No. 18-____

IN THE

Supreme Court of the United States

GLAXOSMITHKLINE LLC,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state sovereign immunity bars a federal court from binding a State to a Rule 23 class settlement as an absent class member plaintiff based on the State's failure to opt out of the class.

PARTIES TO THE PROCEEDING

Petitioner GlaxoSmithKline LLC was the defendant in the district court and the appellant in the Third Circuit.

Respondent State of Louisiana was the respondent in the district court and the appellee in the Third Circuit.

CORPORATE DISCLOSURE STATEMENT

GlaxoSmithKline plc, a publicly traded company, is the ultimate parent corporation, through several levels of wholly owned subsidiaries, of Petitioner GlaxoSmithKline LLC (f/k/a SmithKline Beecham Corporation). No publicly held company owns ten percent or more of the stock of GlaxoSmithKline plc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 879 F.3d 61 (3d Cir. 2017). App. 1a. The district court's opinion is unreported and is available at 2015 WL 9273274. App. 21a.

JURISDICTION

The Third Circuit entered judgment on December 22, 2017. App. 1a. The court denied rehearing on February 7, 2018. App. 60a-61a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

STATEMENT

This case presents an exceptionally important question at the intersection of state sovereign immunity and class action litigation. Since long before the Founding, sovereign immunity has been a shield, never a sword. This Court, the Framers, and our English forebears all understood that sovereign immunity protects sovereigns from lawsuits brought against them. The Eleventh Amendment reflects that understanding in its text: federal jurisdiction does not extend to "any suit in law or equity, commenced or prosecuted against" a State. U.S. Const. amend. XI. By contrast, States have not been permitted to invoke sovereign immunity when they are aligned as plaintiffs, *i.e.*,

when they face no claims and risk no adverse judgment.

But in the decision below, the Third Circuit turned sovereign immunity on its head. The court held that the Eleventh Amendment applies to States in their capacity as absent class member plaintiffs, even though no claim of any sort was or could have been asserted against them. As a consequence, the Third Circuit held that a federal district court was powerless to prevent the State of Louisiana from reasserting antitrust claims against petitioner GlaxoSmithKline that were released in an earlier class settlement expressly including States as class members.

The decision below flouts centuries of this Court's sovereign immunity precedents and joins the short side of a circuit split. Equally bad, the decision's rationale—that absent class member plaintiffs are entitled to the same constitutional protections as defendants—runs headlong into this Court's landmark decision approving the use of opt-out class actions, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Opt-out class actions—a cornerstone of modern American litigation—would be categorically unconstitutional if the decision below were correct and every absent class member were entitled to the constitutional protections due defendants. The Third Circuit reasoned that a class representative's motion to approve a class settlement is a lawsuit brought by the class representative against absent class members, because approval of the settlement precludes the class members from reasserting released claims. To recite the theory is to condemn it.

Absent this Court's intervention, the decision below threatens a sea change in class action litiga-

tion. States are major commercial actors. They buy almost everything, from prescription drugs to body armor, from securities to natural gas, from paper clips to steel and concrete. And when plaintiffs settle class actions involving these products and others, States are regularly included as absent class members in their capacity as commercial purchasers. By holding that sovereign immunity deprives federal courts of the power to enforce class action settlements against States in their role as plaintiffs, the Third Circuit created a massive escape hatch for States alone that would upend countless existing class settlement agreements, foster gamesmanship by class action plaintiffs and by States, and frustrate future attempts to settle class actions. The decision leaves all 50 States free to bring new lawsuits asserting the same settled claims and seeking more money. And it will make future class settlements more costly, less valuable for plaintiffs and defendants alike, and ultimately less likely to occur in the first place.

The Third Circuit's misreading of this Court's sovereign immunity and class action precedents was extreme. Only this Court can correct it. The Court should grant review to reaffirm the foundational boundary of state sovereign immunity and to preserve the ability of litigants to settle class actions.

A. Factual Background

On July 14, 2008, an Alabama welfare benefit plan filed a class complaint in the U.S. District Court for the Eastern District of Pennsylvania, alleging that GSK—the manufacturer of the prescription drug Flonase—violated antitrust laws by impermissibly seeking to delay FDA approval of a competitor's generic equivalent to Flonase. The plan

sought money damages on behalf of itself and a class of indirect purchasers of Flonase or its generic equivalent, and sought class certification under Federal Rule of Civil Procedure 23(b)(3).

In 2013, after years of litigation, the parties settled on a classwide basis. The settlement had standard terms: in exchange for GSK's payment of tens of millions of dollars, class members relinquished their claims, agreed not to pursue those claims further, and authorized the district court to enforce the settlement, including by enjoining any future suit asserting released claims. App. 50a-58a.

The settlement class included States in their role as indirect purchasers of Flonase. The settlement defined the class to include anyone who purchased and/or paid for Flonase nasal spray indirectly from GSK (or any of its predecessors or affiliates) for purposes other than for resale. *See* App. 45a-46a. Eliminating any doubt, the class definition included "State governments and their agencies and departments … to the extent they purchased … [Flonase or its generic equivalents] for their employees or others covered by a government employee health plan." App. 30a, 46a.

Absent class members were notified of the class settlement pursuant to a plan approved by the district court. The plan included both publication notice and individual notice to payors, including to Humana, which administered Louisiana's health insurance plan. *See* COA J.A. 26, 311; COA S.A. 61. Louisiana received notice of the class settlement and its terms under the Class Action Fairness Act, 28 U.S.C. § 1715(b), including a copy of the class complaint, the individual class notice, and the proposed class settlement agreement itself, including

the class definition. App. 24a. The State did not opt out of the settlement class. App. 24a.

The district court approved the class settlement in June 2013. The court found that the settlement was "in all respects, fair, reasonable, and adequate, and in the best interests of the Settlement Class," and that the notice to absent class members satisfied due process and Rule 23. J.A. 26, 28. Upon the settlement agreement's effective date, all class members who did not opt out, including absent class members, "released and forever discharged" their antitrust claims relating to Flonase. App. 52a. The district court's final approval order stated that "each Settlement Class member shall be permanently barred and enjoined from asserting any Released Claims." App. 55a. The district court retained "exclusive and continuing jurisdiction" over disputes related to the settlement. App. 51a.

B. Procedural History

Almost eighteen months later, Louisiana's Attorney General filed a new, state-law antitrust suit against GSK in Louisiana state court. The Attorney General's complaint copied verbatim large portions of the indirect purchasers' earlier class-action complaint.

Relying on *Ex parte Young*, 209 U.S. 123 (1908), GSK moved the federal district court that approved the class settlement agreement to enforce the agreement by enjoining the Louisiana Attorney General's state lawsuit. The district court denied the request. While recognizing that States plainly fell within the settlement class, App. 30a, the court held that the Eleventh Amendment prevents States from being made absent class member plaintiffs without their express consent, App. 30a-32a.

The Third Circuit affirmed. It rejected GSK's argument that sovereign immunity protects States only in their capacity as defendants, rather than plaintiffs, and that Louisiana was an absent class member *plaintiff* in the earlier class action. The court concluded that when the class representatives moved for approval of the settlement, they were suing the absent class members whom they represented, including Louisiana, and thereby transformed the State into a defendant. In particular, the court reasoned that, because the settlement agreement contains an injunction prohibiting class members from reasserting released claims, the motion to approve the settlement had been a "suit" by "private parties" against the State seeking an "equitable remedy." App. 9a-10a. As a result, the Third Circuit held that, under *Missouri v. Fiske,* 290 U.S. 18 (1933), the district court lacked jurisdiction in 2013 to approve the settlement as to the State. App. 8a-14a. The Third Circuit further held that Louisiana had not waived its purported sovereign immunity because, although the State failed to opt out of the settlement class, it had never opted in. App. 14a-17a.[1]

The court denied rehearing en banc. App. 60a.

[1] While litigating its motion to enforce the settlement, GSK sought to determine whether Louisiana had ever submitted a claim or accepted proceeds from the indirect-purchaser settlement fund. After the district court denied GSK's motion, GSK learned that Humana (which administers Louisiana's employee health insurance plans) might have made a claim and received settlement proceeds on Louisiana's behalf. GSK moved to reopen the judgment under Federal Rule of Civil Procedure 60(b). The district court denied GSK's motion, App. 36a-41a, and the Third Circuit affirmed, App. 17a-18a. GSK does not seek review of this aspect of the decision below.

REASONS FOR GRANTING THE PETITION

I. The Question Whether States May Be Bound by Class Action Settlements Is of Enormous and Recurring Significance

It is axiomatic that private class members must opt *out* of a Rule 23(b)(3) class to avoid being bound by a class settlement or class judgment. Here, there is no dispute that the settlement satisfied all the requirements of Rule 23, including the requirement to notify absent class members. That alone should dispose of this case. But the decision below changed this basic rule for States alone, holding that sovereign immunity requires States to affirmatively opt *in* for any class settlement to be enforceable against them. The Third Circuit's decision categorically excludes States from every class-action settlement to which they have not expressly consented and renders federal courts powerless to exercise continuing jurisdiction over court-approved settlement agreements encompassing States. In so holding, the decision below resurrects claims that class-action defendants long believed settled, inhibits future class-action settlements where the class definition encompasses States, and gives States unfair advantages over private class members who *are* bound by the settlement agreement. Absent this Court's intervention, the decision below will fundamentally reshape class-action practice.

1. The question presented is of great and recurring significance. States frequently become absent plaintiff class members because of their ordinary participation in the market. States buy prescription medications for their employees, low-income residents, or their inmate populations. *See, e.g.*, Ellen Schneiter, *States and Prescription Drugs:*

An Overview of State Programs to Rein in Costs, National Academy for State Health Policy (April 2016), https://goo.gl/Mw1WPk. States are major consumers of natural gas, coal, and other utilities. *See Maryland v. Louisiana*, 451 U.S. 725, 736 (1981); *Wyoming v. Oklahoma*, 502 U.S. 437, 459 (1992). State governments buy body armor for their police, securities for their pension funds, construction materials for their buildings, and more. Because of these purchases, States frequently become absent class members plaintiffs in product liability, securities, and antitrust suits. [2]

In the Third Circuit alone, States were absent class members in at least 19 certified classes in the last 5 years. For example, in *Mylan Pharmaceuticals Inc. v. Warner Chilcott Public Limited Co.*, No. 12-3824, 2015 WL 12791433 (E.D. Pa. Jan. 28, 2015), indirect purchasers of a branded medication brought antitrust claims for treble damages against brand-name pharmaceutical companies, alleging that the defendants had conspired to thwart generic competition. The district court certified a settlement class that excluded "all federal, state and municipal government entities, *except for government funded employee benefit plans*." *Id.* at *2 (emphasis added).

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[2] *See, e.g.*, *Southern States Police Benevolent Ass'n v. First Choice Armor & Equip.*, 241 F.R.D. 85, 93 (D. Mass. 2007) (certifying class action including state and local law enforcement entities that purchased allegedly defective body armor); *In re Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013) (certification of class action brought by Connecticut Retirement Plans and Trust Funds on behalf of purchasers of Amgen stock); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 456-57 (E.D. Pa. 1968) (certifying class including state governments that purchased certain pipe and tubing).

States likewise were absent class members in the $215 million settlement in *In re Merck & Co., Inc. Vytorin/Zetia Securities Litigation*—a federal securities action alleging that Merck made false statements regarding two of its products, artificially inflating its stock price. The settlement class included "all persons and entities" that purchased, acquired, or sold Merck stock or options and suffered damages, with no exclusion for state entities.[3] Indeed, the named plaintiffs in that action included several public pension funds.[4] Similarly, the class in *Balon v. Agria Corp* specifically included "government" agencies and subdivisions that purchased the defendant's depositary shares during the covered period.[5]

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[3] Stipulation and Agreement of Settlement, *In re Merck & Co.*, No. 08-cv-02177 (D.N.J. June 4, 2013), ECF No. 328-1.

[4] Second Am. Consolid. Compl., *In re Merck & Co.*, No. 08-cv-02177 (D.N.J. Feb. 9, 2012), ECF No. 208.

[5] Stipulation and Agreement of Settlement, *Balon v. Agria Corp.*, No. 16-cv-8376 (D.N.J. June 30, 2017), ECF No. 25-1 at 9, 14; *see also, e.g.*, *In re Imprelis Herbicide Marketing, Sales Practices and Products Liability Litigation,* 296 F.R.D. 351 (E.D. Pa. 2013) ("all persons or entities" that purchased and applied a particular herbicide, with no exclusion for state governmental agencies or entities); Settlement Agreement, *In re Wellbutrin XL Antitrust Litig.*, No. 2:08-cv-2433 (E.D. Pa. Feb. 15, 2013), ECF No. 454-1 (all persons or entities who purchased branded or generic Wellbutrin); Agreement, Decl. of Bruce D. Greenberg, Ex. 1, at ¶ I(R), *Vitale v. US Gas and Electric*, 2:14-cv-4464 (D.N.J. May 25, 2017) (persons or entities that entered into gas supply plans with defendants), ECF No. 53-21; Settlement Agreement, *Elk Cross Timbers Decking Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 15-cv-00018 (D.N.J. Sept. 16, 2016) (all purchasers of certain decking), ECF No. 108-1; Agreement of Compromise and Settlement, Decl. of Michael McShane, Ex. A, *In re CertainTeed Fiber Cement Siding Litig.*, No. 11-md-2270 (E.D. Pa. Sept. 30, 2013) (all individuals and

All class settlements include terms releasing class members' claims, barring them from further

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entities that owned buildings with particular siding), ECF No. 25-2; Stipulation of Class Action Settlement ¶¶ 1.21, 1.29, *Yencha v. Zeobit, LLC*, 2:14-cv-578 (W.D. Penn. March 6, 2015) (all persons, defined to include all business and legal entities, who purchased MacKeeper security software before a certain date), ECF No. 26-1, Ex. 1; Stipulation and Agreement of Settlement, *Andavarapu v. iBio, Inc.*, No. 14-cv-1343 (D. Del. Dec. 18, 2015) (all persons, defined to include government agencies who purchased iBio Securities), ECF No. 54; Stipulation of Settlement, *Robb v. Education Management Corp.*, No. 14-cv-1287 (W.D. Penn. Sept. 17, 2015) (similar with respect to EDMC securities), ECF No. 45; Settlement Agreement, *Tuttle v. Agile Sky Alliance Fund, LP*, No. 13-cv-802 (D. Del. June 21, 2013) (all persons who own or have owned interests in the limited partnerships, with persons defined to include governments or agencies thereof), ECF No. 8-1; Stipulation and Agreement of Settlement, *In re PTC Therapeutics, Inc. Securities Litig.*, No. 16-cv-1224 (D.N.J. Mar. 2, 2018) (all persons and entities that purchased or acquired publicly traded common stock of PTC, with no exclusion for government entities), ECF No. 84-3; Stipulation and Agreement of Settlement, *San Antonio Fire & Police Pension Fund v. Dole Food Co.*, 15-cv-1140 (D. Del. Mar. 10, 2017) (similar with respect to Dole common stock), ECF No. 84-1; Stipulation and Agreement of Settlement, *Zacharia v. Straight Path Communications, Inc.*, No. 15-cv-8051 (D.N.J. 2015) (similar with respect to Straight Path common stock), ECF No. 67; *Sun v. Han*, No. 15-cv-703 (D.N.J. Feb. 24, 2017) (similar with respect to Telestone common stock), ECF No. 64-3; Stipulation of Settlement, *Yedlowski v. Roka Bioscience, Inc.*, No. 14-cv-8020 (D.N.J. May 20, 2016) (similar with respect to Roka securities), ECF No. 45; Stipulation and Agreement of Settlement, *In re Amicus Therapeutics Inc. Securities Litig.*, No. 15-cv-7350 (D.N.J. Apr. 14, 2017) (any and all record and beneficial holders of Amicus common stock purchased or acquired during a certain period), ECF No. 59-3; Stipulation of Settlement, *Elliott v. ESB Financial, Inc.*, No. 14-cv-1689 (W.D. Penn. Apr. 28, 2015) (similar with respect to ESB common shares), ECF No. 18.

pursuing the claims, and conferring continuing jurisdiction on the district court to enforce these restrictions.[6] Many settlements, including those that encompass States in the class definition, go further and request that the court "permanently … enjoin" future litigation arising from the same claims.[7]

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[6] *See, e.g.*, *Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-3824, 2015 WL 12791433, at *2, 8 (E.D. Pa. Jan. 28, 2015) (noting the settlement's release of claims and covenant not to sue, and retaining exclusive jurisdiction over any dispute arising out of or relating to the settlement agreement); *In re Imprelis Herbicide Mktg., Sales Practices & Prod. Liab. Litig.,* 296 F.R.D. 351 (E.D. Pa. 2013) (containing release and covenant not to sue, and providing that the agreement may be pleaded as a defense); Settlement Agreement, *In re Wellbutrin XL Antitrust Litig.*, *supra* (containing release of claims and providing for exclusive jurisdiction of the district court over disputes arising out of the settlement agreement, including disputes in which any provision of the settlement agreement is asserted as a defense).

[7] *E.g.*, Agreement, *Vitale*, *supra*, ¶ 4(a) (the court "shall … permanently bar and enjoin Plaintiffs and Settlement Class Members from bringing, filing, commencing, prosecuting (or further prosecuting), maintaining, intervening in, participating in, assisting in any way, … or receiving any benefits from, any other proceeding" that arises from the released claims); Settlement Agreement, *Elk Cross Timbers Decking*, *supra*, ¶¶ 8.1, 14.2(g) (the settlement "permanently bar[s] and enjoin[s] the Settlement Class Members … from asserting [released] claims directly or indirectly against any Released Party," and provides that the court "shall … enjoin any and all pending or future actions involving settled matters as to persons or entities that have not opted out of the settlement"); Stipulation of Settlement Agreement, *Yencha*, *supra*, ¶ 7.3(g) (final judgment "shall … permanently bar and enjoin all Settlement Class Members who have not been properly excluded from the Settlement Class from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in, any lawsuit or other action in any jurisdiction based on the Release Claims"); Stipulation

2. Absent this Court's review, the decision below will have extraordinary consequences for class-action litigation, both retrospectively and prospectively.

a. Retrospectively, the decision below upends countless settlement agreements, inviting State governments to bring successive litigation asserting claims that defendants believed were laid to rest long ago. The Third Circuit's decision destroys the massive reliance interests of GSK and other class-action defendants. Defendants enter class-action settlement agreements to buy closure. *See* D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 Ga. L. Rev. 475, 483 (2016). "The goal, from the defendant's perspective, is to wrap up all of the claims and resolve the entire litigation in a single transaction—to essentially buy peace." *Id.* That is what GSK thought it accomplished by paying tens of millions of dollars to settle the plaintiffs' antitrust claims, until the decision below radically rewrote the rules.

The decision below strips federal courts of the power to enforce class settlement agreements against States. GSK—and every other past class-action defendant in the Third Circuit in a case where States were absent class members—is now subject to suit by all 50 States in 50 state courts. This point bears repeating. The immediate and direct effect of the decision below is that GSK and the defendants in the 19 class actions identified above are now subject to

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and Agreement of Settlement ¶ 5, *In re Merck & Co., Inc. Vytorin/Zetia Securities Litig.*, No. 08-cv-2177 (D.N.J. June 4, 2013), ECF No. 328-1 (class members "shall forever be barred and enjoined from prosecuting any or all of the Released Plaintiffs' Claims against any of the Defendants or any of the other Defendants' Releasees").

suit in all 50 states. GSK and other defendants will be forced to litigate on a case-by-case basis whether each State is bound by the settlement agreement, with each individual state court to make its own judgment. This is hardly the lasting, global peace that class-action defendants seek in settling class actions. It is an extreme burden that undermines the goals of Rule 23 and the Class Action Fairness Act, the "primary objective" of which is to "ensur[e] Federal court consideration of interstate cases of national importance." *Standard Fire Ins. v. Knowles*, 568 U.S. 588, 595 (2013) (internal quotation marks omitted); *see also Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014) (similar).

The risk to defendants extends far beyond the need to relitigate claims in 50 state courts. States will surely argue that the decision below renders the settlement unenforceable against them in any court. The Third Circuit held that the district court "lacked jurisdiction over the State" in approving the settlement agreement. App. 8a. On this theory, the settlement agreement never bound the States, and hence class-action defendants may not even be able to raise the settlement's preclusive effect in state court. In short, States that declined to opt out of a settlement are now free to pursue the same settled claims to recover more money in subsequent litigation against the same defendants. In countless past class action settlements, defendants have agreed to pay specific amounts based on the understanding that States were members of the settlement class and that their claims were being resolved at that time. In one fell swoop, the Third Circuit's decision deprives these defendants of the benefit of their bargain. They paid to resolve all

claims, but did not obtain an effective, enforceable release.

b. Prospectively, the consequences are equally immediate and even more dramatic. The decision below will reshape parties' incentives and risks, and impede settlement of class-action litigation. "[A] settlement is ordinarily impractical unless it covers all claims, actual and potential, state and federal, arising out of the transaction or conduct at issue." Joseph M. McLaughlin, 2 McLaughlin on Class Actions: Law and Practice § 6:29 (14th ed. 2017). "In a class action setting, defendants seek and pay for *global* peace—i.e., the resolution of as many claims as possible." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (en banc) (emphasis added) (citation omitted); *see also In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 337 (2d Cir. 1985).

But the decision below makes global peace impractical, if not impossible. Defendants cannot resolve claims on a class-wide basis if they nonetheless face successive lawsuits by all 50 States. "The existence of multiple and harassing actions by the states could only serve to frustrate the district court's efforts to craft a settlement in the multidistrict litigation before it." *In re Baldwin-United Corp.*, 770 F.2d at 337.

Requiring class-action defendants to obtain affirmative consent from 50 different States is not a viable prospect. Requiring States to opt-in fundamentally defeats the purpose of the opt-out class mechanism under Rule 23(b)(3). The parties would be left in limbo while each State decided whether to consent to class membership and attempted to negotiate side agreements. Absent a

definitive answer from each State, the settlement's status would remain uncertain, preventing finality and closure.

At the same time, by allowing States alone to avoid the binding consequences of a class-action settlement, the decision below invites destabilizing and unfair gamesmanship. Absent this Court's intervention, in the Third Circuit, all 50 States now have the option to stand silent during the opt-out period, and then decide later whether to accept the settlement's terms or to pursue their own litigation to obtain a greater recovery against the defendant in the State's own court system. Class-action defendants will never know whether a given settlement amount is a financially reasonable exchange or just the tip of the iceberg. Because defendants trying to settle class-action claims will have to weigh the risk that they will face future claims by States that neither opt out nor affirmatively consent, class-action settlements will be less valuable to defendants. Defendants will pay less for partial peace than they would for full peace. Ultimately, the cost of the uncertainty will fall on *private* class plaintiffs, who will share smaller settlements and who must still affirmatively opt out to pursue individual claims. The Third Circuit's decision creates a two-tiered class-action system where unsophisticated private individuals receive the lowest compensation.

3. All of these consequences amplify the concerns that this Court has long expressed about class actions. Class actions entail an inherent "risk of in terrorem settlements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (internal quotation marks omitted). "Faced with even a small chance of a devastating loss, defendants will be

pressured into settling questionable claims." *Id.* Moreover, defendants have "good reason" to want to avoid becoming "embroil[ed] … in protracted and costly litigation," particularly in class actions involving an aggregation of an enormous number of claims. *Kohen v. Pa. Inv. Mgmt. Co.*, 571 F.3d 672, 678 (7th Cir. 2009).

But under the decision below, even succumbing to the pressure to settle does not guarantee relief from the burdens of ongoing litigation. In short, not only do defendants face enormous pressure to settle due to the *in terrorem* effect of class litigation, they now cannot even buy peace when they do.

II. The Third Circuit's Flawed Sovereign Immunity Analysis Contravenes Centuries of Precedent From This Court and Deepens a Circuit Split

The decision below destabilizes not only the operation of class actions in this country, but also basic premises of sovereign immunity that have stood since the Founding (and indeed, since Medieval England). The Third Circuit's holding, shocking in its breadth and implications, conflicts with two hundred years of sovereign immunity precedent from this Court, strikes at the theoretical foundations of this Court's class-action jurisprudence, and intensifies a circuit split. The Third Circuit's extreme departure from this Court's precedent warrants review.

A. The Decision Below Flouts Two Hundred Years of Sovereign Immunity Precedent

For more than two centuries this Court has drawn a bright line between states-as-plaintiffs and states-as-defendants. In every case where this Court has recognized a State's sovereign immunity, the

State has been a defendant. The Court has adamantly rejected the notion that sovereign immunity applies when States are plaintiffs, and the text of the Eleventh Amendment squarely refutes any such suggestion. The Third Circuit's unprecedented expansion of state sovereign immunity defies centuries of precedent from this Court. It stands in diametric opposition to an unbroken understanding that state sovereign immunity is not a sword, but only a shield.

1. The Constitution never vested States with the power to claim sovereign immunity in their capacity as plaintiffs. At the Founding, the Framers considered it self-evident that state sovereign immunity meant only immunity *from* suits against the State. English law, at the time of the Constitution's ratification, treated sovereign immunity as an entirely defensive doctrine. The King could not be sued, on the fiction that "the King can do no wrong." *See* 3 William Blackstone, Commentaries *254. But the King could sue on his own behalf to redress civil and criminal offenses against him (indeed, the English constitution required that he do so).[8] When the King sued, he could not claim immunity.[9] Rather, when the King was a plaintiff, he pursued common-law actions in

[8] *See* William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 80 (2d ed. 1914); Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 St. Louis U. L.J. 393, 426-27 (2005); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 2-3 (1972).

[9] *See* Seidman, *supra*, at 432-34.

the courts in much the same way any other plaintiff would. Blackstone, 3 Commentaries *257.

The scope of state sovereign immunity in our Constitution was "derived from the laws and practices of our English ancestors." *United States v. Lee*, 106 U.S. 196, 205 (1882); *see also Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753-55 (2002). Then-future Chief Justice John Marshall accordingly explained that Article III, § 2 of the Constitution—which gives this Court original jurisdiction over cases "in which a State shall be Party"—could only provide a federal forum for States if they, as plaintiffs, sued "to recover claims of individuals residing in other states." 3 Debates on the Federal Constitution 555 (Jonathan Elliot 2d ed., 1854) (Virginia ratifying convention). That construction was "necessary … and cannot be avoided," Marshall explained, because "I see a difficulty in making a state defendant, which does not prevent its being plaintiff." *Id.* at 556.

The traditional understanding of sovereign immunity is reflected in the history and text of the Eleventh Amendment, which protects States from suits commenced or prosecuted against them, not by them. The Eleventh Amendment overturned this Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), which held that federal diversity jurisdiction extended to suits by private plaintiffs against nonconsenting States. The text of the Eleventh Amendment thus divests the Federal courts of jurisdiction over "any suit in law or equity, commenced or prosecuted *against* one of the United States by Citizens of another State." U.S. Const. amend. XI (emphasis added).

The Constitution thereby enshrined the traditional conception of sovereign immunity, and with it the proposition that the sovereign may not claim sovereign immunity when it acts as a plaintiff.

2. The rule is founded on considerations of fair play as well as on history. The rule "rests upon the [Eleventh] Amendment's presumed recognition of the judicial need to avoid [the] inconsistency, anomaly, and unfairness" that would attend permitting States to raise sovereign immunity in cases where they are not defendants. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga*, 535 U.S. 613, 620 (2002). Permitting plaintiff States to claim sovereign immunity would allow them to make tactical use of that immunity to achieve litigation advantages. *See id*. They could, for instance, maintain a suit until the chance of recovery appeared remote or unlikely, then invoke sovereign immunity to escape the binding effect of an adverse judgment.

3. For more than two hundred years this Court has hewed to the understanding that States cannot raise sovereign immunity as a defense unless they are defendants in the lawsuit. As early as 1809, this Court recognized that state sovereign immunity "exempts states from being sued in [federal] courts by individuals." *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139 (1809). But it has no application when a state is aligned as a plaintiff: "The right of a state to assert, as plaintiff, any interest it may have in a subject … in one of the courts of the United States, is not affected by th[e] [Eleventh] amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested." *Id.* And again: "The amendment simply provides, that no suit shall be commenced or prosecuted against a state." *Id.* Once more: "The

state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant." *Id.* This Court flatly held that, because the "suit was not instituted against the state," there was no sovereign immunity, even though adjudicating the suit would affect the state's claim to title in property. *Id.* at 139-40.

In *Cohens v. Virginia*, 19 U.S. 264, 375 (1821), Virginia sought to claim immunity against a writ of error filed in this Court by a criminal defendant. *Id.* at 375-76. Virginia argued that, because it was the "defendant in error," it could not be compelled to submit to the jurisdiction of a federal court. *See id.* This Court rejected that argument because Virginia was the plaintiff in the underlying suit. *See id.* at 407-09. As Chief Justice Marshall explained, sovereign immunity "extend[s] to suits commenced or prosecuted by individuals, but not to those brought by States." *Id.* at 407. "[I]t [i]s intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union." *Id.* *Cohens* explained that, "[b]y a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it." *Id.* at 408.

In case after case in the two centuries since *Cohens* and *Peters*, this Court has continually echoed their basic holding: States can only claim sovereign immunity when they are defendants in a lawsuit. *See, e.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011) (describing state sovereign immunity as "the privilege of the sovereign not to be

sued without its consent"); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) (sovereign immunity is "immunity *from* private suits") (emphasis added); *Lapides*, 535 U.S. at 616 (similar); *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (similar).

That a State may be *bound* by the consequences of a federal judgment, this Court has held, does not transform the State into a defendant and thus does not trigger the application of sovereign immunity. As recently as 2004, in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), this Court again reaffirmed that non-defendant States cannot claim sovereign immunity against a federal court's judgment. *Hood* held that States are bound by a federal bankruptcy court's discharge of a debtor's debts—including any debts owed to the State as a creditor—notwithstanding the Eleventh Amendment. *Id.* at 448. "Under our longstanding precedent," this Court explained, "States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors." *Id.* That is true even if the order renders "individualized determinations of States' interests." *Id.* at 450. Sovereign immunity is no barrier because "[a] debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts." *Id.* Put another way, because the State is not a defendant in a discharge proceeding, the State cannot claim sovereign immunity, notwithstanding that the discharge disposes of the absent State's affirmative claims against the debtor.

4. The Third Circuit's decision radically departs from this Court's longstanding and uniform precedents and from the foundational premise of sovereign immunity. The decision below held that sovereign immunity deprives federal courts of jurisdiction to bind a State to a class settlement, even though the State is aligned as an absent class plaintiff, and even though no claim of any kind is or can be asserted against a State in such a proceeding. This is not some minor departure from this Court's precedent, but a fundamental rejection of the very core principle of state sovereign immunity reflected in this Court's decisions dating back to 1809 and in English common law before that. The court below did not err merely with respect to some peripheral issue. It committed a category error.

In light of the significance of state sovereign immunity under this Court's jurisprudence and to the jurisdiction of the federal courts, this Court has regularly granted certiorari to review important decisions restricting or expanding sovereign immunity, and it should do so here. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 712 (1999); *Howlett v. Rose*, 496 U.S. 356, 360 (1990); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976).

B. The Decision Below Directly Contravenes this Court's Class Action Precedent

In addition to defying this Court's longstanding sovereign immunity precedents, the decision below flouts this Court's core decision approving opt-out class actions. The entire edifice of opt-out class actions rests on the notion that absent class members are *plaintiffs*, not defendants, and do not receive the protections to which defendants are entitled. The Third Circuit's opinion, however,

treated a plaintiff class member (Louisiana) as a defendant for purposes of a motion filed *on its own behalf* by its own class representatives. App. 4a-5a. In other words, the Third Circuit held that the class representatives were *suing* the absent class members by seeking approval of a settlement on their behalf. App. 9a-10a. That is not how class actions work, nor could they work in such a manner. Class actions would be seven ways unconstitutional if class representatives could be adverse to class members some-of-the-time.

There is no ambiguity here. This Court squarely, directly, and unequivocally held in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that unnamed plaintiff class members are plaintiffs. Astonishingly, the Third Circuit did not even cite *Shutts*, let alone discuss that obvious and fundamental feature of class actions in concluding that the class representatives' own motion to approve the class settlement somehow constituted a *suit against* absent class members for sovereign immunity purposes.

Shutts held that absent class members—whose claims may be "extinguish[ed] … forever" through settlement or an adverse judgment—are still plaintiffs. *See id.* at 807. In *Shutts*, a class-action defendant argued that a constitutional limitation protecting defendants—that courts cannot exercise personal jurisdiction unless the defendant has sufficient contacts with the forum state or has affirmatively consented to jurisdiction—should apply to absent plaintiff class members. *Id.* at 804-05. This Court disagreed, expressly holding that absent class members fundamentally differ from defendants. *Id.* at 812-14.

"A class-action plaintiff," the Court explained, "is in quite a different posture" than a "defendant." *Id.* at 808. Unlike defendants, absent class members are not "haled anywhere to defend themselves upon pain of a default judgment." *Id.* at 809. They cannot be "forced to respond in damages or to comply with some other form of remedy imposed by the court should [they] lose the suit." *Id.* at 808. "They are almost never subject to counter-claims or cross-claims, or liability for fees or costs." *Id.* at 810. "Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claims which were litigated." *Id.*

Shutts accordingly "reject[ed]" the "contention that the Due Process Clause … requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.'" *Id.* at 812. The Court held that "such a contention … ignores the differences between class-action plaintiffs, on the one hand, and defendants in nonclass civil suits on the other." *Id.*

Shutts should have decided this case. The Third Circuit held that certain absent class members (States) are entitled to a constitutional protection (sovereign immunity) that is available only to defendants, on the theory that those absent class members were defendants. App. 9a-10a. That is exactly the argument that *Shutts* rejected. And *Shutts* also expressly rejected the Third Circuit's ostensible hook for treating absent State class plaintiffs as defendants. The Third Circuit noted that the approval of the class settlement extinguished the State's claims and authorized the federal court to enjoin the State from further pursuing those claims. *See* App. 9a. But *Shutts* held

that absent class members do not require the same constitutional protections due to defendants even though a class action judgment could "extinguish" the absent class member's claims "forever through res judicata." *Id.* at 807.

It is astonishing that the Third Circuit would ignore such an important and closely analogous decision of this Court, especially when GSK extensively briefed the issue to the Third Circuit. *Shutts* is the seminal case explaining the role that absent class members play in modern class-action litigation, and it says that they are plaintiffs, not defendants. That is why opt-out class actions are constitutional. This Court should not allow the Third Circuit's extraordinary departure from *Shutts* to go unreviewed. Such flagrant disregard for a landmark decision of this Court demands intervention.

C. The Decision Below Deepens a Circuit Split

Numerous courts of appeals across an array of contexts have applied the straightforward rule that a State enjoys no sovereign immunity when it is a plaintiff. The decision below bolsters a contrary minority position among the courts of appeals. This Court's review is necessary to prevent further confusion and disruption in the interpretation of federal law.

1. The Ninth, Tenth, and Federal Circuits have all held that when a State is a plaintiff it cannot claim sovereign immunity, and that a plaintiff State is not transformed into a defendant merely because a federal court might enter a judgment concerning the State without its permission.

In *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237 (10th Cir. 2004), the Tenth Circuit rejected a State's argument that

involuntary removal of a lawsuit brought by the State to federal court implicated sovereign immunity. The court explained: "[T]he Eleventh Amendment's abrogation of federal judicial power 'over any suit … commenced or prosecuted against one of the United States' [simply] does not apply to suits commenced or prosecuted *by* a State." *Id.* at 1239, 1240 (ellipsis in original) (emphasis in original).

Similarly, the Federal Circuit refused even to consider whether California waived its immunity in a case where California, as a plaintiff, objected to a change of venue from a California federal district court to an Indiana federal district court. *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564-65 (Fed. Cir. 1997). The Federal Circuit held that, because California was a plaintiff, sovereign immunity did not apply and no waiver question "even arises." *Id.* at 1565. "[T]he Eleventh Amendment applies to suits 'against' a state, not suits by a state." *Id.* at 1564. Although a federal court would be adjudicating California's claims against its will, the case "[did] not involve any claim or counterclaim *against* [California] that places [the State] in the position of a defendant." *Id.* at 1565 (emphasis in original).

In *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004), the Ninth Circuit held that "plaintiff states may not invoke the [Eleventh] Amendment," because this Court's precedent "plainly understands sovereign immunity as protection from *being sued*." *Id.* at 846-48. The court accordingly rejected the notion that a State that had sued in state court could advance a sovereign immunity defense against removal to federal court. *Id.* at 848. The Ninth Circuit held that this Court's history, dating back to the Founding era, "gives little

indication that sovereign immunity was ever intended to protect *plaintiff* states." *Id.* at 847 (emphasis in original).

The Fifth Circuit has also repeatedly observed that, "[o]f course, the eleventh amendment is inapplicable where a state is a plaintiff." *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 24 n.6 (5th Cir. 1980); *see also In re Katrina Canal Breaches*, 524 F.3d 700, 709 (5th Cir. 2008) ("The many cases looking to immunity's purpose and rejecting a strict textual interpretation of immunity have all focused on the importance of protecting states as *defendants*" (emphasis added)).

2. In direct conflict with those decisions, the court below held that sovereign immunity applied even though Louisiana was an absent class member *plaintiff*, and even though no one asserted any claim against Louisiana in the original class action. The court reasoned that, although the State was an absent plaintiff, sovereign immunity protected the State against the class representatives' motion to approve the class settlement, on the theory that the motion was a "suit" against the State seeking an injunction against relitigation of the released claims. *See* App. 10a-12a. The court below relied on and expanded an Eighth Circuit decision holding that the Eleventh Amendment prevented a State from being involuntarily joined as a plaintiff because the State was being forced to prosecute a case at a "time and place dictated by the federal courts." *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505-06 (8th Cir. 1995). Like the decision below, *Thomas* rejected the notion that sovereign immunity "only applies when parties directly assert claims against the state." *Id.* at 506.

This case would have come out differently in the Ninth, Tenth, or Federal Circuits. Each of those decisions involved states-as-plaintiffs in the context of motions to remove or transfer to federal courts. But their reasoning applies with equal force in the class action context. The Federal Circuit, for example, held that sovereign immunity does not apply *unless* the action "involve[s] any claim or counterclaim *against* [the State] that places [the state] in the position of a defendant." *Lilly*, 119 F.3d at 1565. That is the argument that the Eighth Circuit rejected in *Thomas*, and that the Third Circuit rejected in the decision below.

Like the Federal Circuit, the Ninth and Tenth Circuits have held as a categorical matter that States enjoy no sovereign immunity where they are aligned as plaintiffs. The class action "involved only claims asserted by the State and no party sought to interject counterclaims or cross-claims against the State," so Louisiana would be categorically ineligible to invoke sovereign immunity in the Tenth Circuit. *Edmondson*, 359 F.3d at 1240. And Louisiana cannot plausibly claim that it was "being sued" when the district court approved the settlement agreement, *Lockyer*, 375 F.3d at 847 (emphasis omitted), meaning that no sovereign immunity would have applied in the Ninth Circuit either.

3. The Third Circuit held that the Ninth, Tenth, and Federal Circuit cases were distinguishable from the present case because none of them involved private parties who "sought legal or equitable remedies *against* the State." App. 13a (emphasis in original). But the Third Circuit's basis for distinguishing those cases is nonsensical. No one here sued the State either.

The Third Circuit believed that the class representatives' motion for settlement approval was a lawsuit seeking an "equitable remed[y] against [the] State" because the settlement enjoins all class members from reasserting released claims. App. 9a-10a. But every final judgment bars further litigation of the resolved claims, and that bar is always enforceable by a court. The settlement is in this respect no different than any judgment. In the Ninth, Tenth, and Federal Circuits the removal and transfer to federal court brought with it the certainty that the federal court would obtain the power to conclusively adjudicate the State's legal claims against its will, thus precluding the State from reasserting those claims later. Under the Third Circuit's rationale, any time a plaintiff moves for summary judgment, it is seeking an equitable remedy against itself, because entry of a summary judgment would preclude the plaintiff from reasserting the adjudicated claims in a subsequent lawsuit. The Third Circuit's reasoning thus would transform every plaintiff into a defendant.

Indeed, in *Shutts*, this Court rejected exactly the distinction the decision below adopted. This Court explained that the res judicata effect of a judgment in a class action did not transform the absent class members from plaintiffs into defendants. 472 U.S. at 807-09. *Shutts* explained that the preclusive effect of a class judgment did not constitute any "form of remedy" akin to that faced by a defendant, and was not a "judgment *against*" the absent class members. *Id.* at 808 (emphasis in original).

In short, the Third Circuit's decision deepens a sharp and irreconcilable conflict between the Circuits. This Court should grant certiorari to resolve the division.

III. The Decision Below Is Incorrect

As explained above, the Third Circuit's radical conception of state sovereign immunity and the role of absent class member plaintiffs stands in brazen opposition to innumerable precedents from this Court. The holding misconstrues the core premise of sovereign immunity as the Founders understood it and as this Court has applied it for more than two hundred years. *Supra* at pp.16-19.

The Third Circuit's extensive reliance on *Missouri v. Fiske*, 290 U.S. 18 (1933), a case that neither party even cited in the briefing below, was misplaced. Just to recite *Fiske*'s facts is to illustrate its irrelevance. In *Fiske*, the state of Missouri was a defendant in the most traditional sense of that word: someone sued Missouri in federal court, seeking injunctive relief. The claimants filed a "complaint," and the state "moved to dismiss," asserting sovereign immunity. *Id.* at 21. The complaint was "brought by the [plaintiffs] directly against the state of Missouri." *Id.* at 26. Under those circumstances the Court had no difficulty concluding that the case was "unquestionably a 'suit'" against the State. *Id.* at 24-27. *Fiske* confirmed that Eleventh Amendment immunity protects states from "suit[s] commenced by an individual" seeking injunctions as well as money damages. *Id.* at 27. But it did not hold that there is a "suit commenced by an individual" any time a State is subject to the enforcement power of a federal court. *Fiske* certainly did not suggest, much less hold, that a class representative's motion to approve a class settlement agreement constitutes a "suit" against the absent class members merely because it contains provisions for enforcement. Indeed, the Court *expressly* distinguished situations, like this one, where the State was subject to an injunction only

because it was a "party to the litigation which resulted in the decree" that had preclusive effect. *Id.* at 27.

The differences between the cases are terrifically stark. In *Fiske*, Missouri was the defendant. Here, Louisiana was a plaintiff. In *Fiske*, Missouri's opponent sued for the injunction. Here, Louisiana's own class representatives moved for the settlement approval. In *Fiske*, the complaint was clearly and directly adverse to Missouri's interests. Here, the injunction was the product of an agreement and was crafted to further the interests of the plaintiff class. *Fiske* is manifestly inapposite and should have had no bearing on the outcome of this case. There is a reason no party cited *Fiske* in the court below.

Because sovereign immunity did not prevent the court from approving the settlement agreement, Louisiana's express consent to participate in the class action was not needed. It is undisputed that Louisiana received all the notice that Rule 23 and the Due Process Clause require to bind absent class members to an opt-out settlement. The court's sovereign immunity holding was thus outcome determinative. Because that holding was wrong, Louisiana is bound by the settlement like everybody else, and cannot pursue a duplicative lawsuit in state court now.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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July 6, 2018

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 16-1124 & 16-3019

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IN RE: FLONASE ANTITRUST LITIGATION

Smithkline Beecham Corporation, d/b/a
GlaxoSmithKline; n/k/a GlaxoSmithKline LLC,
Including GlaxoSmithKline, PLC,

Appellant

———

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-08-cv-03301)
District Judge: Honorable Anita B. Brody

———

Argued June 7, 2017

Before: CHAGARES, GREENAWAY, JR., and
VANASKIE, *Circuit Judges*.

(Opinion Filed: December 22, 2017)

———

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OPINION

GREENAWAY, JR., *Circuit Judge*.

In this case, SmithKline Beecham Corporation, doing business as GlaxoSmithKline ("GSK"), seeks to enforce a court-approved settlement agreement and enjoin the State of Louisiana, through its Attorney General, from bringing allegedly released claims against GSK in the Louisiana state courts. Louisiana protests this enforcement action on the theory that the Eleventh Amendment to the Constitution of the United States bars its involuntary inclusion in the settlement agreement.

To resolve this dispute, we must answer two questions: First, does a motion for approval of a class action settlement qualify as a suit against a state for

Eleventh Amendment purposes if the requested settlement agreement enjoins a state from suing in a state court? Second, if the Eleventh Amendment does cover this motion for settlement approval, may GSK avoid the Eleventh Amendment's prohibition by showing that Louisiana waived its sovereign immunity? We find that the Eleventh Amendment covers this motion and that GSK may not avoid its bar.

In addition to this claim, GSK asserts that the District Court abused its discretion in denying Rule 60(b) relief from a final judgment. We find this argument unavailing. On these two grounds, we will affirm.

I.

On July 14, 2008, private indirect purchasers of Flonase, a brand-name prescription drug, sued GSK in the United States District Court for the Eastern District of Pennsylvania. They alleged that: (a) GSK had filed sham citizen petitions with the Food and Drug Administration to delay the introduction of a generic version of Flonase, and (b) this delay forced the private indirect purchasers to pay more for Flonase than they would have if the generic version were available. The private indirect purchasers sued on behalf of themselves and a class of other indirect purchasers. For the purpose of the case at bar, two motions matter.

First, in the primary suit, the private indirect purchasers moved for final approval of settlement on April 1, 2013, after the District Court had certified the class, and had approved of the notice to settlement class members. The State of Louisiana, an indirect Flonase purchaser, qualified as a potential class member but did not receive the approved notice.

Instead, it only received a Class Action Fairness Act ("CAFA") Notice. This notice, "serve[d] upon the appropriate State official of each State in which a class member resides," included: (1) "a copy of the complaint," (2) "notice of any scheduled judicial hearing in the class action," (3) "any proposed or final notification to class members," (4) "any proposed . . . class action settlement," and (5) an estimate of the number of class members in each state. 28 U.S.C. § 1715(b) (2012). The notice includes this information because Congress "designed [this notice requirement] to ensure that a responsible state and/or federal official receives information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies." S. Rep. No. 109–14, at 31 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 32. It made clear, however, that state officials "will not be required" to "get involved." *Id.* at 33.

The requested court order "permanently enjoined" all members of the settlement class, including Louisiana, from bringing released claims against GSK, even in Louisiana's state court. Pls.' Mot. Final Approval Settlement and Plan Allocation, Award Att'ys' Fees, Reimbursement Expenses and Incentive Awards Named Pls. at 9-10, *In re Flonase Antitrust Litig.*, No. CV 08-3301, 2015 WL 9273274 (E.D. Pa. Dec. 21, 2015), ECF No. 574 [hereinafter Motion for Final Approval of Settlement Plan]. The proposed settlement agreement, among other things, provided compensation to the plaintiffs and class members, released the plaintiffs' and class members' claims, "reserv[ed] exclusive and continuing jurisdiction over the Settlement and this Settlement Agreement" for the District Court, and gave GSK the power to enforce

the settlement. App. 98–107. On June 19, 2013, the District Court approved the final settlement.

Second, in the ancillary suit, GSK filed a motion to enforce the settlement agreement against the Louisiana Attorney General because, according to GSK, Louisiana violated the settlement agreement. In its motion, GSK argued that "Louisiana did not opt-out of the Settlement Class, and thus is bound by the release and covenant not to sue provisions in the Settlement Agreement and Final Order and Judgment." App. 314. As a result, GSK "respectfully submit[ted] that this Court should enjoin the Louisiana Attorney General from further pursuit of claims that were encompassed by the settlement in this litigation." App. 315.

On December 21, 2015, the District Court for the Eastern District of Pennsylvania denied this request and dismissed the case. It held that the Eleventh Amendment covered this enforcement action because, pursuant to the Eleventh Amendment, "a State retains the autonomy to choose 'not merely whether it may be sued, but where it may be sued.'" App. 12 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)). *See also* App. 14 ("Even though some of Louisiana's claims fall within the Settlement Agreement, I cannot enjoin Louisiana unless the State has waived its sovereign immunity and consented to this Court's jurisdiction."). It then held that "Louisiana's receipt of the CAFA Notice is insufficient to unequivocally demonstrate that the State was aware that it was a class member and voluntarily chose to have its claims resolved by the Settlement Agreement." App. 17.

Shortly before the District Court decided GSK's motion to enjoin Louisiana's state court action, GSK

moved pursuant to Rule 60(b)(2) for Relief from a Judgment or Order because of newly discovered evidence that a third party had allegedly submitted a settlement claim on behalf of Louisiana. On May 31, 2016, the District Court denied this motion. GSK appealed the December 21 and May 31 orders.

II

Because we review the District Court's final decisions, we exercise jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. "Dismissal of an action based upon sovereign immunity is subject to plenary review by this Court." *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 (3d Cir. 1996). "We review the denial of Rule 60(b) relief for an abuse of discretion." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002).

III

The District Court: (a) properly granted Louisiana's Motion to Dismiss, (b) appropriately denied GSK's Motion to Enforce Class Settlement, and (c) did not abuse its discretion in denying GSK's Rule 60(b) motion. As a result, we will affirm.

This case turns on whether the District Court exercised jurisdiction over Louisiana in the primary suit. A private party may bring a suit against a state official to enforce a settlement agreement despite the Eleventh Amendment. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004). To enforce a settlement agreement, a private party must draw upon a federal court's ancillary jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379–80 (1994). "Ancillary jurisdiction may extend to claims having a factual and logical dependence on the primary lawsuit, but that primary lawsuit must contain an independent basis

for federal jurisdiction." *Peacock v. Thomas*, 516 U.S. 349, 355 (1996) (internal quotation marks and citation omitted). As a result, GSK may not draw upon the District Court's powers of ancillary jurisdiction unless the District Court properly exercised jurisdiction over the State in approving the settlement agreement. In approving the settlement agreement, the District Court lacked jurisdiction over the State because the Eleventh Amendment applies to the primary case and because Louisiana did not waive its sovereign immunity in that case.

A.

The Eleventh Amendment applies to the primary suit. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

The Supreme Court has defined a "suit" as "the prosecution, or pursuit, of some claim, demand, or request" and regarded "commenced or prosecuted" as follows: "By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance." *Cohens v. Virginia*, 19 U.S. 264, 407–08 (1821). "[A] suit is *against* the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 102

n. 11 (1984) (internal quotation marks and citation omitted) (emphasis added).

In *Missouri v. Fiske*, the Supreme Court found that the Eleventh Amendment applied to a motion to enjoin a state from suing in its own court. 290 U.S. 18, 26 (1933). The Supreme Court came to this conclusion because the Eleventh Amendment covers claims that seek equitable remedies and because the private party's motion to enjoin the State from suing in its own court qualified as a suit that sought an equitable remedy. *Id.* at 27.

Like the private parties in *Fiske*, the private parties here sought an equitable remedy against a State. In their motion for final approval of settlement, the private indirect purchasers asked the District Court to order that "all members of the Settlement Class[, including Louisiana,] . . . are hereby permanently enjoined" from bringing any of the released claims against GSK "in any state or federal court . . . ." Motion for Final Approval of Settlement Plan at 9–10. Because *Fiske* held that the Eleventh Amendment covers a motion to enjoin a state from suing in its own court and because the motion for final settlement approval sought to enjoin Louisiana from suing in its own court, the Eleventh Amendment covers the motion for final approval of settlement at issue here.

Procedurally, *Fiske* differs from the case at bar in two respects. Neither distinction, however, undermines *Fiske*'s utility or applicability. First, the States played a different role in each claim. In *Fiske*, the private parties sought an injunction against a state that acted as an intervening defendant. 290 U.S. at 23–24. Here, private parties sought an injunction against a state that acted as an absent class member.

This distinction between the States' procedural titles does not make *Fiske* less useful. The Supreme Court has instructed us to focus on the nature of the claim's requested relief, as opposed to the "mere names of the titular parties," *In re New York*, 256 U.S. 490, 500 (1921), and, "in the context of lawsuits against state and federal employees or entities," the Supreme Court has ruled that "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017). To make this decision, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 1290. If we must look beyond "the characterization of the parties in the complaint" and, instead, scrutinize the requested remedy's effects to ensure that it does not infringe upon an unnamed sovereign's immunity, we should surely adopt the same approach here when considering whether a claim implicates the rights of a state acting as an absent class member. *Id.*

Second, the private parties sought equitable relief in different types of motions. In *Fiske*, the private parties filed an "ancillary and supplemental bill of complaint," *Fiske*, 290 U.S. at 24, and requested "the equitable remedy of injunction against the state." *Id.* at 27. Here, the private parties asked for the approval of a settlement agreement in which the state was "hereby permanently enjoined . . . ." Motion for Final Approval of Settlement Plan at 9.

The specific name of the vessel requested to carry the injunction does not distinguish *Fiske* from the case at bar. The Supreme Court has acknowledged a consent decree's hybridity. On the one hand, "[a] consent

decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992). On the other hand, "it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Id.* Because of this ambiguity, the Supreme Court has established a rule to determine whether a settlement agreement carries the force of federal law and has held that a settlement agreement becomes enforceable federal law when it: (a) receives a federal court's approval, (b) "springs from a federal dispute," and (c) "furthers the objectives of federal law." *Hawkins*, 540 U.S. at 438.

As GSK concedes, this settlement agreement "was functionally a consent decree" that "federal courts may enforce." Appellant's Br. at 35. As a result, *Fiske* applies even though the private parties in *Fiske* requested an injunction in the form of a court order—as opposed to in the form of a court approved settlement agreement.

Another court of appeals has come to a similar conclusion, albeit in a slightly different situation. In *Thomas v. FAG Bearings Corp.*, the Eighth Circuit found that "the Eleventh Amendment bars involuntary joinder of" a state because "[i]nvoluntary joinder will compel [the state] to act by forcing it to prosecute [a private party] at a time and place dictated by the federal courts." 50 F.3d 502, 505 (8th Cir. 1995). The Eighth Circuit supported its conclusion by noting that "[p]ermitting coercive joinder also undermines the two aims of the Eleventh Amendment: protection for a state's autonomy and protection for its pocketbook." *Id.* at 506. According to our sister circuit, a contrary

ruling would undermine the Amendment's aims by: (a) allowing a private party to waive a state's sovereign immunity, and (b) compelling "[p]remature litigation [that] potentially limits the costs [the state] can recover." *Id.* These same concerns motivate our decision today.

GSK preemptively questions our holding by citing three Supreme Court cases that held that the Eleventh Amendment did not cover a private party's suit involving a state. In the first case, *Cohens*, the Supreme Court held that the Eleventh Amendment did not cover a criminal defendant's appeal from a state court to the Supreme Court of the United States on a writ of error. 19 U.S. at 407–08. In the second case, *California v. Deep Sea Research, Inc.*, the Supreme Court found that the Eleventh Amendment did not apply to an *in rem* complaint over a sunken ship that the State of California claimed as its own after the private party filed the *in rem* suit. 523 U.S. 491, 496 (1998). In the third case, *Tennessee Student Assistance Corp. v. Hood*, the Supreme Court held that the Eleventh Amendment did not apply to discharge orders in *in rem* bankruptcy proceedings even though a state agency had guaranteed the allegedly dischargeable loan. 541 U.S. 440, 449 (2004).

In addition to these Supreme Court cases, GSK relies on three sister circuit cases that held that motions to remove or transfer did not implicate the Eleventh Amendment. *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 845, 848 (9th Cir. 2004) (observing that "*Cohens* counsels strongly that removal does not constitute the commencement or prosecution of a suit" and holding that "a state that voluntarily brings suit as a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks removal to a

federal court of competent jurisdiction"); *Okla. ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1240 (10th Cir. 2004) ("We hold that the State may not assert its Eleventh Amendment immunity to preclude defendants' removal of the tort action it brought against them in its own courts."); *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997) (finding "that the Eleventh Amendment does not deprive the Indiana district court of jurisdiction in this case" because "it does not involve any claim or counterclaim against [the state] that places [the state] in the position of a defendant").

We distinguish these Supreme Court and sister circuit cases from the case at bar because none of the private parties in the cases cited by GSK sought legal or equitable remedies *against* the State. Indeed they sought a writ of jurisdiction that "acts only on the record," *Cohens*, 19 U.S. at 410, a removal notice that was not "dissimilar" from a writ of jurisdiction, *Dynegy*, 375 F.3d at 845,[1] a transfer motion that "does not involve any claim or counterclaim *against*" the State, *Eli Lilly & Co.*, 119 F.3d at 1565,[2] an *in rem* admiralty action where the "the possession of the"

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[1] GSK unsuccessfully sought to remove Louisiana's state court case to the United States District Court for the Middle District of Louisiana. Ruling and Order, *Louisiana v. SmithKline Beecham Corp.*, No. 15-cv-00055 (M.D. La. Feb. 4, 2015), ECF No. 38. As GSK's counsel conceded at Oral Argument, this issue is not before us.

[2] While the removal notice was pending in the Middle District of Louisiana, GSK futilely tried to transfer the case from the Middle District of Louisiana to the Eastern District of Pennsylvania. *Louisiana v. SmithKline Beecham Corp.*, No. 15-cv-00055, (M.D. La. Feb. 4, 2015), ECF No. 36.

sovereign was not “invaded under process of the court,” *Deep Sea Research*, 523 U.S. at 507, and an *in rem* bankruptcy determination not “seeking to recover property in the State’s hands,” *Hood*, 541 U.S. at 441–42. As a result, we conclude that the Eleventh Amendment applies here.

B.

The Eleventh Amendment prevented the District Court from issuing an injunction against Louisiana because Louisiana did not waive its sovereign immunity. A suit may avoid the Eleventh Amendment’s broad prohibition in three ways. “First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. Second, a State may waive its sovereign immunity by consenting to suit.” *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (internal citation omitted). Third, a private party may sue a state official to prevent the official from violating federal law. *Ex parte Young*, 209 U.S. 123, 159–60 (1908). GSK argues that Louisiana waived its sovereign immunity. We disagree.

The State of Louisiana did not waive its sovereign immunity by receiving a CAFA notice and by failing to oppose the settlement based on that notice. A state waives its immunity “if the State makes a ‘clear declaration’ that it intends to submit itself to our jurisdiction.” *Coll. Sav. Bank*, 527 U.S. at 675–76 (citation omitted). The law “requir[es] a ‘clear declaration’ *by the State* of its waiver” to ensure “that the State in fact consents to suit” and because “there is little reason to assume actual consent based upon the State’s mere

presence in a field subject to congressional regulation." *Id.* at 680.

In *College Savings Bank*, a private party sued a state for infringing upon a patent. *Id*. at 671. The private party argued that the Eleventh Amendment did not bar the suit because the State "constructively waived its immunity from suit by engaging in the voluntary and nonessential activity . . . after being put on notice by the clear language of the [Act] that it would be subject to . . . liability for doing so." *Id.* at 680. The Supreme Court rejected this argument and found that the State did not voluntarily consent to federal jurisdiction by engaging in "voluntary and nonessential activity" because "[t]here is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680–81.

In *Lapides v. Board of Regents of University System of Georgia*, the Supreme Court applied this test and came to a different conclusion. 535 U.S. 613, 620 (2002). In that case, a private party sued a state official and the State removed the case to federal court. *Id.* Once in federal court, the state claimed sovereign immunity. *Id.* The Court observed that *College Savings* did "require[] a 'clear' indication of the State's intent to waive its immunity" and held that "[t]he relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver. And that act—removal—is clear." *Id.*

In light of *College Savings Bank* and *Lapides*, Louisiana did not clearly indicate its intent to waive its sovereign immunity in the primary suit. It received

a CAFA notice. That notice may not "impose any obligations, duties, or responsibilities upon . . . State officials." 28 U.S.C. § 1715(f). After it received this notice, it did not act, in its capacity either as a litigant, as was the case in *Lapides*, or as a market participant, as was the case in *College Savings Bank*. As a result, we reject GSK's argument and hold that Louisiana did not waive its sovereign immunity in the primary suit by merely receiving a CAFA notice and failing to act.

GSK attempts to refute this argument in three ways. We find none of them persuasive. First, it attempts to distinguish *College Savings Bank* by arguing that *College Savings Bank* announced "the test for whether States consented to federal jurisdiction by enacting statutes or otherwise engaging in non-litigation conduct that Congress specified would abrogate immunity" and that *Lapides* "governs whether a State's litigation conduct waives immunity." Appellant's Reply at 18. This argument lacks merit because the Court decided *Lapides* and *College Savings Bank* under the same rule. Indeed, in *Lapides*, the Court observed that *College Saving Bank* "required a 'clear' indication of the State's intent to waive its immunity" and concluded that, in *Lapides*, "that act— removal—is clear." *Id.* at 620.

Second, GSK argues that "Louisiana cites no authority suggesting that only affirmative litigation acts can waive immunity." Appellant's Reply at 19. This characterization misconstrues Louisiana's argument. Louisiana does not argue that only affirmative litigation acts can waive immunity. Instead, it argues that a state cannot waive its immunity merely by receiving notice and failing to act. Appellee's Br. at 23 ("Sovereign immunity . . . requires something more than silence or inaction before a state can be bound by a

federal proceeding."). This distinction matters because, as explained above, *College Savings* supports the State's actual position.

Third, GSK asserts, without citation, that "it does not follow that sovereign immunity must afford States more protection against becoming absent class members than what ordinary litigants receive under Rule 23." Appellant's Reply at 19. It reasons that States should not receive more protection because "States are far more sophisticated than ordinary litigants, and understand the significance of litigation conduct far better." *Id.* at 19. This argument misses the point. The Constitution requires more protections for States than for ordinary litigants not because of their sophistication but because of their status as sovereigns. *P.R. Aqueduct & Sewer Auth.*, *v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."). Analogizing states to private parties and comparing their respective sophistication ignores this justification. As a result, we find that Louisiana did not waive its sovereign immunity when it received a CAFA notice and failed to act.

C.

The District Court did not abuse its discretion in denying GSK's Rule 60(b) motion. In its briefing before the District Court, GSK expressed its belief that another organization could have filed a claim on behalf of the State of Louisiana. Because of this suspicion, it asked the claims administrator to inform GSK of any claims submitted on Louisiana's behalf. The claims administrator refused and cited its commitment to confidentiality to justify its decision. After the District

Court had denied GSK's motion to enforce the settlement agreement, GSK learned that an organization, Humana, had submitted a claim on behalf of Louisiana. Based on this information, GSK then moved pursuant to Rule 60(b) on the theory that it had discovered new evidence. The District Court denied this motion.

The District Court did not abuse its discretion in denying this motion. A "court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60. "That standard requires that the new evidence (1) be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial." *Compass Tech., Inc. v. Tseng Labs., Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995).

The District Court found that GSK had not carried its burden under the second prong because it did not prove that it could not have discovered this information with reasonable diligence. It came to this conclusion because GSK did not draw on the Court's power to recover the discovered information and because GSK did not show that it could not have received this information with a court order. GSK has not cited a case to support its position that reasonable diligence requires less than a court order. As a result, the District Court did not abuse its discretion in denying this motion.

IV.

The Eleventh Amendment applies to the settlement agreement and the instant enforcement action. GSK may not avoid the Eleventh Amendment's prohibition. Additionally, the District Court did not abuse its discretion in denying GSK's Rule 60(b) Motion. For the foregoing reasons, we will affirm the District Court's orders.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 08-3301

IN RE FLONASE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
Indirect Purchaser Actions

ORDER

AND NOW, this 21st day of December, 2015, **IT IS ORDERED** that the State of Louisiana's Rule 12(b)(2) Motion to Dismiss (ECF No. 667) is **GRANTED** and GlaxoSmithKline LLC's Motion to Enforce Class Settlement (ECF No. 661) is **DENIED**.

s/ Anita B. Brody
ANITA B. BRODY, J.

Copies **VIA ECF** on _______to:

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 08-3301

IN RE FLONASE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
Indirect Purchaser Actions

MEMORANDUM

December 21st, 2015 ANITA B. BRODY, J.

More than a year after I approved a Settlement Agreement between indirect purchasers of the prescription drug Flonase[1] and its generic equivalents, and GlaxoSmithKline ("GSK"), Louisiana's Attorney General filed a lawsuit against GSK seeking to recover for purchases of the drug made by the State of Louisiana. GSK moves to enforce the Settlement Agreement and to enjoin Louisiana from maintaining any claim against GSK that is covered by the Settlement Agreement. Louisiana, in turn, moves to dismiss for lack of jurisdiction or to stay GSK's motion. Because Louisiana has not waived its sovereign immunity and consented to this Court's jurisdiction, I will grant Louisiana's Motion to Dismiss (ECF

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[1] Flonase is the brand-name version of fluticasone propionate ("FP"), a nasal corticosteroid used to treat nasal inflammation caused by allergies.

No. 667) and deny GSK's Motion to Enforce Class Settlement (ECF No. 661).

I. BACKGROUND

This litigation arises from allegations that GSK illegally delayed the introduction of a cheaper, generic version of Flonase by filing sham citizen petitions with the Food & Drug Administration ("FDA"), resulting in overcharges to indirect purchasers of the drug. After vigorous settlement negotiations, the parties reached a Settlement Agreement in November 2012 under which GSK agreed to pay $35 million to indirect purchasers of fluticasone propionate ("FP") in exchange for the settlement and release of all of their claims. *See* ECF No. 566, Ex. 1, at 8.

A. Preliminary Approval of the Settlement and Notice Plan

On January 14, 2013, I "conditionally" certified[2] the following class for settlement purposes under Federal Rule of Civil Procedure 23(b)(3) ("Settlement Class"):

> All persons throughout the United States and its territories who purchased and/or paid for, in whole or in part fluticasone propionate nasal spray, whether branded Flonase or its AB-rated generic equivalents, intended for the consumption of themselves, their family members and/or household members, and all Third Party Payor entities throughout the

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[2] Presently, in the Third Circuit, the appropriate term for this step is a "preliminary determination regarding class certification." *In re Nat'l Football League Players Concussion Injury Litigation*, 775 F.3d 570, 584 (3d Cir. 2014) (internal quotation marks omitted); *see id.* (noting that "'conditional certification' should not be a preferred term of art in this Circuit")

> United States and its territories that purchased, paid for, administered and/or reimbursed for fluticasone propionate nasal spray, whether branded Flonase or its generic equivalents, intended for consumption by their members, employees, plan participants, beneficiaries or insureds,
>
> The applicable time period for the Settlement Class is May 19, 2004 through March 31, 2009.
>
> Third Party Payors are all health insurance companies, healthcare benefit providers, health maintenance organizations, self-funded health and welfare plans, and any other health benefit provider and/or entity that contracts with a health insurer acting as a third party administrator to administer their prescription drug benefits.

ECF No. 570, at 4. The Settlement Class excluded:

> the United States and/or State governments and their agencies and departments, except to the extent they purchased fluticasone propionate nasal spray (branded Flonase and/or its generic equivalents) for their employees or others covered by a government employee health plan.

Id.

I also preliminarily approved the Settlement Agreement reached by the parties and approved their proposed Notice Plan. Under this Notice Plan, Class Counsel was responsible for mailing a postcard Settlement Notice "to each third-party payor Settlement Class member . . . who can be identified through

reasonable effort." *Id.* at 6. Class Counsel was also required to publish "the summary notice available to the rest of the Class" in several publications. *Id.* at 7. Any class member who requested a long-form Settlement Notice would be sent one by mail. *Id.* The Settlement Notices informed the recipients of their potential membership in the Settlement Class, the terms of the Settlement Agreement, their right to object or opt out of the settlement, and the consequences of failing to opt out. *See id.*, Attachs. 1-4.

In addition to these Settlement Notices, I ordered GSK to "prepare and send, at GSK's expense, all notices that may be required by the Class Action Fairness Act of 2005 ('CAFA') as specified in 28 U.S.C. § 1715" ("CAFA Notice"). *Id.* at 11. CAFA requires "each defendant that is participating in [a] proposed settlement [to] serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement." 28 U.S.C. § 1715(b). With this proposed notice, a defendant must include various documents, including the complaint, any proposed or final notification to class members, and any proposed or final class action settlement. *See id.* § 1715(b)(1)-(8).

The CAFA Notice that GSK disseminated included copies of the operative Class Action Complaint, the Settlement Agreement, and the various Settlement Notices sent to Settlement Class members. *See* ECF No. 571. Louisiana's Attorney General received GSK's CAFA Notice on December 27, 2012. *See* ECF No. 678, Ex. A. Louisiana did not receive a directly-mailed Settlement Notice from Class Counsel. *See id.*, Ex. B. The State did not opt out or file any objections to the Settlement Agreement.

B. Final Approval of the Settlement Agreement

On June 19, 2013, I certified the Settlement Class[3] and issued final approval for the Settlement Agreement. My Final Order and Judgment stated that, upon the Settlement Agreement becoming effective, GSK would be "released and forever discharged from all manner of claims . . . that Plaintiffs or any member or members of the Settlement Class, whether or not they object[ed] to the Settlement and whether or not they ma[de] a claim upon . . . the Settlement Fund . . . , alleged or which could have been alleged in the Actions relating to" Flonase. ECF No. 606, at 9. I also enjoined members of the Settlement Class "from commencing . . . any proceeding in any state or federal court . . . alleging or asserting" any claims against GSK that were covered by the Settlement Agreement. *Id.* at 11.

Finally, I reserved "exclusive and continuing jurisdiction" over "any suit, action, proceeding or dispute arising out of or relating to th[e] Settlement or the Settlement Agreement or the applicability or interpretation of the Settlement Agreement, or the Final Order and Judgment, including, without limitation any suit, action, proceeding or dispute relating to the Release provisions." *Id.* at 8.

C. Louisiana's Lawsuit and GSK's Motion to Enforce Class Settlement

On December 29, 2014, Louisiana brought suit "in its proprietary and/or sovereign capacity" to recover for its "purchases of and reimbursements for the prescription drug Flonase and its generic equivalent, fluticasone propionate" between May 19, 2004 and

[3] The class certified in my Final Order and Judgment was the same as the class I preliminarily certified in my January 14, 2013 Order.

February 22, 2006. ECF No. 661, Ex. A, at 1-2. The State's complaint, which was filed in Louisiana state court, alleged that GSK had interfered with the FDA's drug-approval process in order "to prevent or delay a less expensive generic version of fluticasone propionate from entering the market." *Id.* at 1. As a result, Louisiana claimed, "the State paid unlawfully inflated prices for brand name Flonase when generic versions of Flonase, and the accompanying lower generic prices, would otherwise have been available." *Id.* at 2. The complaint alleged only violations of Louisiana state law. *Id.* at 19-21.

On February 4, 2015, GSK removed Louisiana's lawsuit to the Middle District of Louisiana, arguing that federal question jurisdiction existed because Louisiana's state-law claims "necessarily raised" "federal questions of law." *See Louisiana v. SmithKline Beecham Corp.*, No. 15-cv-00055, ECF No. 1, at 2 (M.D. La. Feb. 4, 2015). Louisiana moved to remand the case. *See id.*, ECF No. 5. This motion is currently pending before the Middle District of Louisiana. The Louisiana district court has stayed "all pretrial activity" and "all . . . discovery and pretrial deadlines[] pending the Court's final determination of the State's motion to remand." *Id.*, ECF. No. 4.

II. DISCUSSION

On April 2, 2015, GSK filed its Motion to Enforce Class Settlement in this Court, arguing that some of the claims raised in Louisiana's lawsuit are barred by the Settlement Agreement.[4] On April 30, 2015,

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[4] On the same day, GSK also filed a motion in the Middle District of Louisiana seeking to transfer Louisiana's lawsuit to this Court. *See Louisiana v. SmithKline Beecham Corp.*, No. 15-cv-00055, ECF No. 8 (M.D. La. Apr. 2, 2015). The Louisiana

Louisiana filed a motion to dismiss arguing that this Court lacks jurisdiction to enjoin Louisiana's lawsuit because the State has not waived its Eleventh Amendment sovereign immunity. Alternatively, Louisiana moves to stay proceedings until the Louisiana district court resolves the State's motion to remand. On December 1, 2015, I heard oral argument on the parties' motions and ordered supplemental briefing. The briefs were filed on December 9, 2015.

I will grant Louisiana's motion to dismiss for lack of jurisdiction and deny GSK's motion to enforce the class settlement against Louisiana.[5]

A. The Eleventh Amendment and Waiver of Sovereign Immunity

The Eleventh Amendment, which precludes any suit in federal court "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const. amend. XI, reaffirms the general principle of sovereign immunity: "each State is a sovereign entity in our federal system[] and . . . [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (second alteration in original). "While the Amendment by its terms does not bar suits against a State by its own citizens, th[e] [Supreme] Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

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district court, however, struck GSK's motion as a violation of its order staying pretrial proceedings. *See id.*, ECF No. 36.

[5] Because I will grant Louisiana's motion to dismiss, I will not address its alternative motion to stay proceedings.

Sovereign immunity applies to suits for both damages and for injunctive relief, *see Cory v. White*, 457 U.S. 85, 90-91 (1982), and acts as a limit on the jurisdiction of federal courts, *see Sossamon v. Texas*, 563 U.S. 277, 284 (2011) ("Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts."); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) ("[T]he fundamental principle of sovereign immunity limits the grant of judicial authority in Article III.").

"The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *see also Sossamon*, 563 U.S. at 283 ("Immunity from private suits has long been considered 'central to sovereign dignity.'" (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999))). As the Supreme Court has recognized, the "object and purpose of the 11th Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private entities." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993); *see also Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir. 2003) (recognizing a State's "dignity interest as a sovereign in not being haled into federal court" (internal quotation marks omitted)). Thus, a State retains the autonomy to choose "not merely *whether* it may be sued, but *where* it may be sued." *Halderman*, 465 U.S. at 99.

In order to preserve a State's sovereign dignity to decide where and when to have its claims adjudicated, the Supreme Court has repeatedly emphasized that a State's consent to suit must be "unequivocally

expressed." *Id.*; *see also Sossamon*, 563 U.S. at 284. The test for whether a State has waived its sovereign immunity "is a stringent one." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (internal quotation marks omitted). "[A] waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Sossamon*, 563 U.S. at 285 (internal quotation marks omitted); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (noting "the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign" (internal quotation marks omitted)).

The Supreme Court generally finds waiver "either if the State voluntarily invokes [federal court] jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to [federal court] jurisdiction." *College Sav. Bank*, 527 U.S. at 675-76 (citations omitted) (internal quotation marks omitted). The "relevant 'clarity' . . . must focus on the litigation act the State takes that creates the waiver." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). Once a State voluntarily "submits its rights for judicial determination," however, it cannot "escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment." *Gunter v. Atl. Coast Line R. Co.*, 200 U.S. 273, 284 (1906); *see also Lapides*, 535 U.S. at 619 (noting that it would be "anomalous" for a State both "to invoke federal jurisdiction" and then "claim Eleventh Amendment immunity").

B. Louisiana Did Not Unequivocally Consent to the Settlement Agreement

GSK seeks to enjoin Louisiana from pursuing any claims covered by the Settlement Agreement. The parties agree that I retain jurisdiction to interpret the

Settlement Agreement and determine who falls within the class definition. The Settlement Agreement includes States in the class definition "to the extent they purchased fluticasone propionate nasal spray (branded Flonase and/or its generic equivalents) for their employees or others covered by a government employee health plan." ECF No. 566, Ex. 1, at 4. Thus, Louisiana falls within the Settlement Class to the extent that it purchased FP for these limited purposes. In its complaint, Louisiana seeks to recover for "all damages sustained by the State" resulting from "paying higher prices for Flonase than it would have paid in the absence of [GSK's alleged] violations." ECF No. 661, Ex. A, at 21-22. On its face, Louisiana's complaint encompasses the types of claims covered by the Settlement Agreement—namely, the State's purchases of FP for its employees and other beneficiaries of government employee health plans.[6]

Even though some of Louisiana's claims fall within the Settlement Agreement, I cannot enjoin Louisiana unless the State has waived its sovereign immunity and consented to this Court's jurisdiction. GSK claims that Louisiana's failure to opt out of the settlement constitutes consent to the Settlement Agreement and this Court's exclusive jurisdiction to enforce that Agreement. Louisiana argues that binding States as

[6] Louisiana argues that its lawsuit also involves claims not covered by the Settlement Agreement, including Medicaid reimbursements and "purchases for its prisons, universities, hospitals, etc." ECF No. 667, at 13. GSK, however, only moves to enjoin the State from seeking recovery for purchases of FP for employees and employee health plan beneficiaries, and acknowledges that Louisiana may continue to pursue its other claims against GSK. *See* ECF No. 679, Ex. A, at 11 (acknowledgment by GSK's counsel that Louisiana has "claims [it] may assert that fall outside of the parameters of the settlement").

absent class members in a Rule 23(b)(3) opt-out class violates their sovereign immunity. Alternatively, Louisiana argues that even if a State could be included as an absent class member, here, Louisiana did not unequivocally consent to this Court's jurisdiction because it was not adequately notified of the Settlement Agreement. I need not—and do not—address the broader question of whether the Eleventh Amendment ever permits a State to be bound as an absent class member in a Rule 23(b)(3) opt-out class.[7]

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[7] The ability of private parties to bind States as absent class members in a Rule 23(b)(3) opt-out class is an open question of law. Several district courts have certified settlement classes that include state governments and agencies as absent class members. *See, e.g.*, *In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig.*, No. 04-cv-10981, ECF No. 4302, at 3 (D. Mass. Nov. 7, 2014); *S. States Police Benevolent Ass'n v. First Choice Armor & Equip.*, 241 F.R.D. 85, 93 (D. Mass. 2007); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75 (D. Mass. 2005). In *Southern States Police Benevolent Association*, for example, the district court specifically found that a court may "certif[y] state agencies as part of a class action," even if they do not explicitly authorize class counsel to represent them, "so long as they are afforded the opportunity to opt out of the class." 241 F.R.D. at 93. On the other hand, some courts have suggested that "significant sovereignty issues may preclude defining a class to include state entities as absent class members under the Eleventh Amendment of the Constitution." *In re McKesson Govt'l Entities Average Wholesale Price Litig.*, 767 F. Supp. 2d 263, 271 (D. Mass. 2011); *see also Walker v. Liggett Grp., Inc.*, 982 F. Supp. 1208, 1210-11 (S.D. W. Va. 1997) (concluding that the ability to opt out of a class was inadequate to protect a State's sovereign immunity).

Indeed, the inclusion of States as absent class members falls in a gray area of Eleventh Amendment jurisprudence. Most Eleventh Amendment cases involve suits *against* a State—i.e., attempts to hale a State into federal court as a defendant—rather than suits brought on behalf of States. At least one circuit has held that state agencies cannot be involuntarily joined under Federal Rule of Civil Procedure 19, even if the state agency would

Assuming that Louisiana was properly included as an absent class member, the notice received by the State was insufficient to meet the "stringent" test for determining whether it "voluntarily" and "unequivocally" agreed to have its claims resolved through the Settlement Agreement.[8]

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be realigned as a plaintiff, because involuntary joinder would "compel [the state agency] to act by forcing it to prosecute [its claims] at a time and place dictated by the federal courts." *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505 (8th Cir. 1995). But unlike involuntary joinder, which may compromise a State's dignity by forcing it to bring its claims in a particular forum, under Rule 23(b)(3) a State has the ability to opt out of a class and retain complete control of its claims. This opt-out mechanism, then, might serve "to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe*, 517 U.S. at 58 (internal quotation marks omitted).

Nevertheless, it is unclear whether the ability to opt out of a class necessarily preserves a State's sovereign immunity in *every* case. For example, neither Rule 23 nor the Due Process Clause requires that class members receive actual notice of a class action. *See* 4 Alba Conte, *Newberg on Class Actions* § 11:53 (4th ed. 2002). Thus, "an absent class member will be bound by any judgment that is entered if appropriate notice is given, even though the absentee never actually received notice." 7AA Wright et al., *Federal Practice & Procedure* § 1789.1, at 571 (3d ed. 2005). This ability to bind absent class members, even when they do not have actual notice of the class action or their ability to opt out, would hardly appear to satisfy the Supreme Court's "stringent" test for determining whether a sovereign State has "unequivocally" waived its sovereign immunity. *Sossamon*, 563 U.S. at 284 (internal quotation marks omitted).

[8] I only address the adequacy of notice as it relates to the Eleventh Amendment's high standard for waiver of sovereign immunity. I previously approved the adequacy of notice in this case for purposes of Rule 23. *See* ECF No. 606, at 3.

The parties agree that the only notice Louisiana received was the CAFA Notice. A CAFA Notice is sent to the "appropriate official of each State in which a class member resides." 28 U.S.C. § 1715(b). Whether a CAFA Notice is sent to a State depends on if its citizens are impacted by the settlement, and not on the State's membership in the class. A court cannot give final approval to a proposed settlement until ninety days after the appropriate state officials receive the CAFA Notice. *Id.* § 1715(d). This ninety-day period is meant to allow States "to review the proposed settlement and decide what (if any) action to take to protect the interests of the plaintiff class." S. Rep. No. 109-14, at 35, 2005 WL 627977, at *34 (2005).

By notifying States about class actions impacting their citizens, the CAFA Notice is "intended to give states a role in ensuring that [their] citizens are equitably compensated in class action settlements." *California v. Intelligender, LLC*, 771 F.3d 1169, 1173 (9th Cir. 2014); *see id.* at 1172 (noting that "CAFA expressly provides that the defendant in a class action must provide notice to the appropriate state official of any proposed settlement, presumably so that the state may comment upon or object to the settlement's approval, if the State believes the terms inadequately protect state citizens"). The legislative history of § 1715 further confirms that Congress intended the CAFA Notice to enable States to safeguard their citizens' interests, rather than their own. For example, the Senate Judiciary Committee Report states that § 1715 provides an "additional mechanism to safeguard plaintiff class members' rights by requiring that notice of class action settlements be sent to appropriate state and federal officials, so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."

S. Rep. No. 109-14, at 5; *see also id.* at 35 ("[N]otifying appropriate state and federal officials of proposed class action settlements will provide a check against inequitable settlements in these cases."). *See generally* Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy*, 156 U. Pa. L. Rev. 1971 (2005) (discussing the enactment of § 1715 and its effect on state attorneys generals' ability to protect citizen class members).

Thus, the CAFA Notice that GSK sent to Louisiana alerted the State to the fact that some of its citizens would be affected by the Flonase Settlement. *See* ECF No. 571 (indicating that approximately 166,421 consumer class members and 246 third-party payor class members resided in Louisiana). GSK points out that the Settlement Agreement and the Settlement Notices were attached to the CAFA Notice, and thus argues that Louisiana should have been aware that it was included in the class. It is certainly possible that the State could have learned that it was included as a class member by reviewing the Settlement Agreement attached to the CAFA Notice. But given the purpose of the CAFA Notice, it is just as likely that Louisiana would have considered these documents with a view to protecting the interests of its citizens. In short, it is not clear that upon receipt of the CAFA Notice, Louisiana would have been aware that the State itself was a class member and that, if it did not opt out, it would be bound by the Settlement Agreement.

This lack of clarity is fatal to GSK's argument that Louisiana's failure to opt out after receiving the CAFA Notice constitutes consent to this Court's jurisdiction. The test for finding a waiver of sovereign immunity is stringent, and ambiguities are resolved in favor of the sovereign. Here, Louisiana's receipt of the CAFA

Notice is insufficient to unequivocally demonstrate that the State was aware that it was a class member and voluntarily chose to have its claims resolved by the Settlement Agreement.

III. CONCLUSION

Louisiana has not clearly waived its sovereign immunity. Therefore, I will grant Louisiana's Motion to Dismiss (ECF No. 667) and deny GSK's Motion to Enforce Class Settlement (ECF No. 661) because this Court lacks the authority to enjoin the State from pursuing its lawsuit against GSK.

s/ Anita B. Brody
ANITA B. BRODY, J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION No. 08-3301

IN RE FLONASE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
Indirect Purchaser Actions

EXPLANATION AND ORDER

Defendant GlaxoSmithKline ("GSK") moves, under Federal Rule of Civil Procedure 60(b)(2), for reconsideration of my denial of its Motion to Enforce Class Settlement. *See* ECF No. 686. The State of Louisiana moves to strike GSK's Rule 60(b) motion for lack of jurisdiction. *See* ECF No. 688. For the reasons stated below, I deny Louisiana's Motion to Strike and deny without prejudice GSK's Rule 60(b) Motion.

I. BACKGROUND

On April 2, 2015, GSK filed a Motion to Enforce Class Settlement against Louisiana after the State filed suit against GSK in Louisiana state court. GSK claimed that Louisiana was bound by a Class Settlement Agreement entered into between GSK and a class of indirect purchasers of the prescription drug Flonase ("Indirect Purchaser Class"). Under the Class Settlement Agreement, GSK argued, Louisiana released certain claims against GSK. In response,

Louisiana asserted that it was not bound by the Class Settlement Agreement because it had not waived its sovereign immunity.

Since filing its Motion to Enforce Class Settlement in April 2015, GSK has been in contact with Class Counsel and the claims administrator, Rust Consulting ("Rust"), to determine whether Louisiana waived its sovereign immunity by filing any claims as part of the Flonase settlement. Under the settlement scheme, Louisiana could have filed claims in a variety of ways, including directly as a class member or through one of several "settling health plans" ("SHPs").[1] Humana Insurance Company ("Humana") is one of the SHPs.

In the course of its communications with Rust, "GSK was told that any information it received would not include information relating to [claims submitted through SHPs] because that information was confidential, even as to GSK." Mot. for Relief at 9, ECF No. 686. GSK nevertheless continued to negotiate with Rust, Class Counsel, and Humana to determine whether Louisiana submitted any claims.

On December 1, 2015, approximately eight months after GSK filed its Motion to Enforce Class Settlement, I heard oral argument. At the hearing, counsel for

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[1] The SHPs were excluded from the definition of the Indirect Purchaser Class. *See* Mot. for Prelim. Approval, Ex. 1, at 4, ECF No. 566. The SHPs entered into a separate agreement with GSK. Under a Plan of Allocation negotiated between the SHPs and the Indirect Purchaser Class, the SHPs could only submit claims on behalf of themselves or on behalf of entities that were members of the Indirect Purchaser Class. *See id.*, Ex. 5 ¶¶ 1(w), 4(d). On June 9, 2013, I issued final approval of both the Indirect Purchaser Settlement Agreement and the Plan of Allocation and retained exclusive jurisdiction over both. *See* Final Order & Judgment ¶¶ 10, 15, 18, ECF No. 606.

Louisiana represented to the Court that the State never received any payment from the Flonase settlement. Tr. of Hr'g, Ex. A at 14, ECF No. 679. After the hearing, I ordered supplemental briefing based on various issues. On December 9, 2015, both parties filed their supplemental briefs. In its brief, GSK specifically acknowledged that although Louisiana "has stressed that it did not file a claim, . . . that does not preclude the possibility it received settlement funds indirectly through . . . a member of the related SHP settlement." Def.'s Supp. Mem. at 9 n.6, ECF No. 679.

On December 21, 2015, I denied GSK's Motion to Enforce Class Settlement on the basis that Louisiana did not unequivocally waive its sovereign immunity. *See* Mem. & Order, ECF Nos. 681-82. GSK has appealed my decision.

In January 2016, Humana finally consented to the disclosure of claims that it filed with Rust. As a result, GSK alleges that it discovered that Humana had submitted claims worth $183,404.44 as an SHP on behalf of Louisiana. In light of this new evidence, GSK filed the present Rule 60(b)(2) motion. In response, Louisiana has moved to strike the Rule 60(b) motion.

II. DISCUSSION

A. Louisiana's Motion to Strike

Louisiana argues that GSK's Rule 60(b) motion should be stricken because this Court lacks jurisdiction while GSK's appeal is pending. Although the filing of a notice of appeal usually transfers jurisdiction from the district court to the appellate court, a district court has limited jurisdiction to adjudicate motions filed pursuant to Rule 60(b).

> [W]hile an appeal is pending, a district court, without permission of the appellate court, has

> the power both to entertain and to deny a Rule 60(b) motion. If a district court is inclined to grant the motion or intends to grant the motion, . . . it should certify its inclination or its intention to the appellate court which can then entertain a motion to remand the case. Once remanded, the district court will have power to grant the motion, but not before.

Venen v. Sweet, 758 F.2d 117, 123 (3d Cir. 1985); *see also Main Line Fed. Sav. & Loan Ass'n v. Tri-Kell, Inc.*, 721 F.2d 904, 906 (3d Cir. 1983). As discussed below, I will deny GSK's Rule 60(b) motion. Because I have jurisdiction to entertain and deny GSK's Rule 60(b) motion while GSK's appeal is pending, Louisiana's Motion to Strike is denied.

B. GSK's Rule 60(b) Motion

Pursuant to Rule 60(b)(2), GSK asks that I reconsider my denial of its Motion to Enforce Class Settlement in light of evidence that Humana submitted claims on behalf of Louisiana. GSK argues that the submission of these claims constitutes an affirmative waiver of Louisiana's sovereign immunity and Louisiana should therefore be bound by the Class Settlement Agreement.

Under Rule 60(b)(2), a "court may relieve a party . . . from a final judgment, order, or proceeding . . . [based on] newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). This "standard requires that the new evidence (1) be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would

probably have changed the outcome of the trial." *Compass Tech., Inc. v. Tseng Labs, Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995). The party seeking relief "bears a heavy burden"; a Rule 60(b) motion "should be granted only where extraordinary justifying circumstances are present." *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991) (internal quotation marks omitted).

At least since April 2015, GSK has been aware that "any information it received [from Rust] would not include information relating to the SHP agreement" because of confidentiality issues. Mot. for Relief at 9, ECF No. 686. GSK understood that "[w]ithout encompassing the SHP agreement, information limited to the Indirect Purchaser Class would provide an incomplete list of those entities participating as class members." *Id*. Despite Louisiana's counsel's statements at oral argument that the State did not receive funds from the settlement, GSK remained aware that an SHP claim may have been filed on behalf of Louisiana. GSK's supplemental brief specifically acknowledged that Louisiana's representation did "not preclude the possibility it received settlement funds indirectly through . . . a member of the related SHP settlement." Def.'s Supp. Mem. at 9 n.6, ECF No. 679.

Thus, GSK clearly knew that it was not receiving potentially significant data about SHP claims well before I denied its Motion to Enforce Class Settlement on December 21, 2015. In the eight months that its motion was pending, however, GSK did not inform the Court of its ongoing discussions with Humana, Rust, and Louisiana, or alert the Court to the obstacles it faced in obtaining the relevant data. By failing to do so, GSK did not exercise the reasonable diligence required by Rule 60(b)(2). *See Smith Int'l Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1579 (Fed. Cir. 1985)

(stating that the diligence requirement of Rule 60(b)(2) provides "finality to judicial decisions and orders by preventing belated attempts to reopen judgment on the basis of facts that the moving party" could have previously discovered).

Because GSK failed to exercise reasonable diligence, it is not entitled to relief under Rule 60(b)(2). I need not address whether the evidence of Humana's claims is material, whether it would have affected the disposition of GSK's Motion to Enforce Class Settlement, or whether GSK could use the evidence as a defense in another action.

ORDER

AND NOW, this 31st day of May, 2016, it is **ORDERED** as follows:

- The State of Louisiana's Motion to Strike (ECF No. 688) is **DENIED**.
- Defendant GlaxoSmithKline LLC's ("GSK") Motion for Relief Based on Newly Discovered Evidence (ECF No. 686) is **DENIED**.

s/ Anita B. Brody
ANITA B. BRODY, J.

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APPENDIX E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 08-3301

IN RE FLONASE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
Indirect Purchaser Actions

Hon. Anita B. Brody

Civil Action No. 12-4212

MEDICAL MUTUAL OF OHIO, on behalf of itself and all others similarly situated,

Plaintiff,

v.

SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE PLC,

Defendant.

Hon. Anita B. Brody

FINAL ORDER AND JUDGMENT

This matter came for a duly-noticed hearing on June 3, 2013 (the "Final Approval Hearing"), upon the Plaintiffs' Motion for Final Approval of Settlement between Defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline, including GlaxoSmithKline LLC and GlaxoSmithKline plc ("GSK" or "Defendant") and Plaintiffs A.F. of L. A.G.C. Building Trades Welfare Plan ("AFL"), IBEW NECA Local 505 Health & Welfare Plan ("IBEW"), Painters District Council No. 30 Health and Welfare Plan ("Painters"), Medical Mutual of Ohio, Inc. ("MMOH"), and Andrea Kehoe ("Kehoe"), individually and on behalf of a class (collectively "Plaintiffs") in IBEW NECA Local 505 Health & Welfare Plan v. SmithKline Beecham Corp., No. 08-3301 (E.D. Pa.), and Medical Mutual of Ohio, Inc. v. SmithKline Beecham Corp., No. 12-cv-4212 (E.D. Pa.) (the "Actions"), (the "Motion"). GSK and Plaintiffs are collectively referred to as the Parties. Due and adequate notice of the Settlement Agreement having been given to the members of the Settlement Class, the Final Approval Hearing having been held and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and good cause appearing therefor, and a determination having been made expressly pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no justification for delay,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. This Final Order and Judgment hereby incorporates by reference the definitions in the Settlement Agreement dated December 6, 2012 (the "Settlement Agreement"), and all terms used herein shall have the same meanings as set forth in the Settlement Agreement.

2. This Court has jurisdiction over the subject matter of the Actions and over all parties to the Actions and over all members of the Settlement Class.

3. The Court finds that due process and adequate notice have been provided pursuant to Rule 23 of the Federal Rules of Civil Procedure to all members of the Settlement Class, notifying the Settlement Class of, among other things, the pendency of these Actions and the proposed Settlement with GSK.

4. The notice provided was the best notice practicable under the circumstances and included individual notice to those members of the Settlement Class whom the parties were able to identify through reasonable efforts. The Court finds that Notice was also given by publication in multiple publications as set forth in the Declarations of Daniel Coggeshall and Katherine Kinsella dated May 1, 2013. Such notice fully complied in all respects with the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process of law.

5. Pursuant to and in compliance with Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that due and adequate notice of these proceedings was directed to all Settlement Class members of their right to object to the Settlement, the Plan of Allocation, including the SHP-Class Allocation Agreement ("Plan of Allocation"), and Class Counsel's application for incentive payments for named Plaintiffs, payment of attorneys' fees and reimbursement of expenses associated with the Actions. A full and fair opportunity was accorded to all members of the Settlement Class to be heard with respect to the foregoing matters.

6. The Court finds that, for settlement purposes, under the requirements of Rule 23 of the Federal Rules of Civil Procedure, the following Settlement Class is hereby certified:

> All persons throughout the United States and its territories who purchased and/or paid for, in whole or in part, fluticasone propionate nasal spray, whether branded Flonase or its AB-rated generic equivalents, intended for the consumption of themselves, their family members and/or household members, and all Third Party Payor entities throughout the United States and its territories that purchased, paid for, administered and/or reimbursed for fluticasone propionate nasal spray, whether branded Flonase or its generic equivalents, intended for consumption by their members, employees, plan participants, beneficiaries or insureds.
>
> The applicable time period for the Settlement Class is May 19, 2004 through March 31, 2009.
>
> Third Party Payors are all health insurance companies, healthcare benefit providers, health maintenance organizations, self-funded health and welfare plans, and any other health benefit provider and/or entity that contracts with a health insurer acting as a third party administrator to administer their prescription drug benefits. These payors include such entities that may provide prescription drug benefits for current or former public employees and/or retirees, but only to the extent that such entity was at risk for the cost of the payment(s). For purposes of

> this definition, an entity "paid for" fluticasone propionate nasal spray (branded Flonase and/or its equivalents) if it paid some or all of the purchase price, or reimbursed any part of the purchase price paid by their members, employees, insureds, participants or beneficiaries.

7. Excluded from the Settlement Class are: (1) Defendant and its officers, directors, management, employees, predecessors-in-interest, successors-in-interest, assignees or affiliates, and subsidiaries; (2) the United States and/or State governments and their agencies and departments, except to the extent they purchased fluticasone propionate nasal spray (branded Flonase and/or its generic equivalents) for their employees or others covered by a government employee health plan; (3) all entities who purchased fluticasone propionate nasal spray (branded Flonase and/or its generic equivalents) directly from Defendant or its affiliates or purchased fluticasone propionate nasal spray (branded Flonase and/or its generic equivalents) for resale, to the extent and solely to the extent of such purchase as a direct purchaser or for resale; (4) any judge or special master who has presided over the Actions; (5) the health benefit plans listed in Exhibit A to the Settlement Agreement ("Settling Health Plans" or "SHPs"); and (6) those persons who would otherwise be members of the Settlement Class who have timely excluded themselves from the Settlement Class and who are identified on the schedule attached hereto as Exhibit 1. No other individuals or entities have excluded themselves from the Settlement Class.

8. It is hereby determined that all members of the Settlement Class are bound by this Final Order and Judgment.

9. For purposes of settlement, the Court finds that the requirements of Rule 23 are satisfied as follows:

a) The members of the Settlement Class are so numerous that joinder of all members is impracticable.

b) In the context of settlement, there are common issues of law and fact as to whether the conduct challenged violates state antitrust and consumer protection statutes and/or constitutes unjust enrichment under various state laws.

c) In the context of settlement, the claims of the named Plaintiffs are typical of the claims of the Settlement Class.

d) In the context of settlement, Class Counsel will fairly and adequately protect and represent the interests of all members of the Settlement Class, and the interests of the named Plaintiffs are not antagonistic to those of the Settlement Class. The named Plaintiffs and the Settlement Class are represented by counsel who are experienced and competent in the prosecution of complex class action antitrust litigation.

e) In the context of settlement, questions of law and fact common to the Settlement Class predominate over questions that may affect only individual members and a class action is superior to other available methods for the fair and efficient adjudication of these Actions.

10. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement, as set forth in the Settlement Agreement and the Plan of Allocation, and finds that the Settlement Agreement and Plan of Allocation are, in all respects, fair, reasonable and adequate, and in the best interests of the Settlement Class, including Plaintiffs. This Court further finds that the parties' Settlement resulted from an extensive investigation of facts, complete discovery, expert analysis and reports, motion practice, and development of the case for trial and that the Settlement set forth in the Settlement Agreement and Plan of Allocation are the result of *bona fide* and arm's-length negotiations conducted in good faith between experienced counsel representing the interests of Plaintiffs, the Settlement Class, and GSK. The Settlement is fair, reasonable and adequate in light of the factors set forth in *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975), as explained in the accompanying memorandum.

11. The Court has held a hearing to consider the fairness, reasonableness and adequacy of the proposed Settlement, and has been advised that there have been two objections to the Settlement from purported members of the Class. Despite the fact that the objections were not timely filed and each objector failed to provide proof of class membership, the Court has considered and found the objections to lack merit.

12. Accordingly, the Settlement embodied in the Settlement Agreement and Plan of Allocation is hereby approved in all respects. The Parties are hereby directed to consummate the Settlement Agreement and Plan of Allocation in accordance with all of their terms and provisions, including the Termination provisions.

13. Subject to the terms set forth in paragraph 13 of the Settlement Agreement, if final approval is reversed, vacated, or otherwise modified on appeal, or if appellate review is sought and on such review final judgment is reversed, vacated, or modified, the Settlement Agreement shall be terminated upon the election of either (a) Plaintiffs, through Class Counsel, or (b) GSK.

14. Notwithstanding the provisions of any other paragraph of this Final Order and Judgment, if the Settlement Agreement is terminated pursuant to the terms of the Settlement Agreement, or for any other reason does not become effective in accordance with its terms, then (a) the Settlement Agreement shall be of no force or effect, except for the payment of notice and settlement administration costs from the Settlement Fund; and (b) the Settlement Fund, including any and all interest earned thereon, shall be returned to GSK less only the amount validly disbursed for the costs incurred in giving notice to the Settlement Class and administering the Settlement Fund during the interim period, and (c) any release pursuant to the Settlement Agreement shall have no force or effect, and (d) this Final Order and Judgment shall be rendered null and void as provided by the Settlement Agreement, shall be vacated, and all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Settlement Agreement.

15. The Court approves the Plan of Allocation of the Settlement proceeds (net of attorneys' fees, reimbursed expenses, incentive awards, and costs of administration) proposed by Plaintiffs as fair, reasonable and adequate. The Plan of Allocation proposes to distribute the net Settlement proceeds *pro rata*

based on Class members' purchases of Flonase during the Class period, and does so fairly and efficiently. The Court directs Rust Consulting, Inc., the Claims Administrator retained by class counsel and approved by the Court in the preliminary approval order, to distribute the net Settlement proceeds to Class members in the manner provided in the Plan of Allocation.

16. Class members shall look solely to the net Settlement proceeds for settlement and satisfaction against Defendant of all claims that are released by this Order, and shall not under any circumstances be entitled to any further compensation from Defendant with respect to any claims released by this Order. Except as provided by this Order, no Class member shall have any interest in the Settlement proceeds or any portion thereof.

17. Any and all disputes arising out of or related to the Settlement, the Settlement Agreement, the Plan of Allocation, or claims administration, including attorneys' fees, must be brought by Defendant, Plaintiffs, each member of the Settlement Class, and/or any other person or entity, exclusively in this Court.

18. The Court reserves exclusive and continuing jurisdiction, without affecting in any way the finality of this Final Order and Judgment, over the Settlement, Settlement Agreement and the Settlement Fund, the Plan of Allocation, the administration, consummation and interpretation of the Settlement Agreement or Plan of Allocation, and the enforcement of this Final Order and Judgment. The Court also retains exclusive jurisdiction in order to resolve any disputes that may arise with respect to the Settlement Agreement, the Settlement, the Plan of Allocation, the Settlement Fund, or allocation of attorneys' fees and reimbursed expenses, to consider or approve administration costs

and fees, and to consider or approve the amounts of distributions to members of the Settlement Class. In addition, without affecting the finality of this Final Order and Judgment, Defendant, Plaintiffs and each Settlement Class member hereby irrevocably submit to the exclusive and continuing jurisdiction of the United States District Court for the Eastern District of Pennsylvania, for any suit, action, proceeding or dispute arising out of or relating to this Settlement or the Settlement Agreement or the applicability or interpretation of the Settlement Agreement, or the Final Order and Judgment, including, without limitation any suit, action, proceeding or dispute relating to the Release provisions therein, except that this submission to the Court's jurisdiction shall not prohibit: (a) any Released Party from asserting in the forum in which a claim is brought that the Release included in the Settlement Agreement is a defense, in whole or in part, to such claim or (b) in the event that such a defense is asserted in that forum and this Court determines it cannot bar the claim, the determination of the merits of the defense in that forum.

19. As used throughout this Order, references to the "Settlement Class," "members of the Settlement Class," or "Settlement Class members" refer to members of the Settlement Class and include any of their past, present or future officers, directors, stockholders, attorneys, employees, legal representatives, trustees, agents, parents, subsidiaries, general and limited partners, heirs, executors, administrators, purchasers, predecessors, successors and assigns, acting in their capacity as such.

20. Upon the Settlement Agreement becoming effective in accordance with its terms, Defendant and its past, present and future parents, subsidiaries,

divisions, affiliates, stockholders, officers, directors, insurers, general or limited partners, employees, agents, attorneys, and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors, purchasers, and assigns of each of the foregoing) (the "Released Party" or "Released Parties"), are and shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, damages whenever incurred, and liabilities of any nature whatsoever (whether such claims, demands, actions, suits, causes of action, damages or liabilities arise or are incurred before, during or after the date hereof), including costs, expenses, penalties and attorneys' fees known or unknown, suspected or unsuspected, in law or equity, that Plaintiffs or any member or members of the Settlement Class , whether or not they object to the Settlement and whether or not they make a claim upon or participate in the Settlement Fund, ever had, now has, or hereafter can, shall or may have, directly, indirectly, representatively, derivatively or in any other capacity relating to any conduct, events or transactions, prior to the date hereof, alleged or which could have been alleged in the Actions relating to fluticasone propionate nasal sprays (branded Flonase and/or its generic equivalents) (the "Released Claims"). Except for enforcing the Settlement Agreement, each member of the Settlement Class hereby covenants and agrees that he, she or it shall not, hereafter, seek to establish liability against any Released Party based, in whole or in part, on any of the Released Claims. Without in any way limiting the definition of Released Parties, the following specific entities are Released Parties: SmithKline Beecham Corporation d/b/a GlaxoSmith Kline; GlaxoSmithKline LLC; GlaxoSmithKline Holdings (America) Inc.; GlaxoSmithKline plc; Smith Kline

Beecham plc; Glaxo Wellcome plc.; GlaxoSmithKline Finance plc.; GlaxoSmithKline Services Unlimited; and Smith Kline Beecham Limited. In addition, Plaintiffs and each Settlement Class member hereby expressly waives and releases, upon the Settlement becoming effective pursuant to paragraph 5 of the Settlement Agreement, any and all provisions, rights and benefits conferred by § 1542 of the California Civil Code, which reads:

> Section 1542. General Release – Claims Extinguished. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or rights and benefits conferred by any law of any state or territory of the United States or any other jurisdiction, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Plaintiffs and each Settlement Class member may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of this paragraph, but each Plaintiff and each Settlement Class member hereby expressly waives and fully, finally and forever settles and releases, upon the Settlement Agreement becoming final, any known or unknown, suspected or unsuspected, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Plaintiffs and each Settlement Class member also hereby expressly waives and fully, finally and

forever settles and releases any and all claims it may have against any Released Party under § 17200, et seq., of the California Business and Professions Code, or any similar, comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction or principle of common law, which claims are hereby expressly incorporated into the definition of Released Claims. The releases set forth above shall not release any claims arising in the ordinary course of business among Plaintiffs, Settlement Class members and the Released Parties concerning product liability, breach of warranty or contract (other than breach of warranty or contract based in whole or in part on any conduct challenged in the Actions), and/or personal or bodily injury, and/or any claims for costs of providing medical care for individuals allegedly injured by fluticasone propionate nasal spray products.

21. Plaintiffs and all members of the Settlement Class, the successors and assigns of any of them, and anyone claiming through or on behalf of any of them, whether or not they execute and deliver a proof of claim, are hereby permanently enjoined from commencing, instituting, causing to be instituted, assisting in instituting or permitting to be instituted on his, her or its behalf, whether directly, derivatively, representatively or in any other capacity, any proceeding in any state or federal court, in or before any administrative agency, or any other proceeding or otherwise alleging or asserting against the Released Parties, individually or collectively, any of the Released Claims in this Final Order and Judgment. The releases herein given by the Released Parties shall be and remain in effect as full and complete releases of the claims set forth in the Actions, notwithstanding the later discovery or existence of any such additional or different

facts relative hereto or the later discovery of any such additional or different claims that would fall within the scope of the release provided in this Final Order and Judgment, as if such facts or claims had been known at the time of this release.

22. Plaintiffs, their counsel, and Claims Administrator will ensure that each claims form contains a copy of the releases set forth in paragraphs 11(a) through (c) of the Settlement Agreement. Each member of the Settlement Class or its authorized representative shall sign a claim form that contains a copy of the of the release set forth in paragraphs 11(a) through (c) of the Settlement Agreement as a precondition to receiving any portion of the Settlement Fund. The releases set forth above shall be binding and effective as to all Settlement Class members and each Settlement Class member shall be permanently barred and enjoined from asserting any Released Claims as defined herein.

23. The Settlement is not and shall not be deemed or construed to be an admission, adjudication or evidence of any violation of any statute or law or of any liability or wrongdoing by Defendant or any Released Party or of the truth of any of the claims or allegations alleged in the Actions. The Settlement Agreement, including its exhibits, and any and all negotiations, documents and discussions associated with it, shall be without prejudice to the rights of any party, shall not be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by Defendant, or of the truth of any of the claims or allegations contained in the complaints in the Actions or any other pleading or document, and evidence thereof shall not be discoverable or used directly or indirectly, in any way, whether in the

Actions or in any other action or proceeding, except in connection with a dispute under this Settlement or an action in which this Settlement or the releases contained therein is asserted as a defense.

24. All claims in the Actions against GSK are hereby dismissed with prejudice and in their entirety, on the merits, and without costs. This Court shall retain jurisdiction as outlined above in paragraph 19 over the enforcement of the Settlement and Settlement Agreement.

25. The Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties and to the Released Parties. Without limiting the generality of the foregoing, each and every covenant of and agreement in the Settlement Agreement by the Plaintiffs and their counsel shall be binding on each member of the Settlement Class.

26. Any data or other information provided by Settlement Class members in connection with the submission of claims will be held in strict confidence, available only to the Administrator, class counsel, and experts or consultants acting on behalf of the Settlement Class, and Defendant, Defendant's counsel, and experts or consultants acting on behalf of Defendant. In no event will a Settlement Class member's data or information be made publicly available, except as provided for herein or upon Court Order for good cause shown.

27. The Court has reviewed Class Counsel's petition for an award of attorneys' fees and reimbursement of expenses. The Court determines that an attorneys' fee of 33 1/3% of the initial $35 million Settlement Fund (or $11,655,000), plus 33 1/3% of any sums

that may become part of the Settlement Fund after the calculation provided for in the Plan of Allocation with respect to SHPs, and the reimbursement of $1,848,720.15 in expenses, is fair, reasonable, and adequate and that Settlement Class Counsel should be paid said amounts from the Settlement Fund.

28. Each of the five (5) named Plaintiffs are hereby awarded incentive payments as follows: $10,000 each to Medical Mutual of Ohio, the AFL Plan, the IBEW Plan, Painters District Council, and $5,000 to Andrea Kehoe for their efforts in representing the Settlement Class, which is in addition to whatever monies these plaintiffs will receive from the Class Settlement Fund pursuant to the Plan of Allocation and the method of distribution approved by the Court. The Court finds these awards to be fair and reasonable.

29. Plaintiffs shall file, not later than February 1, 2014, an accounting for distribution of the disbursement of the Settlement Fund remaining after the payment of claims administration costs and fees, and incentive payments and attorneys' fees and reimbursement of expenses provided in paragraphs 29 and 30 above. The amounts to be paid pursuant to paragraphs 29 and 30 shall be paid from the Class Settlement Fund.

30. The Court hereby directs that this judgment of dismissal be entered by the clerk forthwith pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. There is no just reason for delay in the entry of this Final Order and Judgment and immediate entry by the Clerk of the Court is expressly directed. The direction of the entry of final judgment pursuant to Rule 54(b) is appropriate and proper because this judgment fully and finally adjudicates the claims of the Plaintiffs and the Settlement Class against

Defendants in the Actions, allows consummation of the Settlement, and will expedite the distribution of the Settlement proceeds to Class members.

BY THE COURT:
s/Anita B. Brody
Anita B. Brody, Judge

Dated: 6/19/2013

Exhibit 1

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 08-3301

IN RE FLONASE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
Indirect Purchaser Actions

Hon. Anita B. Brody

Civil Action No. 12-4212

MEDICAL MUTUAL OF OHIO, on behalf of itself and all others similarly situated,

Plaintiff,

v.

SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE PLC,

Defendant.

Hon. Anita B. Brody

EXHIBIT 1 TO FINAL ORDER AND JUDGMENT
EXCLUSION FROM SETTLEMENT CLASS

1. James O. Guleke II, No. 5 Randolph Place, P.O. Box 684091, Austin, Texas 78768

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 16-1124 & 16-3019

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IN RE: FLONASE ANTITRUST LITIGATION

———

Smithkline Beecham Corporation, d/b/a
GlaxoSmithKline; n/k/a GlaxoSmithKline LLC,
Including GlaxoSmithKline, PLC,

Appellant

———

(E.D. Pa. Civ. No. 2-08-cv-03301)

———

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, AMBRO, CHAGARES, JORDAN, GREENAWAY, JR., VANASKIE, SHWARTZ, and RESTREPO, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: February 7, 2018

CLW/cc: Jessica M. Anthony, Esq.
Lisa S. Blatt, Esq.
R. Stanton Jones, Esq.
Stephen J. Kastenberg, Esq.
Robert J. Leider, Esq.
Sally L. Pei, Esq.
Burt M. Rublin, Esq.
Bart D. Cohen, Esq.
John A. Meade, Esq.
Richard A. Samp, Esq.
William s. Consovoy, Esq.
Cary Silverman, Esq.