UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION, Plaintiff, **v.** **ABBVIE INC., et al.**, Defendants.	Case Number: 2:14-CV-5151-HB

PLAINTIFF FEDERAL TRADE COMMISSION'S
MOTION FOR ENTRY OF JUDGMENT

Plaintiff Federal Trade Commission respectfully moves for entry of judgment in this action in the form attached as Exhibit A to this motion. The FTC and Defendants met and conferred regarding the filing of a proposed joint form of judgment pursuant to the Court's Order (Dkt. 440) but were unable to resolve their disagreements regarding the form of judgment. The primary areas of disagreement as the FTC understands them are: (1) the calculation of prejudgment interest, (2) the timing and control over disbursement of the equitable monetary relief to customers injured by the AbbVie Defendants and Besins's anticompetitive conduct; and (3) whether the judgment should include any language regarding the procedures for a temporary stay. The FTC respectfully requests that the Court enter the FTC's proposed form of judgment for the reasons described below.

I. Prejudgment interest should be calculated pursuant to the regulations cited in the Court's Findings of Fact and Conclusions of Law

The Court ordered that the "FTC is entitled to prejudgment interest calculated at the interest rates set forth by the IRS for underpayments," citing 26 C.F.R. § 301.6621-1 and *SEC v. Teo*, 746 F.3d 90, 109-10 (3d Cir. 2014). (Dkt. 439, Findings of Fact and Conclusions of Law at

94-95, 101.) The FTC's proposed form of judgment calculates prejudgment interest according to this IRS regulation.

26 C.F.R. § 301.6621-1(a)(3) provides that the applicable adjustable interest rate is published by the Commissioner in a Revenue Ruling and that the prescribed rate is compounded daily. The text of the regulation is attached as Exhibit B to this motion. IRS Revenue Ruling 2018-18 is the latest revenue ruling published pursuant to Internal Revenue Code section 6621 and 26 C.F.R. § 301.6621-1. A copy of Revenue Ruling 2018-18 is attached as Exhibit C.

Revenue Ruling 2018-18 provides two different rates for an "underpayment": a regular rate and a rate applicable to "interest payable . . . on any large corporate underpayment." (Ex. C, Revenue Ruling 2018-18 at 1.) "The term 'large corporate underpayment' means any underpayment of a tax by a C corporation for any taxable period if the amount of such underpayment for such period exceeds $100,000." 26 U.S.C. § 6621(c)(3) (cited in Ex. C, Revenue Ruling 2018-18 at 1). Courts have applied the large corporate underpayment rate when calculating prejudgment interest in cases where the statutory definition is met.[1]

Here, the Court awarded $448 million in equitable monetary relief against Defendants; therefore, the interest rates applicable to a "large corporate underpayment" should apply to the calculation of prejudgment interest. The large corporate underpayment interest rates set forth in Revenue Ruling 2018-18 range from 5% to 7% during the relevant period. (*See* Ex. C, Revenue Ruling 2018-18 at 14-16.)

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[1] *See, e.g.*, *Boilermaker-Blacksmith Nat'l Pension Fund v. Alliance Constructors, Inc.*, No. 09-2289-DSW, 2013 WL 1980451, at *2-3 (D. Kan. May 13, 2013) (applying large corporate underpayment rate to all periods during which the defendant's liability exceeded $100,000); *Van Asdale v. Int'l Game, Tech.*, No. 3:04-cv-00703-RAM, 2011 WL 2118637, at *19 (D. Nev. May 24, 2011) (calculating prejudgment interest using the large corporate underpayment rate).

The FTC's calculation of prejudgment interest strictly follows the letter of IRS regulation 26 C.F.R. § 301.6621-1 and Revenue Ruling 2018-18. The FTC used the applicable rates from Revenue Ruling 2018-18 and compounded them daily in its prejudgment interest calculation. The calculation results in total prejudgment interest of $72,085,171. The FTC's calculation is attached as Exhibit D.

The amount of prejudgment interest in the FTC's proposed form of judgment differs from the amount in Appendix A of its post-trial brief for three reasons: the post-trial brief's calculation did not compound interest daily, did not apply the "large corporate underpayment" rate, and did not extend the period for calculating prejudgment interest to the present. (*See* Dkt. 403 at 45.) After the Court issued its Findings of Fact and Conclusions of Law, the FTC reviewed and revised its calculation to accord with 26 C.F.R. § 301.6621-1, the regulation the Court cited.

Defendants apparently agree with the FTC that prejudgment interest on the equitable monetary relief award should accrue through at least July 17, 2018. Moreover, Defendants do not dispute the accuracy of the FTC's calculations.

Defendants instead request that the Court set aside its ruling that prejudgment interest should be calculated in accord with 26 C.F.R. § 301.6621-1 and ask that prejudgment interest be awarded based on the one-year rate for Treasury bills. Defendants' request is tantamount to an improper motion for reconsideration of the prejudgment interest ruling: Defendants never raised any argument about calculating prejudgment interest during the trial, in their post-trial briefing, or in their proposed findings of fact and conclusions of law. It is also meritless. *Teo* affirmed the use of the IRS underpayment rate as reasonable and within the district court's discretion. *Teo*, 746 F.3d. at 110. By contrast, the Treasury bill rate "is the rate at which one lends money to the government rather than borrows money from it. That advantageous rate would seem highly

inappropriate in the circumstances here, where defendants have had the use of the money." *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1476-77 (2d Cir. 1996) (affirming district court order applying IRS rates and rejecting defendant's argument for using Treasury bill rates). That the FTC has revised its calculation in accord with the Court's rulings provides no basis to revisit the ruling itself that the IRS underpayment rate applies.

The FTC respectfully requests that the Court adhere to its decision to award prejudgment interest at the IRS rates and enter the FTC's requested amount of prejudgment interest of $72,085,171.

II. Defendants should not be permitted to delay the distribution of funds or offset the litigated judgment in this case with potential settlements or judgments in future actions

The FTC's proposed form of judgment provides that the FTC will develop a plan for equitable distribution of the judgment to consumers and other purchasers injured by the AbbVie Defendants and Besins's anticompetitive conduct in this case. (*See* Ex. A at III.C.3.) The FTC has extensive expertise and experience in structuring redress plans and administering the equitable and prompt distribution of redress funds to consumers, purchasers, and businesses harmed by illegal practices in complex cases across a wide range of industries, including healthcare, dietary supplements, telecommunications, and home-based business services.[2] The FTC has an entire department—the "Office of Claims and Refunds"—that supports the FTC's

[2] *See, e.g.*, Dkt. 9 at 14-15, *FTC v. Cardinal Health, Inc.*, No. 1:15-cv-03031 (S.D.N.Y. Apr. 23, 2015) (ordering the distribution of over $26 million in relief for antitrust injury in case involving monopolization of healthcare markets that resulted in hospitals and clinics paying inflated prices for drugs); Press Release, FTC, FTC Refunds $88 million to AT&T Customers (Feb. 2017), *available at* https://www.ftc.gov/enforcement/cases-proceedings/refunds/att-refunds (distributing $88 million to consumers in *FTC v. AT&T Mobility, LLC*); Press Release, FTC, Herbalife Refunds (Jan. 2017), *available at* https://www.ftc.gov/enforcement/cases-proceedings/refunds/herbalife-refunds (distributing over $199 million to consumers in *FTC v. Herbalife International of America, Inc.*); Press Release, FTC, The Tax Club Refunds (Dec. 2016), *available at* https://www.ftc.gov/enforcement/cases-proceedings/refunds/tax-club-refunds (distributing over $18 million to consumers in *FTC v. The Tax Club, Inc.*).

mission of returning money to consumers and businesses harmed by illegal practices and has three outside redress administration firms under contract that can assist in this process. Indeed, in fiscal year 2017 alone, the FTC administered at least 28 different redress programs distributing money paid by defendants in FTC cases through the mailing of more than 6.28 million checks to affected consumers or businesses for refunds totaling over $391 million.

The FTC's proposed provision pertaining to the distribution and administration of the redress fund is consistent with this agency's statutory mission of protecting consumers (*see* 15 U.S.C. § 45) and provides the most expeditious route to get money back in the hands of those injured by the AbbVie Defendants and Besins's anticompetitive conduct. Similar provisions routinely have been adopted in orders entered by courts in this district and across the country in FTC cases.[3]

The procedures Defendants proposed to the FTC during the meet and confer process would needlessly condition the distribution of the redress fund to injured purchasers on the final resolution of nascent and yet to be filed lawsuits. This could take many years. Defendants' proposal also would repurpose the judgment in this case into a general legal reserve that Defendants could use to offset future judgments or settlements of unspecified claims filed in

[3] *See, e.g.*, Dkt. 153 at 6-7, *FTC v. Click4Support, LLC*, No. 15-5777 (E.D. Pa. Feb. 6, 2017) ("All money paid to Plaintiffs pursuant to this Order may be deposited into a fund administered by the FTC or its designee on behalf of Plaintiffs to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund."); Dkt. 1057 at 30, *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536 (D. Nev. Sept. 30, 2016) (litigated $1.3 billion judgment for violation of Section 5 of the FTC Act and ordering "[a]ll money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund"); Dkt. 9 at 14-15, *FTC v. Cardinal Health, Inc.*, No. 1:15-cv.03031 (S.D.N.Y. Apr. 23, 2015) ("All funds paid pursuant to this Final Order shall be deposited into a fund administered by the Plaintiff, or its agent, to be used for equitable relief . . . Defendant Cardinal shall have no right to contest the manner of distribution chosen by the Plaintiff."); Dkt. 2 at 8, *FTC v. Gateway Funding Diversified Mortgage Servs., L.P.*, No. 2:08-cv-05805 (E.D. Pa. Dec. 17, 2008) ("The FTC shall have sole discretion in choosing an independent administrator to administer any redress program, and in determining which borrowers are eligible for redress as well as the amounts to be paid.").

connection with the Perrigo and Teva NDAs. This potentially could reduce the funds available for consumers injured by the specific misconduct addressed by the Court in this case.

Defendants' proposal to use the judgment in this case to fund future settlements appears to be copied from the settlement entered in *FTC v. Cephalon*, a reverse payment case that the FTC litigated in this District several years ago. *See* Stipulated Order for Permanent Injunction & Equitable Monetary Relief (ECF No. 405), *FTC v. Cephalon, Inc.*, No. 2:08-cv-02141-MSG (E.D. Pa. June 17, 2015) (the "*Cephalon* Settlement"). The provisions of the *Cephalon* Settlement reflect the circumstances of that case and are inapposite here for at least three reasons. First, the *Cephalon* Settlement resolved claims before trial; here, the FTC seeks entry of judgment following a trial and the Court's finding of liability against Defendants. Second, the FTC's Cephalon case had proceeded alongside several private cases for more than seven years before the FTC settled. Here, the FTC proceeded alone, and the only private action was filed after the Court entered its Findings of Fact and Conclusions of Law. *See* Complaint (ECF No. 1), *Value Drug Co. v. AbbVie Inc.*, No. 2:18-cv-2804-HB (E.D. Pa. filed July 2, 2018). Third, the *Cephalon* Settlement was entered into after at least two private actions had already settled. Here, the only private action alleging the same claims as the FTC was filed two weeks ago. The *Cephalon* Settlement has no bearing on the entry of judgment in this case.

Disbursement of funds in this action should not be conditioned on resolution of a recently filed class action lawsuit or other future lawsuits. Basic principles of equity, fairness, and timeliness dictate that Defendants' proposed procedures for the administration and distribution of the judgment should be rejected.

III. The judgment does not need to include any language regarding a temporary stay

The FTC's position is that Defendants' proposed language regarding a temporary stay is unnecessary. The FTC's proposed form of judgment provides Defendants sufficient time to file a

motion for approval of a bond and stay pending appeal pursuant to Rule 62 before execution of the equitable monetary relief award in the judgment. (*See* Ex. A at III.C.1 and III.C.2 (providing 14 days before payment is required).)

Dated: July 13, 2018

Respectfully submitted,

/s/ Patricia M. McDermott
Patricia M. McDermott
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2569
pmcdermott@ftc.gov

Counsel for Plaintiff
Federal Trade Commission

CERTIFICATE OF SERVICE

I certify that, on July 13, 2018, the foregoing document and accompanying materials were filed with the United States District Court for the Eastern District of Pennsylvania using the ECF system. The document is available for viewing and downloading.

/s/ Peter J. Taylor