' suggestion that weaker protections—which effectively would allow non-class members to opt out class members without evidence of their authorization to do so—should be rejected.

3. Class Members Are Not Treated Disparately.

The Objector Health Plans suggest the proposed Settlement improperly treats class members disparately from one another, contrasting the opt-out requirements for members of the proposed TPP and Consumer Classes. *See* Dkt. 1461 at 25-26; *see also* Dkt. 1465-1 at 12-13 (defining both proposed Classes). That criticism misses the mark. As an initial matter, the cases cited by the Objector Health Plans discuss disparate treatment of "class segments," *i.e.*, treating different sub-groups within the *same* class differently from one another. *See Arena v. Intuit Inc.*, 2021 WL 834253, at *10 (N.D. Cal. Mar. 5, 2021) (admonishing that courts must be "especially wary of unequal treatment among class segments," and noting that the proposed settlement improperly treated class segments differently by permitting class members to submit electronically signed claims online while requiring opt-outs to submit wet-signed exclusion requests by mail); *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (suggesting that a proposed settlement would be improper if it "grant[ed] preferential treatment to class representatives or segments of the class"); *see also* Fed. R. Civ. P. 23(e)(2)(D) (requiring a court to consider whether a proposed class settlement "treats class members equitably relative to each other"). But EPPs' proposed Settlement with

Pfizer does no such thing. Instead, the proposed Settlement's claim and opt-out procedures apply equally to all members of each proposed Class without differentiating between "segments" of the same Class. *See* Dkt. 1398-15 at 6-8.

Moreover, the Objector Health Plans fail to mention that other class settlements similarly have required opting-out TPPs to provide data sufficient to establish their membership in the class but have not required opting-out consumers to provide the same level of detail when opting out of a settlement. *See, e.g.*, Wexler Decl., Ex. C at 10 (*Aggrenox* long-form notice) (requiring opting-out TPPs to provide "data sufficient to establish your entity's relevant [drug] purchases or payments"); Wexler Decl., Ex. E at 5 (*Effexor XR* long-form notice) (same). Requiring TPPs to provide evidence of their membership in the TPP Class in order to opt out also mirrors the data requirements for TPPs to submit individual claims and recover from the Settlement. *Compare* Dkt. 1398-15 at 7-8 (requiring TPPs to provide purchase data when opting out), *with* Dkt. 1398-13 at 6-7 (requiring TPPs to provide purchase data when submitting claims). This typically is so because most settlements, like the Settlement here, have an opt-out threshold for TPPs which, if exceeded, allows the settling defendant to elect to void the settlement.[20] *See* Dkt. 1398-3 (Settlement Agreement) ¶ 17. To assess whether the TPP threshold is met, the parties must understand the extent to which opt-outs purchased branded or

[20] There is no similar opt-out threshold in the Settlement for consumer opt-outs.

generic Lipitor. The data requirements thus are rational and necessary for the implementation of the Settlement.

Further, only an entity that is part of the TPP Class in the first instance can opt out. Requiring entities seeking to opt out to submit purchase data guarantees that those TPPs seeking to opt out of the Settlement meet the fundamental requirement that they truly are TPP Class members, and it allows the Claims Administrator to ensure that an entity seeking exclusion does not later file a claim. Avoiding such potential fraud or duplicative claims protects the interests of the TPP Class in avoiding improper dilution of the Settlement Fund.

4. The Medicare Part D and Medicaid Exclusions Are Not Vague or Unclear.

The Objector Health Plans argue that the exclusion of "Medicare Part D Plans" and "Medicaid Plans" from the TPP Class is "vague and unclear," preventing potential TPP Class members from knowing whether they fall within the exclusion. Dkt. 1461 at 26-27. Classes may be defined in whatever fashion to include or exclude entities or individuals so long as the class is "defined in a manner that makes its membership 'ascertainable'" and "the class definition [is] clear and precise." 3 Newberg and Rubenstein on Class Actions § 7:27 (6th ed.); *see id.* ("Definitions that are difficult to follow or understand must leave absent class members unsure of their standing in regard to the litigation."); *see also Byrd v. Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015) ("Individuals who are injured by a defendant but are

excluded from a class are simply not bound by the outcome of that particular action."). The Objector Health Plans' complaints about what is or is not "unusual," Dkt. 1461 at 22, is of no import.[21]

The Medicare Part D plan and Medicaid plan exclusions are easily administrable, and the Objector Health Plans do not argue otherwise. *See* Dkt. 1297-2 (Expert Report of Laura R. Craft, MPH) ¶¶ 91-93 (noting that Medicare Part D and Medicaid plans are "easily identifiable" in available transaction data); *see also* Dkt. 1412 ¶ 10 (finding that the "Classes are ascertainable under the standards established by the Third Circuit based on testimony from EPPs' expert, Ms. Laura Craft, as well as the documents and data produced in this case"). TPPs—which know whether they have purchased, paid, and/or provided reimbursement for brand Lipitor or generic atorvastatin calcium through *only* a Medicare Part D plan or a Medicaid plan—must both certify that they do not fall within either exclusion when submitting a claim and submit transaction data that exclude such purchases. *See* Dkt. 1398-14. They are fully capable of doing so. *See, e.g.*, Dkt. 1297-11 (Expert

[21] To be clear, the Medicare Part D and Medicaid plan exclusions exclude from the TPP Class only those TPPs that, for consumption by their members, employees, insured, participants, or beneficiaries, purchased, paid, and/or provided reimbursement for some or all of the purchase price of brand Lipitor or generic atorvastatin, in the Class States, other than for resale, during the Class period, *only* through a Medicare Part D Plan or Medicaid Plan it then operated. In other words, a TPP that operated both a Medicare Part D plan and a non-Medicaid prescription drug benefit plan would not be excluded from the TPP Class.

Reply Report of Laura R. Craft, MPH) ¶ 8 ("[I]t is axiomatic that potential TPP claimants are fully aware of whether the particular plans they are sponsoring are offered under Medicare Part D, requiring compliance with a unique set of rules and regulations and continuous reporting to CMS, and providing access to significant federal subsidies.").

5. The Claims Process Will Be Manageable and Protective of Class Members' Interests.

Next, building upon their previous argument that it is excessively onerous to require TPAs or ASOs to provide evidence that they are authorized to submit claims on behalf of their TPP clients, the Objector Health Plans argue that TPPs will be required to file their own claims, greatly increasing the number of claims filed and requiring a more costly administrative process. *See* Dkt. 1461 at 14-20, 27-28. That criticism is illusory, however, and the Court should find that the costs incurred to ensure that TPPs submitting claims for recovery are in fact TPP Class members are fair and reasonable. *See In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998) (noting that courts may consider "whether the procedure for processing individual claims under the settlement is fair and reasonable" when deciding whether to approve a proposed settlement).

As discussed above, requiring authorized agents, including ASOs or TPAs like the Objector Health Plans, to provide evidence of their written authorization to submit claims on behalf of TPPs safeguards against fraud and prevents duplicative

recovery (*e.g.*, if a TPP and its authorized agent submit dueling claims), thereby protecting TPP Class members' recovery from being diluted by paying out erroneous claims. *See supra* Section II.B.1. Furthermore, the Objector Health Plans' concern that requiring authorized agents to provide such evidence will lead to administrative complexity is overblown. Regardless of whether a TPP itself or its authorized agent submits a claim on behalf of the TPP, a valid claim must be supported by transaction data and some written certification that the TPP is a member of the TPP Class. *See* Dkt. 1398-13 at 3, 7-9. Any additional administrative work performed by the Claims Administrator to review authorized agents' written authorization to submit claims on behalf of their TPPs clients is likely to be negligible and, regardless, is warranted to prevent the payment of improper claims. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 694-95 (S.D.N.Y. 2019) ("A claims processing method should deter or defeat unjustified claims . . . ." (internal quotation omitted)).[22]

6. Only the Objector Health Plans Have Objected to EPPs' Proposed Settlement.

Finally, the Objector Health Plans suggest there has been a "strong, negative

[22] The requirement appears to also protect against abuse. EPPs have received information from TPP Class Members that certain entities acting in an ASO or TPA capacity have requested a significant cut of settlement proceeds, in order to file a claim on behalf of a class member. *See* Wexler Decl., Ex. I (Optum Fee Request). Facilitating TPP Class Members filing claims on their own behalf, and requiring proof of authorization when a non-party files on their behalf, helps avoid such fees being assessed against a TPP Class Member without their express authorization.

reaction" to the proposed Settlement, characterizing their objection as representing the views of "a significant portion of the insurance market." Dkt. 1461 at 28-29. That argument is grossly misleading. As noted above, the Objector Health Plans lack standing to raise objections on behalf of their TPP clients. *See supra* Section II.A. Moreover, none of the TPP clients that the Objector Health Plans purportedly represent—or any TPPs for that matter—have themselves filed objections to the proposed Settlement, and the Objector Health Plans have not identified any TPP clients on whose behalf they are objecting. *See* Dkt. 1465-1 at 20-21 (noting that although notice was provided to approximately 99% of the TPP Database, no TPP objected to the Settlement). Contrary to the Objector Health Plans' suggestion, the robust campaign employed to notify potential TPP Class members of the Settlement yielded no valid objections thereto, heavily favoring final approval of the Settlement. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) ("The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factors weighs in favor of the Settlement . . . ."). The Objector Health Plans' attempt to fabricate a "strong, negative reaction" to the proposed Settlement should be rejected.

III. CONCLUSION

Therefore, EPPs respectfully request that the Court reject the Objector Health Plans' objection and grant final approval to EPPs' Class Settlement with Pfizer.

DATED: September 24, 2024

Respectfully submitted,

/s/ Lisa J. Rodriguez
DILWORTH PAXSON LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102-2101
Phone: (215) 575-7000
Fax: (215) 754-4603
ljrodriguez@dilworthlaw.com

/s/ Sharon K. Robertson
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, New York 10005
srobertson@cohenmilstein.com

/s/ Kenneth A. Wexler
WEXLER BOLEY & ELGERSMA LLP
311 S. Wacker Drive, Suite 5450
Chicago, Illinois 60606
kaw@wbe-llp.com

/s/ Michael Buchman
MOTLEY RICE LLC
777 Third Avenue, 27th Flr.
New York, New York 10017
mbuchman@motleyrice.com

/s/ Robert G. Eisler
GRANT & EISENHOFER P.A.
485 Lexington Avenue, 29th Floor
New York, NY 10017
Reisler@gelaw.com

Interim Co-Lead Counsel for the Proposed EPP Classes

CERTIFICATE OF SERVICE

The undersigned certifies that on September 24, 2024, a copy of the foregoing Reply in Further Support of End-Payor Plaintiffs' Motion for Final Approval of Settlement and Other Relief was filed electronically. Those attorneys who are registered with the Electronic Filing System may access this filing through the Court's System and notice of this filing will be sent to these parties by operation of the Court's Electronic Filing System.

/s/ Lisa J. Rodriguez