THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, et al., *Plaintiffs,* v. AUROBINDO PHARMA USA, INC., et al., *Defendants.*	No. 3:16-cv-02056-MPS
STATE OF CONNECTICUT, et al., *Plaintiffs*, v. TEVA PHARMACEUTICALS USA, INC. et al., *Defendants*.	No. 3:19-cv-00710-MPS
STATE OF CONNECTICUT, et al., *Plaintiffs*, v. SANDOZ, INC., et al., *Defendants*.	No. 3:20-cv-00802-MPS
	October 31, 2024

MEMORANDUM OF LAW IN SUPPORT OF THE STATES' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH HERITAGE PHARMACEUTICALS INC., EMCURE PHARMACEUTICALS LTD., AND SATISH MEHTA.

TABLE OF CONTENTS

I. INTRODUCTION 1
II. PROCEDURAL BACKGROUND 4
III. SETTLEMENT TERMS 4
A. Injunctive Relief 5
B. Monetary Payment and Distribution 5
1. Restitution to Consumers and State Agencies 6
2. Compensation to the States and Settlement Administration Costs 7
C. Notice Plan 8
D. Contemplated distribution plan 8
E. Cooperation by Heritage Defendants 8
F. Release of Claims 9
IV. THE STATES' AUTHORITY 10
A. The States' *Parens Patriae* Authority to Represent Consumers 11
B. Fundamental Differences Between *Parens Patriae* Claims and Rule 23 Claims 14
V. ARGUMENT 14
A. Standard for Preliminary Approval of *Parens Patriae* Settlement 14
B. The States' Settlement Meets the Standard for Preliminary Approval 16
1. Procedural Analysis Factors Support Preliminary Approval 17
i. The States Have Adequately – and Zealously – Represented Consumers 18
ii. The Settlement Was Negotiated at Arm's Length by Experienced Counsel. 18
iii. The States Have Obtained a Sufficient Understanding of the Case 19
2. Substantive Analysis Factors Support Preliminary Approval 20
i. The Settlement Provides Adequate Relief 21
ii. The Cooperation from the Heritage Defendants Adds Value to the Settlement 23
iii. The Settlement Is Reasonable Considering the Costs, Risks, and Delay of Trial and Appeal. 24
iv. The Proposed Method of Distributing the Restitution Account Is Not Yet Before the Court. 27

v. The Settlement Does Not Contain a Proposed Attorney Fees Award or Any Additional Agreement. 28

vi. The Settlements Treatment of Eligible Consumers 28

C. The Proposed Notice Plan is Reasonable and Meets the Requirements of Due Process... 29

D. The Court Should Appoint Huntington Bank as the Escrow Agent 33

VI. CONCLUSION 34

I. INTRODUCTION

Plaintiff States[1] (the "States") have reached a settlement agreement ("Settlement") with Heritage Pharmaceuticals Inc., Emcure Pharmaceuticals Ltd., and Satish Mehta (collectively "Heritage Defendants") resolving the States' claims against Heritage Defendants for their participation in an unlawful conspiracy to fix prices and allocate markets for generic pharmaceuticals. The Settlement resolves and releases all the States' claims against the Heritage Defendants based on the conduct alleged in the action in which the Heritage Defendants are defendants, *Connecticut et al. v. Aurobindo Pharma USA, Inc.*, *et al.*, 3:16-cv-02056 (the "Action"), and the related actions pending in *Connecticut et al. v. Teva Pharmaceuticals USA, Inc.*, *et al.,* 3:19-cv-00710; *Connecticut et al. v. Sandoz, Inc.*, *et al.,* 3:20-cv-00802 (collectively all three actions are referred to as the "States' Actions"), in exchange for the Heritage Defendants' payment of $10 million (the "Settlement Payment") and injunctive relief. Of the $10 million, $6 million is in escrow for later distribution to Eligible Consumers,[2] state Medicaid agencies, and non-Medicaid state agencies. The remaining $4 million is in a different escrow account to pay the cost of providing notice to consumers of the settlement and generally to finance the States'

[1] Plaintiff States means Connecticut, Alaska, Arizona, California, Colorado, District of Columbia, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In addition to the States that are Plaintiffs in this Action, the settling Plaintiff States also include Georgia, Northern Mariana Islands, Puerto Rico, Rhode Island, South Dakota, U.S. Virgin Islands, and Wyoming, who are Plaintiffs in either or both related States' Actions, and who are releasing their claims against Heritage Defendants that they could have brought in any of the States' Actions. Plaintiff States include every remaining plaintiff in the States' Actions.

[2] Eligible Consumers, like other capitalized terms that follow, is a defined term in the Settlement and is used here with the same meaning.

prosecution of the States' Actions.

As a matter of law[3] and policy, the States seek the Court's preliminary approval of the Settlement. The States seek Court approval of the notice plan described in this motion. With the notice plan, the States will provide an opportunity for consumers to opt out of the Settlement and the litigation generally, and to comment on and object to the Settlement and the States' efforts generally. In addition, the States seek a deadline for consumers opting out of the Settlement with the Heritage Defendants and final approval of the Settlement.

As chief legal officers, the attorneys general of the States enforce both state and federal law and represent their states in their sovereign, proprietary, and *parens patriae* capacities. The States' Actions are enforcement actions brought to advance the public interest and address anticompetitive activity in the generic drug industry that has led to higher prices for consumers and state agencies. Through this Settlement, the States are beginning to gather settlement proceeds for later distribution to consumers and state agencies and are exercising authority to settle and release claims under their *parens patriae* and other state law authority. A minority of state attorneys general under the law exercised here are obligated under state law to provide consumers with notice of settlements, including an opportunity to opt out of the settlement (or the litigation when the settlement does not resolve the dispute completely) and to object to or comment on the settlement.[4] All States are providing and will continue to provide those opportunities to consumers. Similarly, a minority of States under their states' laws need court approval of the

[3] *See, e.g., Shepherd Park Citizens Ass'n v. Gen. Cinema Beverages of Washington, D.C.,* 584 A.2d 20 (D.C. 1990); D.C. Code § 28-4507); Idaho Code § 48-108(3); Nev. Rev. Stat. 598.0975(3)(b); ORS 646.775(2), (3), (4), and (5). For citations of the authority pursuant to which each State is acting, see footnote 6 below.

4 *See, e.g.,* Cal. Bus. & Prof. Code § 16760(c); *Shepherd Park Citizens Ass'n v. Gen. Cinema Beverages of Washington, D.C.,* 584 A.2d 20 (D.C. 1990); D.C. Code § 28-4507; Del. Code Ann. 6, § 2108(e) and (f); Idaho Code § 48-108(3); ORS 646.775(2), (3), (4), and (5). For citations of the authority pursuant to which each State is acting, see footnote 6 below.

Settlement of consumer claims after the notice plan is implemented and all States will be seeking the Court's approval after the notice plan is implemented.

In addition to providing notice to consumers, the States are endeavoring to develop and build toward an efficient and effective distribution to consumers. The settlement administration process includes a website – www.AGGenericDrugs.com – with specifics about the settlement and the litigation, including an opportunity to provide contact information for the eventual distribution to consumers. The settlement administrator will staff the contact center to answer consumer questions made to a toll-free number, 1-866-290-0182, and to an email address info@AGGenericDrugs.com. In addition to financing the administration of this settlement and potential future settlements, the States seek the Court's approval to use the balance of the $4 million escrow set aside for costs to fund continued litigation against the remaining defendants.

With this motion, the States request that the Court set a deadline for consumers to opt out of the Settlement with the Heritage Defendants and approve the States using the costs escrow to fund continued litigation at seventy-seven days after the Court enters preliminary approval. The States are not currently imposing or asking the Court to impose a deadline for consumers to opt out of the litigation generally or comment on or object to the distribution plan that has not yet been specified. The States prefer to set those deadlines only when the States' notice plans have more fully played out and a specific distribution plan has been proposed.

The States hope to move soon to approve another settlement, this one with Apotex Corp. That settlement is currently conditioned on obtaining all signatures from all States. The States intend to convey to the Court and the public how the States intend to build on the notice process discussed here, build further toward a distribution plan, and otherwise build on what the States have done with the Heritage Defendants. With that settlement, the States expect to split the

proceeds 70%/30% as to money for distributions to consumers and agencies and money for the States. With those proceeds, the States expect to provide a more fulsome notice plan, which would also include a description of this Settlement. For example, the States expect to work with businesses with direct relationships with Eligible Consumers for transactions of the Drugs at Issue to provide direct notices to Eligible Consumers under both settlements.

II. PROCEDURAL BACKGROUND

A large coalition of States brought three actions against generic drug manufacturers alleging that they conspired to fix prices and allocate markets for many generic drugs in violation of federal antitrust laws and state antitrust and consumer protection laws. The actions, collectively referred to as the States' Actions, include: (1) a complaint focused on agreements involving Heritage, filed in December 2016, *Connecticut et al. v. Aurobindo Pharma USA, Inc., et al.*, 3:16-cv-02056 (the "Heritage Action" and this "Action") which after amendments and consolidation of separate complaints, now encompasses 15 drugs; (2) a complaint focused on over 100 different drugs centered on agreements involving Teva Pharmaceuticals, filed in 2019, *Connecticut et al. v. Teva Pharmaceuticals USA, Inc., et al.*, 3:19-cv-00710; and (3) a complaint focused primarily on dermatology products concerning over 80 different drugs, filed in 2020 (the "Dermatology Action"), *Connecticut et al. v. Sandoz, Inc., et al.*, 3:20-cv-00802. In each of the complaints, the States allege an overarching conspiracy for the drugs and anticompetitive acts in that action. Although the States have brought claims against the Heritage Defendants only in the Heritage Action, this Settlement, if approved, will resolve and release all claims based on the conduct that the States brought or could have brought against the Heritage Defendants in all three States' Actions.

III. SETTLEMENT TERMS

The Settlement contains several different categories of terms and relief, namely: (1)

Injunctive Relief, (2) Monetary Relief, in form of (a) restitution to Eligible Consumers and state agencies, (b) compensation to the States, (3) Notice Plan, (4) contemplation of a distribution plan, (5) Cooperation by Heritage Defendants, and (6) Release of Claims. *Exhibit 1* (*Settlement Between the States on the One Hand, and Defendants Heritage Pharmaceuticals Inc., Emcure Pharmaceuticals Ltd and Satish Mehta on the Other Hand, dated* September 19, 2024).

A. Injunctive Relief

The Settlement prohibits Heritage Defendants from, directly or indirectly, maintaining, soliciting, suggesting, advocating, discussing, or carrying out any unlawful agreement with any actual or potential competitor in the generic pharmaceutical industry to: (a) fix prices for generic pharmaceuticals; (b) submit courtesy, cover, or otherwise non-competitive, bids or proposals for the supply, distribution, or sale of generic pharmaceuticals; (c) refrain from bidding on, or submitting proposals for, the supply, distribution, or sale of generic pharmaceuticals; or (d) allocate customers for the sale of generic pharmaceuticals for the Enforcement Period, which is 10 years from the execution of the Agreement. *Settlement* ¶ *IX, I.* Heritage Defendants covenant that they have not, since January 1, 2016, engaged in any price-fixing, market allocation, or bid rigging as to any generic pharmaceutical product, including any product named in the States' Actions. *Settlement* ¶ *IX*. Further, for a period of 10 years, Heritage Defendants will continue to maintain a written "Antitrust Compliance Manual," on which all current Heritage employees have been trained, including its employees engaged in activities relating to the pricing or sale of generic pharmaceuticals, and maintain a Chief Compliance Officer, who serves to enforce Heritage Defendants' Antitrust Compliance Manual and monitor employees to ensure that there are no further violations of the antitrust laws. *Settlement* ¶ *IX.*

B. Monetary Payment and Distribution

The Settlement requires Heritage Defendants to make a total cash payment of $10 million to the States (referred to as the "Settlement Payment"). *Settlement* ¶ *II.* Sixty percent (60%) of the Settlement Payment – or $6 million – will be placed in a Restitution Account, which the States will hold in escrow for later distribution to victims of the anticompetitive acts alleged by the States, including Eligible Consumers, Medicaid state agencies, and other state agencies whose claims are being released by the States. *Id.* Forty percent (40%) of the Settlement Payment – or $4 million – will be placed in the Costs Account, which the States will hold in escrow and use to pay for Settlement Administration Costs and, upon final approval of the Settlement, for costs of litigating the States' claims or such other uses as required or permitted by State law. *Id.* The Settlement further provides that a "State Escrow" account ("Settlement Fund") will be established by order of the District Court at Huntington Bank with such bank serving as escrow agent ("Escrow Agent") subject to one or more escrow agreements mutually acceptable to the Parties. *Settlement.* ¶ *VI.*

1. Restitution to Consumers and State Agencies

The Settlement provides for restitution to victims of the anticompetitive acts alleged by the States, which include Eligible Consumers, Medicaid state agencies, and other state agencies whose claims are being released by the States. "Eligible Consumers" are natural persons who purchased, directly or indirectly, any of the drugs specified in the Action and the two other actions brought by the States pending in the States' Actions, whether through a cash payment in the absence of insurance, or through insurance, paid a co-pay, deductible, or co-insurance payment. *Settlement* ¶ *I.* Eligible Consumers are entitled to receive notice of this Settlement, under a future Notice Plan, and have a right to comment on or to exclude themselves from the States' Actions and this Settlement. *Settlement* ¶ *I.*

The Settlement's $6 million Restitution Account is intended to compensate consumers and

certain state agencies for damages incurred from Defendants' alleged anticompetitive acts and constitutes adequate restitution for the alleged injury to consumers and state agencies under the States' claims. *Settlement* ¶ *II*. Eligible Consumers, Medicaid agencies, and other non-Medicaid state agencies shall look solely to the funds in the Restitution Account in settlement and satisfaction of all claims asserted by the States against Heritage Defendants in the States' Actions. *Id*.

2. Compensation to the States and Settlement Administration Costs

Under the terms of the Settlement, the States will receive and hold $4 million of the Settlement Payment in escrow to pay for Settlement Administration Costs and, upon final approval of the Settlement, the past and future costs of litigating the States' claims against the remaining defendants. *Settlement* ¶ *II*. Disbursements for Settlement Administration Costs not to exceed a total of $600,000 may be withdrawn from the Costs Account, before final approval of the Settlement and without further District Court order, upon preliminary approval of the Settlement. *Id.* The Settlement Administration Costs expressly include any fees or costs payable to the settlement administrator that the States have retained. *Settlement* ¶ *I.* The States expect the balance of the Costs Account to be used to offset States' costs of litigating the States' Actions. To the extent that monies in the Costs Account are not used to offset costs of States litigating in the States' Actions, any remaining funds may be used for any of the following: (1) deposit into a state antitrust or consumer protection account (e.g., revolving account, trust account) for use in accordance with the laws governing the account; (2) deposit into a fund exclusively dedicated to assisting any State to defray the costs of experts, economists, and consultants in multistate antitrust investigations and litigations, including healthcare-related investigations and litigation; (3) antitrust or consumer protection enforcement, including healthcare related enforcement, by an individual State or

multiple States; or (4) for any other use permitted by state law at the sole discretion of that State's Attorney General. *Id.*

C. Notice Plan

The Settlement provides that the States will submit a "Notice Plan" with the request for preliminary approval. *Settlement* ¶ *I*,V. The Settlement requires that the Notice Plan specify "the manner and content of notifying Eligible Consumers of this Settlement Agreement and informing Eligible Consumers of their rights to comment on or exclude themselves from the States' Actions and this Settlement." *Settlement* ¶ *I.* The Settlement contemplates that the Notice Plan will take ninety (90) days to be completed, or such other time period set by the Court, but also recognizes that later notifications to Eligible Consumers, potentially following later settlements, may be necessary, including prior to distribution of funds. *Id.*

D. Contemplated Distribution Plan

The Settlement provides that the monies in the Restitution Account must be held in escrow for later distribution pursuant to a Court-approved distribution plan for Eligible Consumers, as well as Medicaid agencies and non-Medicaid state agencies if required by law, whose claims are being released. *Settlement* ¶ *I, II and V.* Any distribution from the Restitution Account shall be made according to a distribution plan submitted to and approved by the Court at a future date. *Id.*

E. Cooperation by Heritage Defendants

As a condition of the Settlement, Heritage Defendants are also required to continue providing cooperation to the States and their respective counsel. *Settlement* ¶ *IV.* Heritage Defendants have to date provided substantial cooperation to the States in the form of providing an account of the facts known to them that are potentially relevant to the claims in the Action; furnishing documents and data in their possession, custody, or control that are potentially relevant

to the States' claims in the Action; and exercising best efforts to secure and facilitate cooperation from cooperating individuals covered by their conditional leniency agreement and to make themselves available for interviews. *Id.* The required continued cooperation under the Settlement includes: (1) Reasonable efforts to authenticate and lay the foundation to admit as business records any documents; (2) Identification of certain persons who are likely to have particular relevant information about the alleged conduct in this Action; (3) Attorney proffers on Heritage Defendants' knowledge and roles in the conduct alleged in this Action; (4) Best efforts to provide access to persons for interviews; (5) Production of witnesses for testimony at trial; and (6) Identification of certain price increases implemented by Heritage Defendants. *Id.*

F. Release of Claims

If this Court enters an order finding the Settlement to be fair, reasonable, and adequate, and all appeals have been resolved or all appeal periods have expired, the Settlement provides that the States will, to the extent permitted by law, release Heritage Defendants from all claims that the States brought or could have brought against them (except on behalf of Local Entities) in the Action brought by States relating to the drugs specified in the Action based on the conduct alleged in that Action, namely, antitrust, consumer protection, fraud or false claims act, "overarching conspiracy," unjust enrichment, and disgorgement claims. *Settlement* ¶ *III.* Further, States covenant not to sue Heritage Defendants for all claims that the States brought or could have brought against other defendants for any other drug for which the States assert a claim in any of the States' Actions based on the conduct alleged in the States' Actions. *Id.* The release explicitly carves out various classes of claims for any conduct other than the conduct alleged in the States' complaints. *Id.* The persons and entities being released are Heritage (and all its current and former employees, personnel, agents, and representatives, except for Jeffrey Glazer and/or Jason Malek)

and Emcure (and all its current and former employees, personnel, agents, and representatives, including, but not limited to, Mr. Mehta) individually and collectively. *Settlement ¶ I.*

IV. THE STATES' AUTHORITY

This Settlement is presented to the Court for preliminary approval by the attorneys general of the States in their sovereign or proprietary capacities and in their capacity as *parens patriae* or similar authority under their state laws[5] to bring claims and to obtain important redress for harm

[5] *E.g.*, Conn. Gen. Stat. § 35-32(c); Alaska Stat. §§ 45.50.580; 45.50.577(b); Ariz. Rev. Stat. §§ 44-1407, 44-1408(A), 44-1528(A); Cal. Bus. & Prof. Code § 16760; Col. Rev. Stat. § 6-4-111: D.C. Code §§ 28-4507, 28–3909; Del. Code Ann. tit. 6, § 2101, *et seq*.; Del. Code Ann. tit. 29, §§ 2520 and 2522; Fla. Stat. § 542.22(22); Ga. Code Ann. § 10-1-397(b)**;** Idaho Code Ann. § 48-108; 740 Ill. Comp. Stat. 10/7(2); Ind. Code § 24-1-2-5; *Bd. of Comm'rs of Howard Cty. v. Kokomo City Plan Comm'n*, 263 Ind. 282, 295 (1975); *Bd. of Comm'rs of Union City v. McGuinness*, 80 N.E.3d 164, 170 (Ind. 2017); Ind. Code § 24-5-0.5-4(c); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); Iowa Code § 553.12; Kan. Stat. Ann. § 50-103(a)(8); Ky. Rev. Stat. Ann § 15.020, 367.110 through 367.990, and 518.020; *Com. ex. rel. Conway v. Thompson,* 300 S.W.3d 152 (Ky. 2010); *Com. ex rel. Beshear v. ABAC Pest Control Inc.,* 621 S.W.2d 705 (Ky. 1981); *State v. Bordens, Inc.*, 684 So.2d 1024, 1026 (La.Ct.App.1996); *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554 (Me.1973); Md. Com. Law Code Ann., § 11-209; MGL c. 93A § 4; *State v. Detroit Lumberman's Association*, 1979-2 Trade Cas. (CCH) ¶ 62,990, 1979 WL 18703 (Mich. Cir. Ct. 1979); *Minnesota v. Standard Oil Co*., 568 F. Supp. 556, 563 (D. Minn. 1983); Miss. Code Ann. §§ 7-5-1; *Clark Oil & Ref Corp. v. Ashcroft*, 639 S.W.2d 594, 596 (Mo. 1982); S*tate ex rel. Olsen v. Public Service Comm'n*, 283 P.2d 594 (Mont. 1955); Neb. Rev. Stat. § 84-212; Nev. Rev. Stat. § 598A.160(1) (1999); Nev. Rev. Stat. 598.0963 (2023); N.H. Rev. Stat. Ann. § 356:4-a; State v. City of Dover, 153 N.H. 181 (N.H. 2006); N.J. Stat. Ann. § 56:9-12.b; N.M. Stat. Ann. § 57-1-3(A), (B) (1979); *New Mexico v. Scott & Fetzer Co.*, 1981-2 Trade Cas. ¶ 64,439, 1981 WL 2167 (D.N.M. 1981); N.Y. Exec. Law § 63(12) and N.Y. Gen. Bus. Law §§ 340-342-a; N.C. Gen. Stat. §§ 75-15, 75-16; *Hyde v. Abbott Labs, Inc.*, 473 S.E.2d 680 (N.C. Ct. App. 1996); *FTC v. Mylan Labs*, 99 F. Supp. 2d 1 (D.D.C. 1999); N. D. Cent. Code §§ 51-08.1-07, -08(2); N. D. Cent. Code § 51-15-07; 4 CMC §§ 5107, 5121(b), 5206(b); Ohio Rev. Code § 109.81; *Ohio v. United Transp. Inc.,* 506 F. Supp. 1278, 1280-81 (S.D. Ohio 1981); 79 O.S. § 205 (A)(1); Or. Rev. Stat. § 646.775(1); 71 Pa. Stat. Ann. § 732-204(c); P.R. Laws Ann. tit. 32, §§ 3341–3344; R.I. Gen. Laws § 6-36-12; S.C. Code Ann. § 39-5-50(b); *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E. 2d 623 (2002); S.D. Codified Laws § 37-1-23; *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990); Tenn. Code Ann. § 8-6-109; *In re Cardizem CD Antitrust Litig*., 391 F.3d 812 (6th Cir. 2004); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369 (D.D.C. 2002); *Connecticut v. Mylan Labs, Inc.*, No. 1:98cv2114, 2001 WL 765466 (D.D.C. Apr. 27, 2001); *Government of Virgin Islands by and through Encarnacion v. Health Quest, LLC,* 2023 WL 7214673, at *4 (Superior Ct. V.I. Oct. 31, 2023) (*citing Mathes v. Century Alumina Co*., 2008 U.S. Dist. LEXIS 90087, at *29 (D.V.I. 2008)); Utah Code Ann. §§ 76-10-3106(3), 76-10-3108(1), 13-11-17; *Utah Division of Consumer Protection v. Stevens,* 398 F.Supp.3d 1139, 1150 (D. Utah Aug. 19, 2019); Vermont Stat. Ann. 9 V.S.A. § 2458; Va. Code Ann. §§ 59.1-9.15; Rev. Code Wash. § 19.86.080; *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011); W. Va. Code § 47-18-17; Wis. Stat. Ann. §§ 133.16 – 133.17(1); Wy. Stat. §§ 40–12–105, 40–12–106, 40–12–107, 40-12-112 and 40-12-113; *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592 (1982).

caused by Heritage Defendants' conduct. State attorneys general are politically accountable representatives of their states and have authority under state law to recover (1) for consumers to the extent permitted by state laws; (2) for public purchasers, including state agencies to the extent permitted by state laws; and (3) for the state, in the form of disgorgement, civil penalties, costs, and fees.[6] The States, based on their authority to bring actions and seek relief for violations of state antitrust and consumer protection laws as to the facts in their complaints,[7] are authorized by state law to enter into this Settlement with Heritage Defendants to recover for Eligible Consumers and state agencies in their states.

A. The States' *Parens Patriae* Authority to Represent Consumers

The States bring claims for monetary relief for consumers pursuant to state antitrust and

---

[6] *See* footnote 5, *supra.*

[7] *E.g.,* Conn. Gen. Stat. §§ 35-34, 35-38, 42-110o, and 42-110m; Alaska Stat. §§ 45.50.576 - .578, 45.50.501, .531, and .537; Arizona State Uniform Antitrust Act, Ariz. Rev. Stat. §§ 44-1407, 44-1408, 44-1528, and 44-1531; Cal. Bus. & Prof. Code §§ 16750, et seq., 17200, et seq., 17500, et seq., 17206, 17536, 17206.1, 16750, 16754, and 16754.5; Cal. Civil Code § 3345; Colo. Rev. Stat. § 6-4-101, et seq.; D.C. Code §§ 28-4507 and 28-4509; Del. Code Ann.tit. 6 § 2101, et seq.; Del. Code Ann. tit. 29, §§ 2520 and 2522; Fla. Stat. §§ 501.201, et seq, and 501.204; Idaho Code §§ 48-104, 48-108, and 48-112; 740 ILCS 10/1 et seq.; 10/7(1), 7(2), and 7(4); Ind. Code. §§ 24-1-2-5, 24-1-1-2, and § 24-5-0.5-4; Iowa Code §§ 553.12, 553.13, 714.16; Kan. Stat. Ann. §§ 50-103, 50-108, 50-160, 50-161, and 50-162; Ky. Rev. Stat. Ann. 367.110 et seq.; LSA-R.S. 51:1407, and 51:1408; 10 M.R.S. § 1104, 5 M.R.S. § 209; Md. Com. Law Code Ann. § 11-209; MGL c. 93A, § 4; Mich. Comp. Laws § 445.771, et seq. and § 445.901 et. seq.; Minn. Stat. §§ 325D.43, 325D.45, 325D.49, 325D.56, 325D.57, 325D.58, and 325D.66; Minn. Stat. Ch. 8; Miss. Code Ann. §§ 75-24-1, et seq., and 75-21-1 et seq.; Missouri Rev. Stat. §§ 416.011 et seq., 407.010 et seq., 15 CSR 60-8.010 et seq., 15 CSR 60-9.01 et seq.; Mont. Code Ann. §30-14-111(4), §30-14-131, §30-14-142(2), and § 30-14-222; Neb. Rev. Stat. §§ 59-803, 59-819, 59-821, 59-1608, 59-1609, 59-1614, and 84-212; Nev. Rev. Stat. §§ 598.0963, 598.0973, 598.0999, 598A.160, 598A.170, 598A.200 and 598A.250; N.H. RSA 356:4 et seq.; N.H. RSA 358-A:1 et seq.; N.J.S.A. 56:9-1 et seq.; N.J.S.A. 56:8-1 et seq.; N.M. Stat. Ann. §§ 57-1-3, -7, -8; N.M. Stat. Ann. § 57-12-8, -10, -11; N.Y. Gen. Bus. Law §§ 340-342c; N.Y. Executive Law § 63(12); N.C. Gen. Stat. § 75-1 et seq.; N.D.C.C. §§ 51-08.1-01 et seq. and 51-15-01 et seq.; 4 CMC §§ 5101 et. seq.; 4 CMC §§ 5201 et. seq.; Ohio Rev. Code § 109.81 and Ohio Rev. Code §§ 1331.01 et seq.; 79 O.S. § 201 et seq.; 79 O.S. § 205; ORS 646.760, ORS 646.770, ORS 646.775, and ORS 646.780; 73 P.S. §§ 201-4, 201-4.1, and 201-8 (b); 10 P.R. Laws Ann. §§ 257 et seq.; 32 P.R. Laws Ann. § 3341; R.I. Gen. L. §§ 6-36-1, et. seq.; South Carolina Code of Laws §§ 39-5-50, 39-5-110, 39-5-140, and 1-7-85; S.D. Codified Laws Chapters 37-1 and 37-24; Tenn. Code Ann. §§ 47-25-101 et seq.; 11 V.I.C. § 1507; 12A V.I.C. § 328; Utah Code §§ 76-10-3101 through 76-10-3118; 9 V.S.A. §§ 2458, 2461 and 2465; Virginia Code Section 59.1-9.15; Wash Rev. Code 19.86.080 and 19.86.140; West Virginia Code § 47–18–1 et seq.; Wis. Stat. §§ 133.03, 133.14, 133.16, 133.17, and 133.18; Wyoming Statutes § 40-12-101 et seq.

consumer protection laws, which build or elaborate on the common law doctrine of *parens patriae*. States have long-standing authority to bring *parens patriae* actions. The term *parens patriae* literally means "parent of the country." *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 600 & n.8 (1982) (*quoting* BLACK'S LAW DICTIONARY 1003 (5th ed. 1979)). The doctrine originated under the English common law, which recognized the King as the guardian of "'all charitable uses in the kingdom.'" *Hawaii v. Standard Oil Co. of Cal.,* 405 U.S. 251, 257 (1972) (quoting 3 William Blackstone, Commentaries, 47-48 (1794)). In *Hawaii v. Standard Oil Co. of Cal*., the Supreme Court affirmed "the right of a State to sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests." 405 U.S. at 258. In the United States, *parens patriae* authority has "been greatly expanded … beyond that which existed in England" and "the 'royal prerogative' and the 'parens patriae' function of the King passed to the States." *Id.* at 257.

The *parens patriae* doctrine has evolved to encompass a wide range of actions to protect the health and safety of a state's citizens. *See, e.g., Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907) (action to enjoin interstate air pollution); *Kansas v. Colorado,* 185 U.S. 125 (1902) (action to prevent water diversion); *Louisiana v. Texas,* 176 U.S. 1 (1899) (action to prevent spread of communicable disease). "One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Alfred L. Snapp & Son, Inc.,* 458 U.S. at 607.

State authority to bring a *parens patriae* action for antitrust law violations was first recognized by the Supreme Court under federal law in *Georgia v. Pennsylvania Railroad Co.,* 324 U.S. 439 (1945). The Supreme Court recognized a state's right to seek to enjoin price fixing, declaring that antitrust violations could erect trade barriers harmful to the state's "prosperity and

welfare," and that the state had a sovereign interest in such "matter[s] of grave public concern." *Georgia*, 324 U.S. at 449. Since *Georgia,* courts have routinely recognized the state attorneys' general right under federal law to bring *parens patriae* actions to redress consumer deception and antitrust violations. *See, e.g., In re Electronic Book Antitrust Litig.,* 2014 WL 3798764 (S.D.N.Y. Aug. 1, 2014) (conspiracy to raise eBook prices); *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. 532, 535 (S.D.N.Y. 1995), *aff'd,* 96 F.3d 44 (2d Cir. 1996) (conspiracy to fix, raise, maintain, or stabilize retail prices of shoes); *Louisiana v. Borden, Inc.,* No. 94-3540, 1995 WL 59548 (E.D. La. February 10, 1995) (milk price-fixing claim on behalf of schools and students); *Pennsylvania v. Milk Indus. Mgmt. Corp.,* 812 F. Supp. 500 (E.D. Pa. 1992) (milk contract bid-rigging claims on behalf of schools); *In re Mid-Atl. Toyota Antitrust Litig*., 541 F. Supp. 62 (D. Md. 1981) (alleged conspiracy to fix artificially high price for "polyglycoat" finish applied to certain automobiles); *California v. Infineon Technologies AG,* 531 F.Supp.2d 1124 (N.D. Cal 2007) (alleged horizontal price-fixing conspiracy in market for dynamic random access memory (DRAM)).

States have, and have used, *parens patriae* authority to recover monetary damages for consumers for antitrust violations. *E.g.,* 15 U.S.C. § 15c; *In re Electronic Book Antitrust Litig.,* 14 F. Supp. 3d 525, 531 (S.D.N.Y. 2014); *see In re Insurance Antitrust Litigation*, 938 F.2d 919, 927 (9th Cir. 1991), *aff'd in part, rev'd in part sub. nom. Hartford Fire Ins. Co. v. California,* 509 U.S. 764 (1993) (the "state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction").

The States have built on federal *parens patriae* authority with state law, including the provisions exercised here. Those laws are sometimes constitutional, statutory, including both

competition specific statutes and general statutes that apply to competition issues, and case law, as specified in footnote 6 above. States are exercising those laws here to fill gaps in federal law and otherwise strive to further the public interest.[8]

B. Fundamental Differences Between *Parens Patriae* Claims and Rule 23 Claims

Parens patriae claims differ from Rule 23 class action claims substantively and procedurally, and *parens patriae* actions are not directly governed by Rule 23. Fed. R. Civ. P. 23; *Purdue Pharma L.P. v. Kentucky,* 704 F.3d 208, 217 (2nd Cir. 2013). While *parens patriae* authority derives from the states' interest as sovereigns, *Georgia*, 324 U.S. at 449, class action representation is developed to more efficiently and effectively manage litigation asserting claims for many businesses or consumers. *See American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). Because of its sovereign nature and political accountability, *parens patriae* authority is exercised as soon as a state attorney general files an action. In contrast, representation by counsel under Rule 23 requires court approval, certification, and factual findings before class representation is effective. Fed. R. Civ. P. 23(c) (1), 23(b)(3), and 23(a). Additionally, a class action requires the ascertainability of class members. Fed. R. Civ. P 23(b)(3).

V. ARGUMENT

Preliminary approval of the Settlement is warranted and appropriate based on the substantive terms of the Settlement and the process by which this Settlement was negotiated.

A. Standard for Preliminary Approval of *Parens Patriae* Settlement

A *parens patriae* settlement will be approved if it is fair, reasonable, and adequate. *State of N.Y. by Vacco v. Rebook Intern. Ltd.*, 903 F. Supp. 532, 535 (S.D.N.Y. 1995). Although States' *parens patriae* actions are distinct from class actions, courts in this circuit and elsewhere generally

[8] *See* footnotes 5 and 7 above.

look to the standards used in approving class action settlements when evaluating what a *parens patriae* settlement delivers. *See, e.g.*, *In re Toys "R" Us Antitrust Litig*., 191 F.R.D. 347, 351 (E.D.N.Y. 2000); *New York v. Salton, Inc.*, 265 F. Supp. 2d 310, 313 (S.D.N.Y. 2003); *State of N.Y. by Vacco v. Rebook Intern. Ltd*., 903 F. Supp at 535; *New York. v. Nintendo of America, Inc.*, 775 F. Supp. 676, 680 (S.D.N.Y. 1991). The settlement approval process in *parens patriae* proceedings, similar to class actions, generally apply a two-step approach: (1) preliminary approval, where prior to notice the court makes a preliminary evaluation of fairness, and (2) final approval, where after notice of the settlement is provided and the court conducts a hearing and gives an opportunity to be heard, the court makes a final determination whether the settlement is fair, reasonable, and adequate. *See In re GSE Bonds Antitrust Litigation*, 414 F. Supp. 3d 686, 691-92 (S.D.N.Y 2019); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* 330 F.R.D. 11, 28 (E.D.N.Y. 2019).

A motion for preliminary approval is distinct from a motion for final approval. The preliminary approval process is governed by a "likelihood standard"—requiring the Court to assess whether the parties have shown that "the court ***will likely*** be able to grant final approval…." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig*, 330 F.R.D. at 28 n.21 (emphasis in original). Preliminary approval of a settlement, in contrast to final approval, "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to … [consumers] and hold a full-scale hearing as to its fairness." *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010) (citing *In re Traffic Executive Association–Eastern Railroads,* 627 F.2d 631, 634 (2d Cir.1980)). "Because Rule 23(e)(2) sets forth the factors that a court must consider when weighing *final* approval, it appears that courts must assess at the preliminary approval stage whether the parties have shown that the court will *likely* find

that the factors weigh in favor of final settlement approval." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* 330 F.R.D. at 28.

B. The States' Settlement Meets the Standard for Preliminary Approval

The Settlement satisfies the standard for preliminary approval because the court *will likely be able to* grant final approval of the Settlement. As previously mentioned, when evaluating approval of a *parens patriae* settlement, courts in this circuit and elsewhere generally look to the standard used in Rule 23, *e.g.*, *In re Toys "R" Us Antitrust Litig*., 191 F.R.D. 347, 351 (E.D.N.Y. 2000); *New York v. Salton, Inc.*, 265 F. Supp. 2d 310, 313 (S.D.N.Y. 2003); *State of New York v. Rebook Intern. Ltd*., 903 F. Supp at 535; *New York. v. Nintendo of America, Inc.*, 775 F. Supp. 680. Rule 23(e)(2) sets forth that a final approval of a class action settlement requires courts to consider whether:

> A. the class representatives and class counsel have adequately represented the class;
> B. the proposal was negotiated at arm's length;
> C. the relief provided for the class is adequate, taking into account:
> i. the costs, risks, and delay of trial and appeal;
> ii. the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
> iii. the terms of any proposed award of attorney's fees, including timing of payment; and
> iv. any agreement required to be identified under Rule 23(e)(3); and
> D. the proposal treats class members equitably relative to each other.

"Paragraphs (A) and (B) constitute the 'procedural' analysis factors and examine 'the conduct of the litigation and of the negotiations leading up to the proposed settlement.'" *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* 330 F.R.D. at 29 (quoting Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment). "Paragraphs (C) and (D) constitute the 'substantive' analysis factors and examine '[t]he relief that the settlement is expected to provide

…." *Id.* In the Second Circuit, these Rule 23(e)(2) factors are supplemented by the *Grinnell* factors when determining whether the Court will likely find that a settlement is fair, reasonable, and adequate, thus warranting granting preliminary approval. *Id.*; *In re GSE Bonds Antitrust Litigation*, 414 F. Supp. 3d at 692; *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974), set forth nine factors that are referred to as the *Grinnell* factors:

> (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 the trial,
> (7) the ability of the defendants to withstand a greater judgment,
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery, and
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463 (citations omitted). The States will address both sets of factors.

1. Procedural Analysis Factors Support Preliminary Approval

The initial determination of fairness, often called "procedural fairness," focuses on the settlement process itself. *See e.g. In re GSE Bonds Antitrust Litigation*, 414 F. Supp. 3d at 693; *Ebbert v. Nassau County*, No. CV 05-5445 (AKT), 2011 WL 6826121, at *7 (E.D.N.Y. Dec. 22, 2011); *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 238-39 (E.D.N.Y. 2010). The court must consider two procedural factors under Rule 23; whether (A) the class representatives and class counsel have adequately represented the class, and (B) the proposal was negotiated at arm's length. Fed. R. Civ. P. 23(e)(2). Because the Settlement was negotiated at arm's length by experienced litigators and is the result of a good-faith and procedurally fair

process, the procedural factors support preliminary approval of the Settlement.

i. The States Have Adequately – and Zealously – Represented Consumers

This first procedural factor requiring adequate representation of the class is not directly applicable to a settlement in a *parens* action brought by the States in the public interest. *See e.g. New York v. Reebok Int'l. Ltd*., 96 F.3d at 48 (noting Attorneys General in *parens* actions are motivated by concern for the public interest). Moreover, the States have vigorously represented the interests of their citizens in this action for more than seven years. The States have engaged in extensive discovery and motion practice, have zealously prosecuted this case, and engaged in settlement negotiations to obtain a favorable settlement for consumers. The States represent forty-nine different states, commonwealths, D.C., and territories in the United States whose interests are aligned in enforcing federal and state laws and vigorously pursuing remedies for their states, their consumers, and state agencies.

ii. The Settlement Was Negotiated at Arm's Length by Experienced Counsel.

The Settlement enjoys a presumption of fairness because it was "reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex … litigation.'" *In re GSE Bonds Antitrust Litigation*, 414 F.Supp.3d at 693 (*quoting In re Austrian & German Bank Holocaust Litig.,* 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000), *aff'd sub nom.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001); *New York v. Reebok Int'l, Ltd.*, 903 F. Supp. at 535 (S.D.N.Y. 1995), *aff'd,* 96 F.3d 44 (2d Cir. 1996).

The attorneys representing the parties to the Settlement are experienced and well-informed. Heritage Defendants' counsels have significant expertise in complex antitrust litigation. The Assistant Attorneys General in the offices of the Attorneys General for Connecticut, New York, and Massachusetts who negotiated the Settlement, individually and collectively, also have extensive experience with antitrust investigations and litigation. "The

Attorney Generals have extensive experience in complex antitrust cases brought under their *parens patriae* powers." *New York v. Nintendo of Am. Inc.*, 775 F. Supp.at 680. Indeed, this action is part of a long and successful tradition of multistate litigation by State Attorneys General.[9]

Courts are entitled to place special weight on a settlement agreement being negotiated by government attorneys committed to protecting the public interest. *Wellman v. Dickinson,* 497 F. Supp. 824, 830 (S.D.N.Y. 1980), *aff'd*, 682 F.2d 355 (2d Cir. 1982). The participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected. *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. at 351. The motivating factor in this case is the enforcement of antitrust laws by the States acting as *parens patriae* for their citizens. *See State of New York v. Reebok Intern. Ltd.*, 96 F.3d at 48. The States have negotiated at arms-length with Defendants for years while actively litigating this case, and fifty attorneys general have reviewed and approved the settlements on behalf of their state, consumers, and state agencies.

iii. The States Have Obtained a Sufficient Understanding of the Case

The States were well informed about the issues in this matter and the strength of the States' Action when they negotiated the Settlement with Heritage Defendants. The third *Grinnell* factor requires the court to consider the stage of the proceedings and amount of discovery completed. *In re GSE Bond Antitrust Litigation*, 414 F.Supp.3d 686, 699 (S.D.N.Y

[9] *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993); *In re Panasonic Consumer Elect. Prod.*, 1989-1 Trade Cas. (CCH) ¶ 68, 613 (CCH), 1989 WL 63240, (S.D.N.Y. June 5, 1989); *Colorado v. Airline Tariff Publ's Co.*, 1995-2 Trade Cas. (CCH) ¶ 71,231, 1995 WL 792070 (D.D.C. May 10, 1995); *In re Mid-Atl. Toyota Antitrust Litig., 605* F. Supp. 440 (D.Md.1984); *New York v. Reebok International, Ltd.,* 96 F.3d 44 (2d Cir. 1996); *In re Electronic Book Antitrust Litig.,* 2014 WL 3798764 (S.D.N.Y. Aug. 1, 2014); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp 706 (D. Minn.1975); *U.S. v. Apple Inc.,* 952 F.Supp.2d 638 (S.D.N.Y 2013); *In re Compact Disk Minimum Advertised Price Antitrust Litig.,* 216 F.R.D. 197 (D. Me. 2003); *State of New York, et al. v. Cephalon, Inc.*, No. 16-4234 (E.D. Pa. 2016); *State of Wisconsin, et al. v. Indivior Inc., et al.*, 16-cv-5073 (E.D. Pa. 2016).

2019). "The relevant inquiry 'is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement.'" *Id.* (*quoting In re AOL Time Warner, Inc.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006)). The State of Connecticut has been investigating the claims since July 2014, and most States have been litigating the claims since December 2016. The lengthy and extensive litigation provided an excellent foundation to understand the facts and legal issues, as did this and the MDL Court's opinions and orders. The States understand what the states' consumers, Medicaid agencies, and other non-Medicaid state agencies have overpaid for generic pharmaceuticals manufactured by Heritage Defendants and the challenged conduct's price effects on generic pharmaceuticals, based on data provided by state Medicaid agencies, third parties, and Defendants in the MDL and expert analysis and reports in the Dermatology Action, which was chosen as a bellwether action. The States' investigation and litigation work over the past seven years, including expert discovery, has allowed them to obtain an excellent understanding of the case.

In summary, because the settlement was the product of arm's-length negotiations between experienced counsel and was reached after a lengthy investigation and litigation, the procedural factors weigh in favor of preliminary approval.

2. Substantive Analysis Factors Support Preliminary Approval

The second set of factors focuses on the substantive terms of the Settlement and the relief that the settlement is expected to provide. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* 330 F.R.D. at 29. Fed. R. Civ. P. 23(e)(2). When evaluating preliminary approval of a settlement, the court must consider whether: (C) the relief provided is adequate, and (D) the proposal treats eligible consumers equitably relative to each other. Fed. R. Civ. P. 23(e)(2).

This inquiry overlaps significantly with several *Grinnell* factors, which help guide the Court's application of Rule 23(e)(2)(C)(i). *In re GSE Bonds Antitrust Litigation*, 414 F. Supp. 3d at 693 (*citing, In re Payment Card*, 330 F.R.D. at 36). The substantive factors weigh in favor of preliminary approval because the Settlement provides substantial and guaranteed recovery for consumers and state agencies, which recovery is fair, reasonable, and adequate given the litigation risks.

i. The Settlement Provides Adequate Relief

Rule 23(e)(2)(C) requires the court to examine whether the "relief … is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Further, *Grinnell* factor eight, "the range of reasonableness of the settlement in light of the best possible recovery," and factor nine, "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation," are often considered together, *In re GSE Bond Antitrust Litigation*, 414 F. Supp. 3d at 696 (*quoting In re Payment Card*, 330 F.R.D. at 47-48), and overlap some with Rule 23(e)(2)(C).

In assessing the adequacy of the settlement, courts may need to forecast the likely range of possible recoveries and the likelihood of success in obtaining such results. *In re GSE Bonds Antitrust Litigation*, 414 F. Supp. 3d at 693 (citing *In re Payment Card,* 330 F.R.D. at 36). The court's task is to weigh the settlement figure against the amount of likely recovery. *State of New York v. Reebok Intern. Ltd.,* 96 F.3d at 49. Courts have held that "[t]he proper measure of damages in a suit concerning a price-fixing conspiracy is 'the difference between the prices actually paid and the prices that would have been paid absent the conspiracy.'" *In re Electronic Books Antitrust Litigation*, 2014 WL 1282293 at *16 (S.D.N.Y., March 28, 2014) (quoting *New York v.*

Hendrickson Bros., Inc., 840 F.2d 1065, 1077 (2d Cir.1988)). Further, damage issues in antitrust cases "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 565, 101 S. Ct. 1923, 68 L.Ed.2d 442 (1981) (quoting *Bigelow v. RKO Pictures, Inc.,* 327 U.S. 251, 264 (1946)).

Based on information and data the States have obtained through investigation and discovery, and analysis provided by the States' experts, the States estimate that the total amount of overcharge associated with sales by Heritage Defendants during the period at issue in the litigation is approximately $57 million, of which consumers and state agencies paid somewhere around 40% or $22.8 million. Therefore, the $10 million Settlement represents around 44% of the estimated overcharge associated with Heritage Defendants' sales to consumers and state agencies during the period at issue. Further, the Settlement's Restitution Account provides consumers and state agencies a recovery of approximately 26% of the estimated total amount of overcharge paid by consumers and state agencies.

The recovery provided in the Settlement is a significant percentage settlement considering the case complexity and litigation risk and, therefore, adequate and within the range of possible approval for purposes of the preliminary approval analysis. *See e.g., In re GSE Bond Antitrust Litigation*, 414 F. Supp. 3d at 697 (13-17% of the best possible recovery considered reasonable); *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (preliminarily approving settlements "representing roughly 10-15% of the credit transaction fees collected by Defendants").

In addition to the monetary relief, value is added to the Settlement through the Settlement being an "ice-breaker" or first party to settle, potentially helping to spur other parties to settle. *In re GSE Bond Antitrust Litigation*, 414 F.Supp.3d at 697 (*quoting In re Packaged Ice Antitrust*

Litig., 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011)). The Heritage Defendants were THE leniency applicant here – that is the first to admit an antitrust violation. In addition, the Heritage Defendants have provided cooperation to the States. Accordingly, the $10 million settlement amount is sensible and adequate. Further, value is added by the injunctive relief and Heritage Defendants' covenant that they have not, since January 1, 2016, engaged in any per se price-fixing, market allocation, or bid rigging as to any generic pharmaceutical product, and Heritage's commitment to maintain and train employees on an "Antitrust Compliance Manual" and maintain a Chief Compliance Officer.

ii. The Cooperation from the Heritage Defendants Adds Value to the Settlement

Additional value is added to this Settlement through Heritage Defendants' cooperation. *In re GSE Bond Antitrust Litigation*, 414 F. Supp. 3d at 697. Successful litigation against Heritage Defendants' co-defendants in this MDL will increase the likelihood of further recovery and additional value to the States, their consumers, and state agencies. Related to this is the seventh *Grinnell* factor, defendants' ability to withstand a greater judgment. The States evaluated and considered Heritage Defendants' ability to pay when negotiating the monetary relief under the Settlement. Even if it is determined that Heritage Defendants could withstand a greater judgment, "courts have noted that a defendant's cooperation 'tends to offset the fact that they would be able to withstand a larger judgment.'" *In re GSE Bond Antitrust Litigation*, 414 F. Supp. 3d at 694 (*quoting In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008)).

Heritage Defendants have already provided substantial cooperation to the States in the States' Actions, and Heritage Defendants' covenant of continued cooperation in this litigation provides considerable value to the States. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust*

Litig., 2009 WL 3077396 at *9 (E.D.N.Y. Sept. 25, 2009) ("Additionally, the agreement to cooperate with the plaintiffs has not been factored into the overall value of the settlement, and it adds significant value"); *In re GSE Bonds Antitrust Litig.*, 2019 WL 6842332 at *4 (S.D.N.Y Dec. 16, 2019) ("this cooperation … nonetheless provides some additional value to the GS settlement"). Therefore, Heritage Defendants' agreement to continued cooperation further supports preliminary approval of the Settlement. *See e.g. In re Packaged Ice Antitrust Litig.*, 2010 WL 3070161 at *6 (E.D. Mich. Aug 2, 2010) ("Particularly where, as here, there is the potential for a significant benefit to the class in the form of cooperation on the part of the settling Defendant, this Court is reluctant to refuse to consider the very preliminary approval that will trigger that cooperation").

iii. The Settlement Is Reasonable Considering the Costs, Risks, and Delay of Trial and Appeal.

When evaluating the adequacy of the Settlement, the Court should analyze the comparison between the settlement amount and the full estimated damages in light of all the risks of litigation, which determine the likelihood of recovery. As the risks of litigation increase, the range of reasonableness correspondingly decreases. *In re Cendant Corp. Derivative Action Litig.*, 232 F. Supp. 2d 327, 336 (D.N.J. 2002). This analysis overlaps significantly with *Grinnell* factors 1, 4, 5, and 6, which include: the complexity, expense, and likely duration of the litigation (factor 1); the risks of establishing liability (factor 4); the risks of establishing damages (factor 5); and the risks of maintaining the class action through the trial (factor 6). *Grinnell*, 495 F.2d at 463.

A settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution. *Milstein v. Werner*, 57 F.R.D. 515, 524-25 (S.D.N.Y.1972). The proposed Settlement's substantial and guaranteed recovery for consumers is fair, reasonable, and adequate given the litigation risks inherent in any litigation and more particularly in a complex antitrust case such as this matter. In addition to analyzing purchases of Heritage Defendants' generic pharmaceuticals

at issue and the damage analysis contained in expert reports submitted in the Dermatology Action, the States have gathered information necessary to adequately assess their risks of litigation in this matter.

The States have done significant investigatory and litigation work to support their belief in their claims, but litigation always include risks. Federal antitrust cases "'are complicated, lengthy, and bitterly fought,'… as well as costly." *In re GSE Bond Antitrust Litigation*, 414 F.Supp.3d at 697 (quoting *Wal-Mart Stores, Inc., v. Visa U.S.A., Inc*., 396 F.3d 96, 118 (2d Cir. 2005)); *See also In re Vitamin C Antitrust Litig*, No. 06-MD-1738 (BMC), 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). This litigation, which, in addition to federal law claims, also includes state law claims for forty-three different states,[10] is no exception, particularly given the number of parties, drugs, and alleged conspiracies in the States' Actions and the fact that the States' litigation against the Heritage Defendants in this Action has been ongoing for approximately seven years. *See In re GSE Bond Antitrust Litigation*, 414 F.Supp.3d at 693 (antitrust cases are likely to be complicated, lengthy, bitterly fought, and costly when it involved numerous defendants and complex issues). A trial in this Action will be lengthy and complex because of the nationwide scope of the alleged activities and it has already required lengthy and expensive discovery, which is still ongoing. See *State of New York v. Reebok Intern. Ltd.,* 903 F. Supp. at 536. "Courts favor settlement when litigation is likely to be complex, expensive, or drawn out." *In re GSE Bond Antitrust Litigation*, 414 F.Supp.3d at 693.

[10] Connecticut, Alaska, Arizona, California, Colorado, District of Columbia, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *See* Consolidated Amended Complaint.

This case involves numerous federal and state legal issues and litigating the claims and defenses in this case would necessarily entail a risk that the fact finder would find one or more of the Heritage Defendants not liable. "[A]s to liability, establishing the existence and extent of a conspiracy will necessarily be a complex task, and many of the hurdles that plaintiffs have overcome at the pleading stage will raise substantially more difficult issues at the proof stage." *In re LIBOR- Based Fin. Instruments Antitrust Litig*., 327 F.R.D. 483, 494 (S.D.N.Y. 2018) ("*LIBOR*").

Litigation also includes risk that the fact finder would find that the damages caused by the anticompetitive conduct were less than alleged by the States. Proving violations of the antitrust laws is no mean feat, and even if that feat is accomplished, proving remedies and damages is just as difficult. *See LIBOR*, 327 F.R.D. at 494 (stating that the plaintiffs' damages models would "unquestionably be challenged and perhaps subject to further *Daubert* motions"); *In re GSE Bond Antitrust Litigation*, 414 F. Supp. 3d at 697 (even if they prove liability, plaintiffs will still face the difficulties inherent in proving damages); s*ee also In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* 986 F. Supp. 2d 207, 225 (E.D.N.Y. 2013) (Interchange Fees I), *rev'd and vacated*, 827 F.3d 223 (2d Cir. 2016) (Interchange Fees II) ("proving damages is just as difficult"). At trial, proof of damages, disgorgement, restitution, and civil penalties to which the States would be entitled, would likely be a complex task involving a "battle of the experts." *In re Nasdaq Mkt.-Makers Antitrust Litig*., 187 F.R.D. 465, 476 (S.D.N.Y. 1998). *See also Chatelain* v. *Prudential–Bache Secs., Inc.,* 805 F. Supp. 209, 213 (S.D.N.Y. 1992) (complex issue of establishing damages would require battle of the experts). "As the Second Circuit has noted, 'the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.'" *In re GSE*

Bond Antitrust Litigation, 414 F. Supp. 3d at 694 (*quoting Wal-Mart Stores, Inc.,* 396 F.3d at 118 (citation omitted)); *See also ZF Meritor et al. v Eaton Corporation*, 800 F.Supp.2d 633 (D. Del. August 4, 2011) (exclusion of expert report made plaintiffs unable to prove monetary damages despite jury verdict finding antitrust violations).

In addition, the States must consider the risks relating to standing and statute of limitations defenses raised by Heritage Defendants as to various States in this case. The MDL Court already held that the States may not maintain *parens patriae* standing under the Clayton Act in a suit for damages based solely on injury to their general economy. *In re Generic Pharmaceuticals Pricing Antitrust Litig.,* 605 F. Supp.3d 672, 680 (E.D. Pa. 2022). Thus, the States' claims for damages, restitution, and disgorgement are largely dependent on state laws, which all may have varying language, standards, burdens, and elements that may need to be separately proven at trial. *See footnote 6*, *supra*. Further, there is always some risk that damages could be limited on statute of limitations grounds.

This litigation has been ongoing for more than seven years and considering the risks, costs, and delay involved in an antitrust case of this magnitude, the opportunity for guaranteed relief weighs heavily in favor of the Settlement. *See In re GSE Bond Antitrust Litigation*, 414 F. Supp. 3d at 694 (court should balance immediacy and certainty of recovery against the continued risk of litigation). Recognizing the cooperation that Heritage has provided, a first-in discount, the risks of litigation, and the time value of money, the states believe that the $10 million Settlement is reasonable and adequate.

iv. <u>The Proposed Method of Distributing the Restitution Account Is Not Yet Before the Court.</u>

The States propose to hold funds in the Restitution Account designated for later distribution in escrow and to submit a distribution plan to the Court for approval at a future date. Any

distribution to Eligible Consumers, Medicaid agencies, and other non-Medicaid state agencies, will be made only according to a future Court-approved distribution plan. Settlement ¶ II. Therefore, the proposed method of distributing relief is not yet before the Court for preliminary approval.

v. The Settlement Does Not Contain a Proposed Attorney Fees Award or Any Additional Agreement.

The additional substantive analysis factors set forth in Rule 23(e)(2)(C), *namely* the terms of any proposed award of attorney's fees, including timing of payment, and any agreement required to be identified under Rule 23(e)(3), are not directly applicable to the States' *parens patriae* settlement. The States are not seeking traditional attorneys' fees, and the States have not entered into any related agreements requiring disclosure. The Settlement does provide that 40% of the monetary payment in the Settlement be placed in a Costs Account. These settlement funds allocated to this Costs Account represent statutorily authorized recovery and enforcement remedies, including the costs and expenses of settlement administration, the costs, expenses and attorneys' fees incurred by the States in investigating and litigating the States' Actions, and such other monetary recovery the States may be entitled to pursuant to state law.[11] As specified above, the States expect the Costs Account to be used only for settlement administration costs and to offset the costs of litigating the States' Actions.

vi. The Settlements Treatment of Eligible Consumers

The States do not now propose a plan of distribution and allocation among Eligible Consumers for the Court's consideration. The States are requesting that the proposed allocation and distribution plan be deferred until a later date when it can be part of a proposal relating to additional settlements as well. See Settlement ¶ I, II, and V (any distribution from the Restitution

[11] See footnote 7, supra.

Account shall only be made according to a distribution plan submitted to and approved by the District Court at a future date). A plan of allocation is not required for the Court to grant preliminary approval of the Settlement. *E.g., In re Foreign Exchange Benchmark Rates Antitrust Litig.*, 2015 WL 9952596, at *3 (S.D.N.Y. Dec. 15, 2015) (order granting preliminary approval and stating that counsel shall submit for the Court's approval a proposed Plan of Distribution of the Settlement Funds at a later date).

In summary, the factors set forth in Rule 23(e)(2), together with the *Grinnell* factors, demonstrate that the Settlement is fair, reasonable, and adequate, under the circumstances of this case, and that the Court *will likely be able to* grant final approval of the Settlement. Therefore, preliminary approval of the Settlement is warranted.

C. The Proposed Notice Plan is Reasonable and Meets the Requirements of Due Process.

The States seek the Court's approval of the proposed Notice Plan set forth in the declaration of Tiffaney Janowicz. There are no rigid rules for determining whether a settlement notice satisfies constitutional requirements. *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F.Supp.2d 179, 191 (S.D.N.Y. 2012), *aff'd sub nom. Charron*, 731 F.3d 241 (2d Cir. 2013). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 727 (2d Cir. 2023) (citing, *Wal-Mart Stores*, 396 F.3d at 113–14). "[N]otice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Id.* at 114 (citation and internal quotation marks omitted).

To ensure compliance with notice requirements under the Settlement, as well as state and federal laws, the States have retained Rust Consulting, Inc ("Rust"), a nationally recognized

notice and administration company specializing in the design and implementation of notice and administration programs of all sizes and types in class action settlements and similar matters. *See* Declaration of Tiffany Janowicz ("Janowicz Decl.") at ¶¶ 2-3 and Exhibit A. Rust has extensive experience in state and federal class and *parens patriae* actions. *Id. See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003); *In re Lorazepam & Clorazepate Antitrust Litig*., 205 F.R.D. 369 (D.D.C. 2002); *In re Metropolitan life Ins. Co. Sales Practices Litig*., 1999 WL 33957871 (W.D. Pa. Dec. 28, 1999); *In re Electronic Book Antitrust Litig.,* 2014 WL 3798764 (S.D.N.Y. Aug. 1, 2014)

Specifically, to ensure that the Notice Plan is successful, the States propose to take various actions to effectuate broad, clear, and concise notice to Eligible Consumers – as well as prepare for a fair and thorough claims process. First, the States have drafted a clear, one page notice ("Short Form Notice"), *See* Exhibit 3, that informs consumers of the litigation (including the parties, claims, and relevant, impacted drugs), helps consumers determine whether they may be eligible to participate (and ultimately obtain funds) under this Settlement (as well as potential future settlements to be entered into by the States relating to Drugs at Issue), provides a means by which consumers can register to obtain additional and future information about the litigation, as well as filing claims under the Settlement at the appropriate time, and finally explains the manner and effect of opting out and/or objecting to the Settlement. The States will also provide a much longer and more detailed notice ("Long Form Notice"), *See* Exhibit 2, available on the website and mailed to consumers upon request. Janowicz Decl. at ¶¶ 7-9, 18. States are deferring until later proposing and seeking approval of a claims process. The States expect such approval will either be made with a future settlement, as a separate request, or at latest, as part of a request for approval of the distribution plan.

Second, the States plan to take various actions to distribute notice of the Settlement widely. Specifically, in addition to numerous States Attorneys General issuing press releases of the Settlement – news which is typically picked up and reported on by numerous newspapers, trade journals, and legal news sites – notice of the Settlement will be disseminated as a national press release through PR Newswire's US1 Newsline, thereby reaching approximately 14,500 websites, media outlets, and journalists. Janowicz Decl. at ¶¶14-16. Additionally, the Notice Plan provides for an extensive eight-week social media advertising campaign resulting in targeted banner ads on several popular, highly visited social media sites, *e.g.* Google, Facebook, Instagram (estimated at providing 120,000,000 gross impressions). *Id.*

Third, the States have taken various steps to provide assistance and additional information to consumers that have learned about the Settlement and seek additional information and/or assistance (including opting out or submitting comments/concerns). Specifically, the settlement administrator has created a website for this case - www.AGGenericDrugs.com -- with specifics about the settlement and the litigation, links to both the Short Form Notice and the more detailed Long Form Notice, and a place for consumers to provide contact information for the future claims submission process (and ultimately consumer distribution of funds), as well as to opt-out of the Settlement. *See* Exhibit 4 (Website Notice). The settlement administrator has also already created an email address specific to this case and a toll-free number specific to this case (info@AGGenericDrugs.com, 1-866-290-0182), to answer questions and provide instructions to consumers about the case, settlement, and where and how to provide contact information. Janowicz Decl. at ¶9. Additional specifics of that plan are provided in the declaration of Tiffaney Janowicz.

The States propose that notice begin within 7 days of preliminary approval, continue until 63 days after the date of the order for preliminary approval, and provide a deadline of 77 days from the date of the order of preliminary approval for consumers to opt out of or comment on or object to the Settlement. The States are not currently imposing or asking the Court to impose a deadline for consumers to opt out of the litigation generally or comment on or object to a distribution plan that has not yet been specified. The States are asking the Court to defer those deadlines until a distribution plan has been proposed. The States intend to build on the notice process discussed here and build toward a distribution plan in connection with future anticipated settlements in the States Actions, and plan to work with third parties to provide some level of direct notice to Eligible Consumers.

The objective of the proposed Notice Plan is to provide adequate and reasonable notice to eligible consumers who purchased one of the generic drugs specified in the Action, provide them with opportunities to learn about the settlement and act upon their rights; and ensure that they will be exposed to, see, review, and understand the Notices. Janowicz Decl. at ¶ 5-6. The Notice program is designed to reach approximately 70% of the target audience using a methodology that is consistent with the standards employed by Rust in designing effective notice programs and administering these types of settlements. Janowicz Decl. at ¶ 22. The Notice will "fairly, accurately, and neutrally describe the claims and parties in the litigation, the terms of the proposed settlement and the identity of persons entitled to participate in it," as well as apprising affected consumers of their options with regard to the proposed Settlement. *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (citing *Foe v. Cuomo*, 700 F. Supp. 107, 113 (E.D.N.Y. 1988), *aff'd,* 892 F.2d 196 (2d Cir. 1989)); *Wal-Mart Stores*, 396 F.3d at 114.

The States developed the proposed Notice Plan to provide the best notice to consumers as practicable under the circumstances. *See In re GSE Bonds*, 414 F. Supp. 3d at 702. Providing notice is no easy task in the States' Actions, considering the large number of Defendants and drugs involved and the fact that the identity of the consumers who purchased the drugs at issue are not known. There is no readily available consumer list to be used for direct notice. The proposed Notice Plan has been designed to reach as many potentially Eligible Consumers as practicable, while remaining cost-effective. And by encouraging potentially Eligible Consumers, who choose to remain in the Settlement and litigation, to register on the website, the Notice Plan is designed to make distribution of settlement funds to those injured by Defendants' conduct more attainable. The Notice Plan includes Notices written in clear, concise, easily understood language (in English and Spanish), designed to meet due process requirements. Janowicz Decl. at ¶ 9. Further, the notice will include the settlement website address and toll-free telephone number, and banner ads will contain a hyperlink to access the website easily. *Id.* The States' Notice Plan fully comports with the requirements of due process, both in terms of form and substance, and is reasonable, as well as the best notice practicable under the circumstances. Therefore, the States request that this Court approve the Notice Plan, and order that Notice commence within 7 days after the entry of the Preliminary Approval order.

D. <u>The Court Should Appoint Huntington Bank as the Escrow Agent</u>

Pursuant to the Settlement, the Heritage Defendants have paid $10 million (the "Settlement Payment") to the States. *Settlement* ¶ *II*. The States shall hold the Settlement Payment in escrow pending final approval of the Settlement. *Id.* The Settlement Payment is being held in escrow at Huntington Bank. *Settlement* ¶ *VI*. Huntington Bank is well qualified to serve as the escrow agent, having regularly served in that role in many other *parens patriae* or class action settlements.

Therefore, the States request that the Court appoint Huntington Bank to serve as escrow agent for the purpose of administering the escrow account holding the Settlement Funds.

VI. CONCLUSION

For the foregoing reasons, the States respectfully request that the Court (1) grant preliminary approval of the Settlement; (2) approve Huntington Bank as the Escrow Agent, (3) stay litigation against Heritage Defendants until the Court decides whether to grant final approval of the Settlement; (4) approve Rust Consulting as the Notice and Claims Administrator, (5) approve the Notice Plan for providing notice to consumers, (6) defer the distribution plan until a later date and in connection with a settlement with other defendants, and (7) set a date and time for a final approval hearing.

Respectfully submitted this 31st day of October, 2024.

STATE OF NEW YORK
LETITIA JAMES
Attorney General

/s/ Robert L. Hubbard
Robert L. Hubbard
Assistant Attorney General
Antitrust Bureau
28 Liberty Street, 20th Floor
New York, NY 10005
Tel: (212) 416-8267
Robert.Hubbard@ag.ny.gov

Attorney for the State of New York

STATE OF NORTH DAKOTA
Drew H. Wrigley
Attorney General

/s/ Elin S. Alm
Elin S. Alm
Bar number phv207896
Assistant Attorney General
Director, Consumer Protection & Antitrust Division
Office of Attorney General
1720 Burlington Drive, Suite C
Bismarck, ND 58504-7736
Telephone (701) 328-5570
Facsimile (701) 328-5568
ealm@nd.gov

Attorney for the State of North Dakota