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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

IN RE: BAYER CORP. COMBINATION  
ASPIRIN PRODUCTS MARKETING AND  
SALES PRACTICES LITIGATION

THIS PLEADING RELATES TO:

ALL CASES

09-md-2023 (BMC)(JMA)

**COGAN**, District Judge

**PLAINTIFFS' MOTION TO AMEND PLAN OF DISTRIBUTION**

Plaintiffs William Blank, Beverlysue Blank, Anne McCabe, and Douglas Vinson, by and through their attorneys, and as their Motion to Amend Plan of Distribution, state the following:

As further explained in Plaintiffs' Memorandum of Law, incorporated here by reference, Plaintiffs move to amend the proposed plan of distribution of the \$15,000,000 Settlement Amount<sup>1</sup> in order to ensure that the Net Settlement Fund is paid, to the extent reasonably feasible, to Settlement Class Members submitting claims and to Settlement Class Members with

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<sup>1</sup> All capitalized terms reflect terms used in the Settlement Agreement and Release, attached as Ex. 1.

known purchase records. To see that the payments reach more Settlement Class Members before any *cy pres* distribution, Plaintiffs and Defendant have agreed to an Amendment to the Settlement Agreement and Release (“Amendment”), subject to Court approval. *See* Amendment, attached as Ex. 2.<sup>2</sup>

Pursuant to the Amendment, Plaintiffs propose the distribution of payments, *subject to the existing terms of the Settlement Agreement*, to Settlement Class Members for: (1) claims made through the claims submission process (“Claimed Purchases”),<sup>3</sup> and (2) purchases known to have been made by Settlement Class Members with valid addresses as recorded in the retailer purchase data obtained in discovery (“Recorded Purchases”). This approach will maximize depletion of the Net Settlement Fund to the direct benefit of known Settlement Class Members for both Claimed Purchases and Recorded Purchases.

Accordingly, for the reasons provided above, and in their Memorandum of Law, and for good cause shown, Plaintiffs respectfully request that the Court: (1) grant their motion to amend the plan of distribution in order to ensure that the Settlement Fund inures to the direct benefit of Settlement Class Members; (2) with this amendment, grant Plaintiffs’ Motion For Final Approval and enter the [Proposed] Final Order and Judgment filed with this Motion; and (3) grant Plaintiffs all such other relief the Court deems necessary and appropriate.

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<sup>2</sup> In addition, supplemental notice is unnecessary where the original Notice, attached as Ex. 3, satisfied due process, there are no material changes to the Settlement, and additional notice would only serve to reduce money for Settlement Class Members.

<sup>3</sup> The one-time payment limitation on claims submitted without proof of purchase remains unchanged.

Dated: March 1, 2013

Respectfully submitted,

By: /s/ Elizabeth A. Fegan

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*Additional counsel for Plaintiffs and the putative  
classes*

# **Exhibit 1**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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**IN RE: BAYER CORP. COMBINATION  
ASPIRIN PRODUCTS MARKETING AND  
SALES PRACTICES LITIGATION**

**SETTLEMENT AGREEMENT AND  
RELEASE**

**09-MD-2023 (BMC)**

**THIS DOCUMENT RELATES TO:  
All Actions**

**SETTLEMENT AGREEMENT AND RELEASE**

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<b><u>EXHIBIT E</u></b>	[Proposed] Preliminary Approval Order
<b><u>EXHIBIT F</u></b>	Claim Form

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This Settlement Agreement and Release ("Agreement") is submitted to the United States District Court for the Eastern District of New York pursuant to Rule 23 of the Federal Rules of Civil Procedure. Subject to Court approval, this Agreement is entered into between and among the following parties (the "Parties"), by and through their respective counsel: (i) Anne McCabe, Douglas Vinson, BeverlySue Blank and William Blank, as Class Representatives on behalf of themselves and the Settlement Classes (as such classes are hereinafter defined) (collectively, "Class Plaintiffs"); and (ii) Bayer HealthCare LLC ("Bayer").

WHEREAS, there is a consolidated and coordinated proceeding pending in the United States District Court for the Eastern District of New York (the "Court" or "MDL Court"), *In re: Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, No. 09-MD-2023 (BMC) (E.D.N.Y.) ("MDL Class Actions" or "MDL Action"), comprised of actions in which Class Plaintiffs have alleged, *inter alia*, that Bayer has engaged in unfair, deceptive, or unlawful conduct in marketing certain over-the-counter supplement products;

WHEREAS, Bayer has asserted a number of defenses to Class Plaintiffs' claims and has denied and continues to deny Class Plaintiffs' claims in all of the MDL Class Actions;

WHEREAS, the Parties agree that this Agreement shall not be deemed or construed as an admission or as evidence of any violation of any statute or law, or of any liability or wrongdoing by any of the Releasees, or of the truth of any of the claims or allegations alleged in the MDL Class Actions, or as a waiver of any defenses thereto;

WHEREAS, the Parties have conducted a thorough examination and investigation of the facts and law relating to the asserted and potential claims and defenses in the MDL Class Actions;

WHEREAS, Class Counsel have conducted an extensive investigation into the facts and the law regarding the MDL Action, and nearly completed full merits discovery, reviewing approximately 2.5 million pages of documents produced by Bayer and third parties, over 15 depositions of fact witnesses, depositions of each of the four (4) Class Representatives, nine (9) depositions of former named plaintiffs to the MDL Action, and the exchange of reports by and depositions of Class Plaintiffs' three (3) expert witnesses and four (4) of Bayer's five (5) expert witnesses. Additionally, Class Counsel has fully briefed Class Plaintiffs' Motion for Class Certification as well as Class Plaintiffs' motions to strike the reports and/or testimony of Bayer's class certification expert witnesses.

WHEREAS, Lead Class Counsel and counsel for Bayer began settlement discussions in March 2011, followed by formal mediation sessions before two different mediators, as well as over seven (7) months of extensive negotiations. The Parties engaged in a one-day in-person mediation before Antonio Piazza on August 17, 2011, and a second mediation before Hon. Edward Infante on February 8, 2012. Ultimately, through follow-up negotiations mediated by Judge Infante, the parties were able to agree to this Settlement. During these settlement negotiations and formal mediation sessions, Lead Class Counsel, on behalf of Class Plaintiffs, and Bayer conducted arm's-length settlement negotiations.

WHEREAS, Class Counsel have concluded, after extensive discovery and investigation of the facts and after carefully considering the circumstances of the MDL Class Actions, including the claims asserted in the Amended Master Complaint and the possible legal and factual defenses thereto, that it would be in Class Plaintiffs' best interests to enter into this Agreement to avoid the uncertainties, burdens, and risks of litigation, and to assure that the substantial benefits reflected herein are obtained for Class Plaintiffs, and further, that this



Agreement is fair, reasonable, adequate, and in the best interests of all putative members of the Settlement Classes;

WHEREAS, Bayer, despite its belief that it has strong defenses to the claims described herein, has agreed to enter into this Agreement to reduce and avoid further expense, burden, and inconvenience of protracted litigation, and to resolve finally and completely the claims of the Class Plaintiffs;

WHEREAS, through its counsel, Bayer and Class Plaintiffs, after months of vigorous, arm's-length negotiations, have conditionally agreed to payment by Bayer of \$15 million dollars (\$15,000,000.00) in full and final settlement of the MDL Class Actions and the claims described herein in their entirety;

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NOW, THEREFORE, the undersigned counsel on behalf of Bayer and Class Plaintiffs agree that the MDL Class Actions shall be settled, compromised, and/or dismissed with prejudice on the terms and conditions set forth in this Agreement, and without costs to Bayer (except as provided herein), subject to Court approval of this Agreement as a good faith, fair, reasonable, and adequate settlement under Fed. R. Civ. P. 23(e).

**I. CLASS DEFINITIONS**

The Parties agree and consent, for settlement purposes only, to the certification of the following "opt out" classes under Fed. R. Civ. P. 23(b)(3) and (c)(2)(B) in the MDL Class Actions (collectively, the "Settlement Classes"):

A. Bayer Heart Advantage Class (Class 1):

All persons who, from January 1, 2008 to the date of preliminary approval, purchased "Bayer Aspirin With Heart Advantage" in the United States for personal, family or household uses. Excluded from the Settlement Class are any Judges to whom this Action is assigned and any member of their immediate families.

B. Bayer Women's Low Dose Aspirin + Calcium Class (Class 2):

All persons who, from January 1, 2000 to the date of preliminary approval, purchased "Bayer Women's Low Dose Aspirin + Calcium" in the United States for personal, family or household uses. Excluded from the Settlement Class are any Judges to whom this Action is assigned and any member of their immediate families.

**II. OTHER DEFINITIONS**

As used in this Agreement and its Exhibits, the following terms shall have the meanings set forth below. Terms used in the singular shall include the plural and vice versa.

- A. "Agreement" means this Settlement Agreement, together with the Exhibits attached hereto, which are incorporated herein by this reference.
- B. "Allocation Counsel" means Daniel Mogin of The Mogin Law Firm P.C. and Melanie Muhlstock of Parker Waichman LLP, the counsel responsible for negotiating the allocation of the Net Settlement Fund made available to Class Members between the Settlement Classes.
- C. "Authorized Claimant" means any Settlement Class Member whose claim for recovery has been allowed pursuant to the terms of this Agreement.
- D. "Bayer" shall mean Bayer HealthCare LLC.
- E. "Bayer Heart Advantage" means Bayer® Aspirin With Heart Advantage.
- F. "Bayer Women's" means Bayer® Women's Low-Dose Aspirin + Calcium.
- G. "CAFA Notices" means the notice of this settlement to be served upon State and Federal regulatory authorities as required by the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.
- H. "Claims Administrator" and "Claims Office" mean Gilardi & Co LLC/Larkspur Design Group., an independent professional service company charged with administering the claims process, arranging for Court-ordered dissemination of required notices, and, if so ordered, distributing the settlement proceeds pursuant to the terms of this Agreement.
- I. "Claimant" means any Settlement Class Member who files a Claim Form in such form and manner, and within such time, as the Court shall prescribe.
- J. "Class Counsel" means all attorneys and law firms listed in Case Management Order No. 1, filed June 8, 2009, or as amended in subsequent court orders.

- K. "Claims Deadline" means the date by which any and all Claimants must submit a Claim Form, which will be 150 days from the completion of the notice program or as otherwise set forth in the Preliminary Approval Order issued by the MDL Court, in substantially the form set forth in Exhibit E.
- L. "Claim Form" means the Claim Form and Release substantially in the form attached hereto as Exhibit F.
- M. "Class Product" means "Bayer Aspirin With Heart Advantage" and/or "Bayer Women's Low Dose Aspirin + Calcium."
- N. "Class Period" means January 1, 2008 through the date of preliminary approval, for Class 1 and January 1, 2000 through the date of preliminary approval for Class 2.
- O. "Class Releasers" means each Settlement Class Member, including all Class Members as well as their successors, heirs, executors, trustees, administrators, and assigns.
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- P. "Class Plaintiffs" mean the Class Representatives on behalf of themselves and the Settlement Classes. Class Representatives for the two Classes are as follows:
- Class 1: William Blank, Beverlysue Blank and Douglas Vinson.
- Class 2: Beverlysue Blank and Anne McCabe.
- Q. "Complaint" means Plaintiffs' Amended Master Complaint.
- R. "Consumer" means any individual falling within the definition of Settlement Classes 1 and/or 2 who is a natural person.
- S. "Court" and "MDL Court" mean the Honorable Brian M. Cogan, or if he is unavailable, another judge of the United States District Court for the Eastern District of New York, presiding over *In re: Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, No. 09-MD-2023 (BMC) (E.D.N.Y.).
- T. "Effective Date" is the date defined in Section III.K of this Agreement.
- U. "Escrow Account" means the account established pursuant to Section III.D.1 of this Agreement.
- V. "Escrow Agent" means Washington Trust Bank.

- W. "Excess Amounts" means any settlement amount remaining after payment of all Initial Authorized Payments and Single Payments.
- X. "Fee and Expense Application" means the application of Class Counsel for the award of attorneys' fees and expenses, and incentive awards for the Plaintiffs, as provided in Section VII.B of this Agreement.
- Y. "Fee and Expense Award" means any order by Judge Cogan granting, in whole or in part, the Fee and Expense Application.
- Z. "Final" with respect to this Agreement means that the time has expired for any appeals from a final approval order of the MDL Court, or any such appeals have been resolved in favor of this Agreement.
- AA. "Final Approval" means the MDL Court's last action that settles the rights of the Parties and disposes of all issues in controversy, except for the award of costs and enforcement of the judgment.
- BB. "Final Fairness Hearing" means the hearing conducted by the Court in connection with determining the fairness, adequacy, and reasonableness of this Agreement under Fed. R. Civ. P. 23(e). The Court shall set the date of the Final Fairness Hearing, which will be communicated to the Settlement Classes in a Court-approved notice pursuant to this Agreement and in accordance with Fed. R. Civ. P. 23(c)(2).
- CC. "Individual Settlement Fund" means the dollar value of the percentage of the Net Settlement made available to Settlement Class Members between the Settlement Classes.
- DD. "Initial Authorized Payments" means the amounts computed for any Authorized Claimant as set forth in Section III.E.2.a.
- EE. "Lead Class Counsel" means Elizabeth A. Fegan of Hagens Berman Sobol Shapiro LLP and Michael A. London of Douglas & London P.C.
- FF. "Long-Form Notice" means the full long-form notice of the Settlement to be available to Class Members who request a copy and to be posted on the settlement website at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com) as provided in this Agreement, the Notice Plan as set forth in Ex. B, and Preliminary Approval Order as substantially in the form of Ex. E.
- GG. "MDL Class Actions" means all private class actions included within *In re: Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, No. 09-MD-2023 (BMC) (E.D.N.Y.), including those actions in which Class Plaintiffs have alleged, *inter alia*, that any of the Releasees have

engaged in unfair, deceptive, or unlawful behavior with regards to a Class Product.

HH. "Members" means all persons who are members of any of the Classes.

II. "Net Settlement Fund" means the Settlement Fund net of any (i) Taxes, (ii) notice and administration costs pursuant to Section III.F of this Agreement, (iii) the attorneys' fee and expense award referred to in Section VII.B of this Agreement, (iv) the incentive award referred to in Section VII.B of this Agreement, and (v) any remaining administration expenses referred to in Sections III.F.2.a and VII.A of this Agreement.

JJ. "Opt-Out" means any natural person falling within the definition of a Settlement Class who timely and validly submits a request for exclusion from one or more of the Settlement Classes in accordance with the procedures set forth in the Settlement Notice.

KK. "Parties" means Bayer and Class Plaintiffs.

LL. "Percentage Allocation from the Settlement Fund" shall be the amount allocated to each of the Settlement Classes from the Net Settlement Fund.

MM. "Preliminary Approval Order" means the order preliminarily approving the Settlement, authorizing the creation of the Settlement Fund, authorizing and directing dissemination of the Notice and Publication Notice to the Settlement Classes, and providing for the Fairness Hearing. The proposed form of the Preliminary Approval Order, to be submitted pursuant to Paragraph III.H, is attached hereto as Exhibit E.

NN. "Publication Notice" means the summary form of electronic and/or print notice of the proposed Settlement to be provided to Class Members as provided in this Agreement and the Preliminary Approval Order, substantially in the form attached hereto as Exhibit C.

OO. "Released Claims" means any and all claims released by this Agreement.

PP. "Releasees" means Bayer HealthCare LLC and its parents, predecessors, affiliates, assigns, successors, related companies, subsidiary companies, and holding companies (including but not limited to Bayer Corporation, Bayer Healthcare AG, and Bayer AG), insurance carriers, current and former attorneys, and each of their current and former members, partners, officers, directors, agents, and employees, and any distributors, retailers, and wholesalers of the Class Products.

QQ. "Settlement Amount" means the sum of \$15 million dollars (\$15,000,000.00).

RR. "Settlement Class Amounts" means the amount of money allocated to each Settlement Class from the Net Settlement Fund.

SS. "Settlement Class Member" means any natural person falling within the definition of any of the Settlement Classes, other than any Opt-Out.

TT. "Settlement Fund" means the fund used to pay all claims and administration expenses (including the Taxes set forth in Section III.D.2 below) relating to the settlement of the MDL Class Actions and all Released Claims pursuant to this Agreement, which shall be held in the Escrow Account until distributions and payments are made as provided herein.

UU. "Settlement Notice" means notices, substantially in the form and following the procedures attached as Exhibits B, C, and D, as may be modified in accordance with the Court's rulings with respect to preliminary approval of this Agreement.

VV. "Single Payments" means the amounts computed for any Authorized Claimant as set forth in Section III.E.2.b.

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WW. "Taxes" means the taxes and tax-related expenses described in Section III.D.2 below.

### **III. SETTLEMENT TERMS**

#### **A. Limited Certification of Settlement Classes Only**

Bayer conditionally agrees and consents to certification of the Settlement Classes for settlement purposes only, and within the context of this Agreement only. Bayer's willingness to enter into the Agreement is not an admission as to the propriety of a litigation class in this or any other litigation. Except as to the particular Settlement Classes defined in the Agreement, and for the limited purposes of settlement, no party or other litigant shall use Bayer's agreement to the Agreement as the basis for arguing that a litigation class may be certified.

#### **B. No Admission of Liability**

Neither the Agreement nor any statement, transaction or proceeding in connection with the negotiation, execution, or implementation of this Agreement is intended to be or may be

construed as or deemed to be evidence of an admission or concession by Bayer of any liability or wrongdoing or of the truth of any allegations in the Amended Master Complaint against Bayer, and none of them shall be admissible in evidence for any such purpose in any proceeding. Bayer's conditional agreement is contingent upon execution of this Agreement by the Parties and Final Approval by the MDL Court. If this Agreement, for any reason, is not finally approved or is otherwise terminated, Bayer reserves the right to reassert all of its objections and defenses to certification of any class for litigation purposes, and Class Plaintiffs will not offer this conditional agreement as evidence in support of a motion to certify any class for litigation purposes.

C. Settlement Amount

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In full and final settlement of the claims of the Settlement Class Members, Bayer will pay, in the aggregate, the Settlement Amount of \$15 million. This Settlement Amount includes the full and complete cost of Settlement Class Member benefits and compensation, settlement notice and claims administration, Class Counsel's attorneys' fees and expenses (as approved by the Court), and service awards for the Plaintiffs (as approved by the Court). The Settlement Amount shall not exceed \$15 million. The Settlement Amount, subtracting any sums already paid for the class notice program and related administrative expenses, shall be paid within 10 business days after Final Approval of the Settlement Agreement becomes Final.

D. Settlement Fund/Escrow Account/Qualified Settlement Fund

1. Settlement Fund/Escrow Account

In full and final settlement of the Settlement Class Members' claims, Bayer shall pay the Settlement Amount into the Settlement Fund held in the Escrow Account. The Escrow Account

shall be established and administered pursuant to an Escrow Agreement substantially in the form attached as Exhibit A.

Within ten (10) business days of the MDL Court's preliminary approval of this Agreement, Bayer shall advance to the Escrow Account funds adequate to pay for the class notice program and related administrative expenses.

Within ten (10) business days after the Final Approval of the Settlement Agreement becomes Final, Bayer will pay the remainder of the Settlement Amount into the Escrow Account.

The payment set forth in this section shall be made by electronic funds transfer (pursuant to written instructions to be provided to Bayer by Lead Class Counsel). Monies held in the Escrow Account shall be invested by the Escrow Agent (as defined in the Escrow Agreement) in short-term United States Agency or Treasury Securities (or a mutual fund invested solely in such instruments) or other similar short-term United States government obligations, and any interest earned thereon shall become part of the Settlement Fund.

## 2. Qualified Settlement Fund

The Escrow Account shall be treated as a "qualified settlement fund" for federal income tax purposes pursuant to Treas. Reg. § 1.468B-1. The Parties shall cooperate with each other and shall not take a position in any filing or before any tax authority inconsistent with such treatment. The Escrow Agent (or, if other than the Escrow Agent, the "administrator" designated in the Escrow Agreement pursuant to Treas. Reg. § 1.468B-2(k)(3)), shall (i) take all steps necessary for establishing and treating the Escrow Account as a "qualified settlement fund" and (ii) pay from the Escrow Account any taxes or estimated taxes (including interest and/or penalties) due on any income earned on the funds in the Escrow Account, and all related costs and expenses (including, without limitation, expenses incurred with respect to the preparation and filing of tax



returns and reports) (collectively, "Taxes") The Parties agree to the treatment of the Escrow Account as a qualified settlement fund from the earliest possible date and agree to make (and cause the "administrator" to make) any available "relation back" election as described in Treas. Reg. § 1.468B-1(j)(2). If amounts received by Settlement Class Members, or Bayer upon any refund or other reversion, are construed as income, it is the recipient's sole responsibility to pay taxes on such amount, plus penalties and interest.

E. Plan of Allocation

1. Allocation Between Classes

Based on the recommendation and direction of Allocation Counsel and approval by the Court, the Claims Administrator shall make the percentage allocation from the Net Settlement Fund, after payment of all required expenses under the Settlement Agreement as well as any payments due from any Fee and Expense Award and subject to the provisions below, in order to determine the Settlement Class Amounts, as follows:

<u>Settlement Classes</u>	<u>Percentage Allocation from the Net Settlement Fund</u>
Bayer Heart Advantage Settlement Class	40 %
Bayer Women's Settlement Class	60 %

2. Allocation to Settlement Class Members

Unless otherwise directed in this Agreement, the Claims Administrator shall make payments from each Individual Settlement Fund to Authorized Claimants as follows:

- a. Each Authorized Claimant who files a valid, sworn and timely Claim Form identifying (i) the products(s) purchased; the approximate date of such

purchase(s); and (iii) the location of such purchase(s), and who submits documents that the Claims Administrator determines are valid proof(s) of purchase shall be entitled to payment from the Settlement Class Amounts for \$4.00 for each purchase of "Bayer Women's Low Dose Aspirin + Calcium" and/or \$6.00 for each purchase of "Bayer Aspirin With Heart Advantage," subject to any pro rata reductions described below. The amounts computed for any Authorized Claimant as set forth in this sub-paragraph shall be referred to as "Initial Authorized Payments."

b. If an Authorized Claimant submits a valid, sworn and timely Claim Form, including a written attestation that identifies (i) the products(s) purchased; the approximate date of such purchase(s); and (iii) the location of such purchase(s), but does not submit valid proof of purchase, he or she shall be entitled to a one-time payment of \$4.00 for all purchases of "Bayer Women's Low Dose Aspirin + Calcium" and/or \$6.00 for all purchases of "Bayer Aspirin With Heart Advantage," subject to any pro rata reductions described below. The amounts computed for Authorized Claimants as set forth in this sub-paragraph shall be referred to as "Single Payments."

c. Valid proof of purchase may include but is not limited to product bottles, product packaging, receipts, records from a retailer that identify the claimant and the purchases, or other records that show the Authorized Claimant purchased the Class Product(s). It does not include any written attestations or affidavits from the claimant or other individuals.

### 3. Remaining Funds

Any portion of the Settlement Amount remaining after payment of all Initial Authorized Payments and Single Payments shall be considered "Excess Amounts." If

there are Excess Amounts, the Excess Amounts, after deduction of any further fees and expenses for administration approved by the Court, shall be distributed as provided below.

a. Within one-hundred-twenty (120) days of the Claims Deadline, the Claims Administrator shall identify and submit to Lead Class Counsel an accounting of all Single Payments, Initial Authorized Payments, and all pro rata payments, if any, the Claims Administrator intends to pay. At the same time, the Claims Administrator will provide Bayer with sufficient information to (i) identify, for each Settlement Class, the aggregate of all amounts the Claims Administrator intends to pay to Authorized Claimants, and (ii) explain, for each Settlement Class Amount, the calculation as provided for in this section. Within fourteen (14) days of such notice, Lead Class Counsel shall identify any issues or communicate their agreement with the payments proposed to be made by the Claims Administrator. If Lead Class Counsel and the Claims Administrator are unable to agree on the appropriate payments to be made or the resolution of any outstanding issues, or if Bayer has an objection, they shall request an Order from the Court resolving any such issues. No payments shall be made until so ordered by the Court.

b. If there are any Excess Amounts remaining after all payments ordered by the Court have been made ("Final Excess Amount"), the Claims Administrator shall notify Lead Class Counsel and counsel for Bayer of the Final Excess Amount. The parties shall then apply to the Court for an order pursuant to Section III.G of the Agreement to distribute the Final Excess Amount as *cy pres* payments to charities agreed to by the parties and approved by the Court.

F. Disbursements and Distributions from the Settlement Fund Other Than To Authorized Claimants

The Settlement Fund shall be distributed as follows or as otherwise ordered by the Court:

1. Prior to the Effective Date of this Agreement:
  - a. Any fees and expenses incurred in administering the Escrow Account and the Settlement Fund shall be paid pursuant to the Escrow Agreement. The costs of notice and claim administration of the Settlement shall be paid by the Escrow Agent to the Claims Administrator as approved by the MDL Court and at the direction of Lead Class Counsel with notice of such payments provided to counsel for Bayer;
  - b. Disbursements for the payment of any Taxes shall be made promptly by the Escrow Agent pursuant to the Escrow Agreement with notice of such disbursements provided to Lead Class Counsel and counsel for Bayer.
2. After the Effective Date of this Agreement, the Settlement Fund shall be distributed as follows:
  - a. Any remaining fees or expenses incurred in connection with the administration of the Escrow Account and the Settlement Fund shall be paid pursuant to the Escrow Agreement, and to the extent, if any, the reasonable fees and expenses incurred as part of notice and claims

administration of the Settlement have not been paid, such fees and expenses shall be distributed to the Claims Administrator by the Escrow Agent with notice of such disbursements provided to Lead Class Counsel;

- b. Disbursements for the payment of any Taxes shall be made promptly by the Escrow Agent pursuant to the Escrow Agreement with notice of such disbursements provided to Lead Class Counsel;
- c. Any compensation determined by the MDL Court for services rendered to the Settlement Classes by the Class Representatives shall be distributed to the Class Representatives;
- d. Any attorneys' fees and litigation expenses awarded by the MDL Court to Class Counsel in connection with Final Approval of this Settlement Agreement by the MDL Court. Such attorneys' fees and litigation expenses shall be paid to Lead Class Counsel for allocation and distribution to Class Counsel at Lead Class Counsel's sole discretion and judgment;

G. Distribution to Authorized Claimants

The balance of the Settlement Fund after deducting the fees, expenses, costs and awards identified above in Section III.F (the "Net Settlement Fund"), shall be payable to Authorized Claimants as set forth in Section III.E.

Subject to approval by the Court, the Net Settlement Fund will be allocated to the Settlement Classes as set forth in Section III.E. In the event the Court disapproves of or modifies the plan of allocation, such disapproval or modification shall have no effect on the other terms of the Settlement or the Effective Date.

Upon distribution of the Settlement Fund to Authorized Claimants, all taxes due, if any, on any amounts distributed shall be the responsibility of the Authorized Claimants. No representations have been made to the Authorized Claimants, the Settlement Class Members, Class Counsel, or any consumer regarding the tax consequences of the receipt of any payment under this Agreement. Following the Effective Date, nothing herein precludes the Escrow Agent, upon approval by the Court, from establishing a reserve from the Settlement Fund to pay any Taxes that may be owed for the period prior to distribution of the Settlement Fund, but are not yet due, and for expenses related to payment of such Taxes or the filing of related tax returns.

The parties have agreed that any Final Excess Amount shall be distributed *cy pres* to charities agreed to by the Parties and approved by the Court. The charities shall be not-for-profit organizations exempt from federal taxation as charitable organizations under Internal Revenue Code Section 501(c)(3).

#### H. Motion for Preliminary Approval

Concurrent with submission of this Agreement for the MDL Court's consideration, the parties shall submit to the MDL Court a motion for preliminary approval of this Agreement. The motion shall request entry of a Preliminary Approval Order substantially in the form attached as Exhibit E, which includes a provision enjoining Settlement Class Members from litigating Released Claims pending Final Approval of this Agreement.

I. Stay and Resumption of Proceedings

Subject to preliminary approval of this Agreement by the MDL Court, all proceedings in the MDL Class Actions as related to the Releasees, and any proceedings asserting any of the Released Claims, other than proceedings in this MDL Court arising out of and relating to this Agreement, shall be stayed. In the event the MDL Court does not approve this Agreement, the Effective Date does not occur, or this Agreement is otherwise terminated, all stayed proceedings shall resume in a reasonable manner approved by the MDL Court.

J. Entry of Final Judgment

If the MDL Court approves this Agreement following the Final Fairness Hearing scheduled by the MDL Court pursuant to the Preliminary Approval Order, counsel for the Parties shall request that the MDL Court enter a Final Approval Order, including the Court's express determination under Fed. R. Civ. P. 54(b) that there is no just reason for delay and directing that separate judgments with respect to all claims by Settlement Class Members of Classes 1 and 2 be deemed as final judgments.

K. Effective Date

This Agreement shall be effective on the first date after all of the following events have occurred:

1. Entry of the Preliminary Approval Order, substantially in the form attached as Exhibit E, or entry of a Preliminary Approval Order in an alternative form with respect to which all Parties consent in writing;

2. Final Approval of this Agreement by the MDL Court, following notice to Settlement Class Members and a Final Fairness Hearing, in accordance with Fed. R. Civ. P. 23;
3. Entry of the Final Approval Order ; and
4. The Final Approval becomes Final.

L. Satisfaction of Bayer's Obligations

Bayer's transfer of \$15 million dollars (\$15,000,000) to the Escrow Account shall fully satisfy Bayer's obligations to make payments under this Agreement, and no other payment by any Releasee shall be required to resolve the MDL Class Actions or Released Claims. The Released Parties shall not have any liabilities, obligations or responsibilities thereafter regarding the investment, payment, disposition or distribution of the Settlement Fund or the monies deposited into the Escrow Account.

M. All Released Claims Satisfied By Settlement Fund

Each Settlement Class Member shall look solely to the Settlement Fund for settlement and satisfaction of all Released Claims as provided in this Agreement.

N. Public Statements

The parties agree that no public statements will be made by either party prior to the execution of the Agreement and that Bayer thereafter has the ability in its sole discretion to approve or reject any press releases, notices or any other public statements that may be made by Class Counsel relating in any way to this Agreement. Approval of such press releases, notices or any other public statements shall not be unreasonably withheld. However, nothing in this provision will prevent Class Counsel from communicating privately with Class members in the course of giving legal advice regarding the terms of the Settlement or otherwise in the course of



their representation of the Classes. Class Counsel will provide Bayer at least two business days' notice of any public filing or statement regarding the Agreement.

O. CAFA Notices

Within ten (10) days of entry of the Preliminary Approval Order, Bayer, with the aid of the Claims Administrator if needed, will serve notices of the Settlement on State and Federal regulatory authorities as required by the Class Action Fairness Act of 2005, 28 U.S.C. 1715 ("CAFA Notices"). Bayer will simultaneously serve copies of the CAFA Notices on Class Counsel. In the event that a state or federal official raises concerns about the proposed settlement, the Parties agree to work together in good faith to resolve those concerns.

**IV. CLAIMS ADMINISTRATION**

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A. Claims Administrator/Claims Office

The Claims Administrator/Claims Office shall be an independent professional service company to be selected by Lead Class Counsel, acceptable to Bayer, subject to approval of the Court, and charged with administering the claims process, arranging for Court-ordered dissemination of required notices, and, if so ordered, distributing the settlement proceeds pursuant to the terms of this Agreement. The Claims Administrator may appoint as many claims officers, experts, and/or advisors as are necessary to carry out the duties of the Claims Office expeditiously. The Claims Office procedures shall be subject to MDL Court approval and under the continuing jurisdiction of the MDL Court. The Claims Office shall be responsible for disseminating information to Settlement Class Members concerning settlement procedures, among other ways, by establishing a toll-free "hotline." In addition, the Claims Office shall assist the MDL Court in processing and tabulating opt-out requests, shall receive all opt-out forms and documentation, shall receive, process, classify, and pay claims as provided in this

Agreement and any applicable orders of the MDL Court, and shall operate under the continuing supervision of the MDL Court.

B. Notice

The class notice program shall be in accordance with Fed. R. Civ. P. 23 and subject to Court approval.

1. Upon preliminary approval of this Agreement by the MDL Court, and the making of advance payment(s) pursuant to Paragraph III.D.1, Lead Class Counsel, in accordance with Fed. R. Civ. P. 23 and the Preliminary Approval Order, shall provide all Settlement Class Members who can be identified by reasonable means with the best notice practicable under the circumstances, in substantially the forms attached hereto as Exhibits C and D, or as otherwise ordered by the MDL Court. Such notice shall include publication on a web site established by Lead Class Counsel or the Claims Administrator and additional publication and other notice as set forth in the Notice Plan in Exhibit B.
2. As directed by the Preliminary Approval Order, Lead Class Counsel, through the Claims Administrator, shall establish and maintain a website under the Uniform Resource Locator (URL) [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com), at which the Long-Form Notice, substantially in the form of Ex. D, shall be posted to provide notice to the Settlement Classes of the proposed Settlement. Lead Class Counsel shall notify counsel for Bayer of

the date that Notice will be issued to the Settlement Classes at least three (3) business days prior to the date of issuance.

3. Lead Class Counsel, through the Claims Administrator, also shall cause the Publication Notice, in substantially the same form as Exhibit C, to be given to the Settlement Classes as directed by the Preliminary Approval Order.
  4. All costs of notice to the Settlement Classes shall be paid exclusively from the Settlement Fund (including the advance payments pursuant to Paragraph III.D.1) and in no event shall any Releasee be responsible separately for payment of notice costs.
- 
5. All notice contemplated under this Settlement and the Notice Plan shall be completed within one-hundred-twenty (120) days of the Court's preliminary approval of the Settlement, unless otherwise ordered by the Court.

C. Deadlines

Unless otherwise ordered by the Court, the following deadlines will apply:

1. Completion of Notice Program

Notice to the Settlement Classes, as set forth in the Notice Plan attached as Ex. B, shall be completed within one-hundred-twenty (120) days from the MDL Court's Preliminary Approval Order.

2. Opt-Out Deadline

As detailed in the proposed Long-Form Notice attached hereto as Exhibit D, all requests to opt out of any of the Settlement Classes must be sent in writing to the Claims Administrator and postmarked within one-hundred-fifty (150) days of the MDL Court's Preliminary Approval Order. The Claims Administrator shall provide the Class Counsel, Bayer and the Court with a list of the persons that have requested to opt out of any of the Settlement Classes ("Opt-Out List") within five (5) days of the Opt-Out Deadline. No class or mass opt-outs are permitted under this Agreement.

3. Bayer's Option to Terminate the Agreement

The last day on which Bayer may exercise its right to terminate this agreement pursuant to Section IX shall be twenty-one (21) days after receiving the Opt-Out List from the Claims Administrator.

4. Claims Deadline

The Claims Deadline shall be one-hundred-fifty (150) days from the completion of the notice program.

5. Motion For Final Approval of the Settlement

Plaintiffs shall file their Motion For Final Approval of the Settlement, together with a declaration from the Claims Administrator regarding completion of the notice program, seven (7) days after the deadline for Bayer to exercise its right to terminate this Agreement pursuant to Section IX.

6. Application for Attorneys' Fees and Expenses and Plaintiff Service Awards

Plaintiffs shall file an Application for Attorneys' Fees and Expenses and Plaintiff Service Awards seven (7) days after the deadline for Bayer to exercise its right to terminate this Agreement pursuant to Section IX.

7. Objections to and Comments In Support of the Settlement and/or Plaintiffs' Application for Attorneys' Fees and Expenses and Plaintiff Service Awards

All objections to and comments in support of the Settlement must be sent in writing to the Clerk of the Court for the Eastern District of New York, with a copy to Lead Class Counsel and Bayer's Counsel, at:

<i>Clerk of Court</i>	<i>Counsel for Plaintiffs:</i>	<i>Counsel for Bayer:</i>
Clerk of the U.S. District Court Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201	Elizabeth A. Fegan, Esq. Hagens Berman Sobol Shapiro LLP 1144 W. Lake St., Suite 400 Oak Park, IL 60301	Adam Hoefflich, Esq. Bartlit Beck Herman Palenchar & Scott LLP Courthouse Place 54 West Hubbard Street, Suite 300 Chicago, IL 60654

All objections and comments must be postmarked within fourteen (14) days of the filing of Plaintiffs' Motion For Final Approval of the Settlement and Plaintiffs' Application for Attorneys' Fees and Expenses and Plaintiff Service Awards.

D. Court Approval of Disbursements and Distributions

Court approval shall be required prior to any disbursement or any distribution from the Settlement Fund, but, except as set forth in Section III.F.1.a above, not for any fees and expenses incurred by the Claims Administrator to administer the Escrow Account or the Settlement Fund under the Escrow Agreement, or Taxes on the Settlement Fund.

E. Retention of Records

The Claims Administrator shall retain all records relating to payment of claims under this Agreement for a period of five (5) years from the Effective Date of the Agreement. The confidentiality of any personal health information in those records shall be maintained in accordance with the Protective Order in the MDL Class Actions.

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V. EXCLUSIVE REMEDY/DISMISSAL OF CLAIMS/JURISDICTION

A. Exclusive Remedy

This Agreement shall be the exclusive remedy for any and all Released Claims. No Releasee shall be subject to liability or expense of any kind to any Settlement Class Member related to the Released Claims except as provided in this Agreement. Upon Preliminary Approval of this Agreement, each Settlement Class Member shall be barred from initiating, asserting or prosecuting any Released Claims against any Releasee unless they have complied with the opt-out provisions in Section IV.C.2 and the Long-Form Notice.

B. Dismissal of Claims

The Parties agree that upon the Effective Date of this Agreement, all Released Class Claims shall be dismissed with prejudice in accordance with a Final Approval Order.

C. Jurisdiction

The MDL Court shall retain exclusive and continuing jurisdiction over the Complaint, the Parties, the Settlement Fund and this Agreement with respect to the performance of its terms and conditions (and disputes arising out of or relating to this Agreement), the proper provision of all benefits, and the implementation and enforcement of its terms, conditions, and obligations.

VI. RELEASES AND RESERVATIONS

A. Released Claims

Upon the Effective Date of this Agreement, and in consideration of the provisions of the Agreement, including payment of the Settlement Amount, the Releasees shall be released and forever discharged by the Class Releasors from any and all claims that were or could have been asserted by the Class Releasors arising from or related to Bayer Heart Advantage and Bayer Women's including, but not limited to, any and all claims, causes of action, demands, actions, suits, rights, obligations, controversies or the like, known or unknown, including, but not limited to, under state consumer fraud, warranty or unjust enrichment law (the "Released Claims"). Released Claims shall not include claims for personal injury. All Class Releasors covenant and agree that they shall not hereafter seek to establish liability against any Released Party based, in whole or in part, on any of the Released Claims. Each Class Releasor expressly waives and fully, finally, and forever settles and releases any known or unknown, suspected or unsuspected, contingent or non-contingent Released Claims without regard to the subsequent discovery or existence of different or additional facts.

IN ADDITION, EACH CLASS RELEASOR HEREBY EXPRESSLY WAIVES AND RELEASES, UPON THIS AGREEMENT BECOMING EFFECTIVE, ANY AND ALL

PROVISIONS, RIGHTS, AND BENEFITS CONFERRED BY § 1542 OF THE CALIFORNIA CIVIL CODE, WHICH READS:

SECTION 1542. GENERAL RELEASE; EXTENT. 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 SETTLEMENT WITH ~~THE~~ DEBTOR;

OR BY ANY LAW OR STATE OR TERRITORY OF THE UNITED STATES, OR PRINCIPLE OF COMMON LAW, WHICH IS SIMILAR, COMPARABLE, OR EQUIVALENT TO § 1542 OF THE CALIFORNIA CIVIL CODE. Each Class Releasor 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 VI.A, but each Class Releasor hereby expressly waives and fully, finally, and forever settles and releases, upon the Agreement becoming Effective, any known or unknown, suspected or unsuspected, contingent or non-contingent Released Claims with respect to the subject matter of this Paragraph VI.A whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Class Releasor also hereby expressly waives and fully, finally, and forever settles and releases any and all Released Claims it may have against the Released Parties under § 17200, *et seq.*, of the California Business and Professions Code.

B. Reservation of Claims and Rights

1. Released Claims, shall not include (a) any claim against any person or entity that is not a Releasee or (b) any claim arising out of this Agreement.
2. The Parties agree that this Agreement, whether or not the Effective



Date occurs, and any and all negotiations, documents, and discussion associated with it shall be without prejudice to the rights of any Party (other than those compromised herein); shall not be deemed or construed to be an admission or evidence of any violation of any statute or law, of any liability or wrongdoing by Released Parties, or of the truth of any of the claims or allegations contained in any complaint or pleading, whether in the MDL Class Actions or otherwise. The Parties expressly reserve all their rights if this Agreement fails to become final and effective substantially in accordance with its terms.

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3. This means, *inter alia* and without limitation, that if the MDL Court does not certify the Settlement Classes or this Agreement is not approved by the MDL Court in accordance with the terms of its terms and does not become subject to a final Order following such approval, or Final Approval does not become Final, then no class will be deemed certified by or as a result of this Agreement, and the MDL Action for all purposes will revert to its status as of the date before the execution of this Agreement. In such event, Bayer will not be deemed to have consented to certification of the Settlement Classes, and will retain all rights to oppose class certification, including but not limited to certification of the identical classes provided for herein.

## **VII. ADMINISTRATIVE EXPENSES AND ATTORNEYS' FEES**

### **A. Administrative Expenses**

The Releasees shall not be liable for any litigation expenses of the MDL Class Actions, including without limitation attorneys' fees, notice fees and expenses, claims administration fees and expenses, fees, expenses and Taxes incurred in administering the Escrow Account or the Settlement Fund, expert witness and consultant fees and expenses, and expenses associated with discovery, motion practice, hearings, and/or appeals. All such fees and expenses, if and as approved by the MDL Court, shall be paid from the Settlement Fund and as set forth in Section III.F.2.a.

### **B. Attorneys' Fees and Expenses and Plaintiff Service Awards**

Understanding that the award of attorneys' fees to Class Counsel is a matter in the MDL Court's sole discretion, the Releasees will not object to Class Counsel's Fee and Expense Application for: (a) an award of Plaintiffs' attorneys' fees of up to thirty percent (30%) of the Settlement Amount, to be divided by Lead Class Counsel, at their sole discretion and as they will agree, among themselves and any other Plaintiffs' counsel of record in the MDL Action, (b) reimbursement of Plaintiffs' litigation expenses actually incurred and not to exceed \$600,000, including but not limited to the fees, costs and expenses of any experts or consultants, in the case of clauses (a) and (b) in connection with prosecuting the litigation, and (c) service awards not to exceed \$2,500 for each Class Plaintiff.

## VIII. MISCELLANEOUS PROVISIONS

### A. Reasonable Best Efforts

The Parties agree to use their reasonable best efforts, including all steps required by this Agreement and other efforts that may be necessary or appropriate, by order of the MDL Court or otherwise, to carry out the terms of this Agreement.

### B. No Admission

Nothing in this Agreement, including any of its provisions, any statement made or document related to or filed in connection herewith, or the Parties' willingness to enter into this Agreement, shall be construed as an admission as to the propriety of the litigation in this matter or any other litigation, any liability or wrongdoing of any Releasees, or of the truth of any allegations in any complaint against any Releasees; and neither the Agreement nor any statement made or document related to or filed in connection therewith shall be admissible in evidence for any such purpose in any proceeding.

### C. Enforcement

Notwithstanding the preceding Paragraph, this Agreement may be pleaded as a full and complete defense to any action, suit or other proceeding that has been or may be instituted, prosecuted or attempted with respect to any of the Released Claims, and may be filed, offered, received into evidence, and otherwise used for such defense. This Agreement may also be used in connection with the Parties' application for approval or enforcement of this Agreement and all proceedings incident thereto, including requests for attorneys' fees, costs, disbursements and compensation to the Settlement Classes and any disputes arising from this Agreement.

D. Authorization to Enter Agreement

The undersigned representatives of Bayer represent that they are fully authorized to enter into and execute this Agreement on behalf of Bayer. Lead Class Counsel represent that they are fully authorized to conduct settlement negotiations with Counsel for Bayer on behalf of Class Plaintiffs and to enter into and execute this Agreement on behalf of Class Plaintiffs, subject to approval by the MDL Court pursuant to Fed. R. Civ. P. 23(e).

E. No Party Is the Drafter

None of the Parties to this Agreement shall be considered the drafter of this Agreement or any included provision for the purpose of any statute, case law or rule of construction that would or might cause any provision to be construed against the drafter.

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F. Choice of Law

This Agreement shall be governed by and interpreted according to the substantive laws of the state of New York without regard to its choice of law or conflict of laws principles.

G. Amendment or Waiver

This Agreement shall not be modified in any respect except by a writing executed by all Parties to this Agreement. The waiver of any rights conferred by this Agreement shall be effective only if made in writing by the waiving Party. The waiver by any Party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior to, subsequent to, or contemporaneous with this Agreement.

H. Execution in Counterparts

This Agreement may be executed in counterparts. Facsimile or PDF signatures shall be valid signatures as of the date thereof.

I. Integrated Agreement

This Agreement, including its Exhibits, contains an entire, complete, and integrated statement of the terms agreed to by and between the Parties.

J. Construction.

This Agreement shall be construed and interpreted to effectuate the Parties' intent, which is to resolve completely the Released Claims with respect to the Released Parties through this Agreement.

**IX. TERMINATION OF THIS AGREEMENT**

A. Termination

This Agreement shall be terminated, without notice, if the Court declines to enter an order approving this Agreement, or if such approval order does not become Final (as a result of reversal on appeal or otherwise). Bayer's willingness to enter into the Agreement is conditioned upon the Agreement's providing adequate protections that the Settlement Amount will resolve substantially all of the Class Member claims against Bayer. Bayer retains the right to withdraw from and terminate the Agreement if, in its sole discretion, Bayer believes that the number of Class Member opt outs would undermine the purpose of the settlement to Bayer. If Bayer concludes that the number of Class Members opt outs undermines the purpose of the settlement to Bayer, it will exercise its right to terminate this Agreement, if at all, within twenty-one (21) days of receiving the Opt-Out List from the Claims Administrator.

B. Effect of Termination

In the event of termination, this Agreement shall be of no force or effect; the Parties shall request the MDL Court to vacate any order certifying the Settlement Classes; and the remaining

portion of any monies advanced by Bayer for class notice and related expenses, together with any accrued interest, if any, shall be refunded to Bayer by the Escrow Agent.

IN WITNESS WHEREOF, the Parties hereto, by and through their fully authorized representatives, have executed this Agreement as of May 15, 2012.

Dated: May 16, 2012



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Carolyn J. Frantz  
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*Co-Lead Counsel for Plaintiffs*

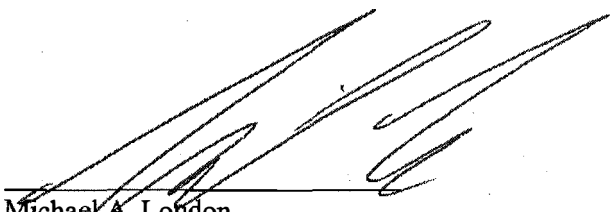
**Dated:**

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*Co-Lead Counsel for Plaintiffs*



# **Exhibit A**

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## ESCROW AGREEMENT

### IN RE: BAYER CORP. COMBINATION ASPIRIN PRODUCTS MARKETING AND SALES PRACTICES LITIGATION

THIS ESCROW AGREEMENT, dated as of May 16, 2012 (this "Agreement"), is by and between Elizabeth A. Fegan of Hagens Berman Sobol Shapiro LLP and Michael A. London of Douglas & London P.C. (the "Lead Class Counsel"), Bayer HealthCare LLC through its fully authorized counsel (herein "Bayer"), and Washington Trust Bank, as Escrow Agent (the "Escrow Agent").

WHEREAS, the Lead Class Counsel, Class Plaintiffs, and Bayer are parties to a Settlement Agreement and Release dated as of the date hereof (the "Bayer Settlement Agreement");

WHEREAS, in connection with the Bayer Settlement Agreement, the Lead Class Counsel, Bayer, and the Escrow Agent, are required to execute and deliver an Agreement in the form hereof. The purpose of this Agreement is to provide a source of funds to fulfill the obligations set forth under Paragraph III.D to III.F of the Bayer Settlement Agreement.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants contained herein, the parties agree as follows:

1. Definitions: For the purposes of this Agreement, capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms as set forth in the Bayer Settlement Agreement.
2. Appointment of Escrow Agent: The Lead Class Counsel and Bayer hereby appoint Washington Trust Bank as Escrow Agent in connection with this Agreement, and Washington Trust Bank hereby accepts such appointment and agrees to act as Escrow Agent on the terms and conditions set forth in the Bayer Settlement Agreement.
3. Escrow Amount:
  - (a) Bayer shall make two wire transfers. The first transfer shall be made within ten (10) business days after the MDL Court's Preliminary Approval Order of the Bayer Settlement Agreement, and Bayer shall deliver to the Escrow Agent by wire transfer the sum of \$1,031,888.00. The second transfer shall be made within ten (10) business days after the Final Approval, and Bayer shall deliver to the Escrow Agent by wire transfer the sum of \$13,968,112.00. Both transfers shall consist of immediately available funds as set forth in the Bayer Settlement Agreement (the "Escrow Amounts") and be made to the account of the Escrow Agent set forth on Exhibit 1 annexed hereto (the "Escrow Account"), accompanied by written notice from Bayer identifying such amount(s) as the amount(s) being delivered for deposit into the Escrow Agent's account.
  - (b) The Escrow Amount, together with all investments thereof in accordance with Paragraph III.D.1 of the Bayer Settlement Agreement and the income accumulated

thereon and proceeds there from (the "Escrowed Funds"), is to be used, pursuant to the terms hereof, for the purposes set forth under said Bayer Settlement Agreement.

- (c) The Escrow Agent shall hold the Escrowed Funds in escrow and shall not withdraw the Escrowed Funds from the Escrow Account except as provided in the Bayer Settlement Agreement and this Agreement.

4. Investment of Escrowed Funds:

- (a) As set forth in the Bayer Settlement Agreement, the Escrow Agent shall invest in, purchase, retain, or sell short-term United States Agency or Treasury Securities (or a mutual fund invested solely in such instruments) or other similar short-term United States government obligations (the "Escrow Investments"). The Escrow Investments shall be held in an account entitled Bayer Settlement Escrow Account. To the extent the Escrow Agent invests any funds in Escrow Investments (in accordance with this Section 4(a)), no party hereto shall be held liable for any loss which may be incurred by reason of such investment.
- (b) Provided the Escrow Agent follows the guidelines set forth in Section 4(a) above, the Escrow Agent shall have no liability for any investment losses resulting from the investment, reinvestment, sale or liquidation of any portion of the Escrowed Funds, except in the case of the gross negligence or willful misconduct of the Escrow Agent.

- 5. Escrowed Funds: The Escrow Agent shall follow the terms, conditions, and payments, as set forth in the Bayer Settlement Agreement, which is herein incorporated by reference. The Escrow Agent shall consult with Lead Class Counsel as needed or necessary in order to carry out the terms of the Escrow Agreement.

- 6. Closing of Escrow Agreement: The Escrow Agent shall close the Escrow Account upon distribution of all funds held in such account, subject to holdbacks to reserve Taxes or final escrow administrative costs.

7. Concerning the Escrow Agent:

- (a) The Escrow Agent shall not have any liability to any of the parties to this Agreement or to any third party arising out of its services as Escrow Agent under this Agreement, except for damages directly resulting from (i) the Escrow Agent's negligence or willful misconduct or (ii) a breach of the terms of this Agreement. Without limiting the generality of the preceding sentence, provided the Escrow Agent follows the guidelines set forth in Section 4(a) above, in no event shall the Escrow Agent have any liability arising out of losses resulting from its failure to invest the Escrowed Funds or the reinvestment of the Escrowed Funds, including, but not limited to, any loss of principal or failure to earn interest on the Escrowed Funds, any claim that a higher rate or return could have been obtained, or any loss of principal or interest resulting from any delay in the investment or reinvestment of the Escrowed Funds.
- (b) Class Lead Counsel and Bayer jointly and severally shall indemnify the Escrow Agent and hold it harmless against any loss, liability, damage or expense (including reasonable attorneys' fees) that the Escrow Agent may incur as a result of acting as escrow agent under this Agreement, except for any loss, liability, damage or expense

arising from (i) its negligence or willful misconduct or (ii) a breach of the terms of this Agreement. For this purpose, the term "attorneys' fees" includes fees paid to any counsel retained by the Escrow Agent in connection with its services under this Agreement.

- (c) The Escrow Agent shall be entitled to rely upon any judgment, notice, instrument or other writing delivered to it under this Agreement without being required to determine the authenticity of or the correctness of any fact stated in that document and irrespective of any facts the Escrow Agent may know or be deemed to know in any other capacity. The Escrow Agent may act in reliance upon any instrument or signature believed by it to be genuine and may assume that any person purporting to give any notice or receipt or advice or make any statement or execute any document in connection with this Agreement has been duly authorized to do so. The Escrow Agent shall have no liability whatsoever for taking or failing to take any action if the Escrow Agent after receipt of any notice or instructions, in its sole discretion, shall decide that it is uncertain as to what action is required of it hereunder with respect to such notice or instructions. In such case the Escrow agent may, but need not, (i) notify the Class Lead Counsel or Bayer of its uncertainty and/or (ii) rely on the advice of counsel (which need not be in writing).
- (d) The Escrow Agent shall have no duties or responsibilities except those expressly set forth in this Agreement as incorporated with the Bayer Settlement Agreement.
- (e) The parties agree that the Escrow Agent may look to the Lead Class Counsel to apply for and obtain the Taxpayer's Identification Number (TIN) for the Escrow Account. In the event the Lead Class Counsel does not provide the TIN, the Escrow Agent is authorized to obtain it. The cost of professional services for any tax return preparation or other reporting requirements or correspondence with the Internal Revenue Service ("IRS") or any other taxing authority will be charged to the Escrow Account as an escrow administrative expense.
- (f) All of the Escrow Agent's rights of indemnification provided for in this Agreement shall survive the resignation of the Escrow Agent, its replacement by a successor Escrow Agent, its delivery or deposit of the Escrowed Funds in accordance with this Agreement, the termination of this Agreement, and any other event that occurs after this date.
- (g) The Escrow Agent shall have no responsibility whatsoever with respect to the sufficiency of the arrangements contemplated by this Agreement to accomplish the intentions of the parties.

8. Representations:

- (a) Lead Class Counsel represents and warrants to the Escrow Agent that it has full power and authority to enter into and perform this Agreement, and that this Agreement is enforceable against it in accordance with its terms.
- (b) Bayer represents and warrants to the Escrow Agent that it has full power and authority to enter into and perform this Agreement, and that this Agreement is enforceable against it in accordance with its terms.

9. Resignation of Escrow Agent: The Escrow Agent (and any duly appointed successor escrow agent) may at any time resign as such upon sixty (60) days prior notice to each of the other parties. Upon receipt of court authorization of the duly appointed successor escrow agent the Escrow Agent will deliver the Escrowed Funds to the successor pursuant to this provision, and upon such delivery, the successor escrow agent shall become the Escrow Agent for all purposes under this Agreement and the resigning Escrow Agent shall have no further responsibilities or obligations under this Agreement, except for the liabilities specified in Sections 7(a)(i) and 7(a)(ii) of this Agreement.
10. Notices: All notices, communications and deliveries hereunder shall be made in writing signed by or on behalf of the party making the same and shall be delivered personally (by courier service or otherwise) or by telecopy or electronic transmission (e-mail) or by U.S. Postal Service delivery or by any national overnight courier service (with postage and fees prepaid) to the following parties:

If to the Lead Class Counsel: Elizabeth A. Fegan  
HAGENS BERMAN SOBOL SHAPIRO LLP  
1144 W. Lake Street, Suite 400  
Oak Park, IL 60301

Phone: 708-628-4960  
Fax: 708-628-4950  
Email: beth@hbsslaw.com

Michael A. London  
DOUGLAS & LONDON P.C.  
111 John Street, 14th Floor  
New York, NY 10038

Phone: 212-566-7500  
Fax: 210-566-7501  
Email: mlondon@douglasandlondon.com

If to Bayer: Adam Hoeflich  
BARTLIT BECK HERMANPALENCHAR &  
SCOTT LLP  
54 W. Hubbard Street  
Chicago, IL 60654

Phone: 312-494-4400  
Fax: 312-494-4440  
Email: adam.hoeflich@bartlit-beck.com

If to the Escrow Agent: Washington Trust Bank – WMAS  
Attn: W.C. Twig Mills  
601 Union St, Ste 4747  
Seattle, WA 98101

Phone: 206-515-4784  
Fax: 206-667-8955

Email: [tmills@watrust.com](mailto:tmills@watrust.com)

or to such other representative or at such other address of a party as such party hereto may furnish to the other parties in writing. Any such notice, communication or delivery shall be deemed given or made (a) on the date of delivery if delivered in person (by courier service or otherwise), (b) upon transmission by facsimile or electronically if receipt is confirmed by telephone or e-mail, provided transmission is made during regular business hours, or if not, the next business day, or (c) on the fifth business day after it is mailed.

11. Miscellaneous:

(a) The first deposit to the Escrow Account as set forth in Section 3 above shall include no less than \$15,000.00 for Escrow Agent administrative costs, which includes the minimum first year of Escrow Agent fees, plus legal, accounting and other costs as set forth in Exhibit 2. The Escrow Agent is authorized to withdraw the escrow fee at its discretion.

(b) If any provision of this Agreement is determined by any court of competent jurisdiction to be invalid or unenforceable in any jurisdiction the remaining provisions of this Agreement shall not be affected thereby, and the invalidity or unenforceability in any jurisdiction shall not invalidate or render unenforceable that provision in any other jurisdiction. It is understood, however, that the parties intend each provision of this Agreement to be valid and enforceable and each of them waives all rights to object to any provision of this Agreement.

(c) This Agreement shall be binding upon and inure solely to the benefit of the parties and their respective successors and permitted assigns, and shall not be enforceable by or inure to the benefit of any third party except for any successor or permitted assigns of the parties. No party may assign its rights or obligations under this Agreement or any interest in the Escrowed Funds without the written consent of the other parties, and any other purported assignment shall be void. ~~In no event shall the Escrow Agent be required to act upon, or be bound by, any notice, instruction, objection or other communication given by a person other than, nor shall the Escrow Agent be required to deliver the Escrowed Funds in any manner other than as set forth under this Agreement or the Bayer Settlement Agreement, unless approved by the supervising Court.~~

(d) This Agreement shall be governed by and construed in accordance with the law of the State of Washington applicable to agreements made and to be performed in Washington.

(e) Any action or proceeding arising out of or relating to this Agreement shall be brought in the state or federal courts in King County, Washington. By execution of this Agreement, each party hereby accepts for itself and in respect of its property, generally and unconditionally, the non-exclusive jurisdiction of the aforesaid courts and appellate courts from any thereof. In addition, each party irrevocably consents to the service of process out of any of the aforementioned courts in any such action or proceeding by the mailing of copies thereof in accordance with Section 10 of this Agreement or in such other manner as may be permitted by law shall be valid and sufficient service. Each party irrevocably waives any objection which it may now or hereafter have to the place of venue of any of the aforesaid actions or proceedings arising out of or in connection with this Agreement brought in the courts referred to above and hereby further irrevocably waives and agrees not to plead and claim in any such court that any such action or proceeding brought in any such court has been brought in an inconvenient forum. Each party hereby irrevocably waives all right of trial by jury in any action, proceeding or counterclaim arising out of or in connection with this Agreement or any matter arising hereunder.

(f) This Agreement, together with the Bayer Settlement Agreement, contains a complete statement of all of the arrangements among the parties with respect to its subject matter and cannot be changed or terminated orally. Any waiver must be in writing and approved by the supervising Court.

(g) Except as set forth in the Bayer Settlement Agreement, together with its applicable exhibits, the documents referenced in this Agreement and the exhibits to such documents, constitute the entire understanding and agreement of the parties to this Agreement with respect to the subject matter of this Agreement and of such documents and exhibits and supersede all prior and contemporaneous agreements or understandings, inducements or conditions, express or implied, written or oral, between the parties with respect to such subject matter. The express terms of this Agreement control and supersede any course of performance or usage of the trade inconsistent with any of the terms of this Agreement.

(h) This Agreement may be executed in counterparts, each of which shall be deemed to be an original and all of which taken together shall constitute one and the same instrument. Facsimile or PDF signatures shall be valid signatures as of the date thereof.

(i) The section headings used herein are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

(j) To help the government fight the funding of terrorism and money laundering activities, federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. For a non-individual person such as a business entity, a charity, a trust, or other legal entity, the Escrow Agent will ask for documentation to verify its formation and existence as a legal entity. The Escrow Agent may also ask to see financial statements, licenses, identification and authorization documents from individuals claiming authority to represent the entity or other relevant documentation. The parties each agree to provide all such information and documentation as to themselves as requested by Escrow Agent to ensure compliance with federal law.

12. Tax Matters.

The Escrow Account is intended to be a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B-1(a). The Escrow Agent shall be the "administrator" of the "qualified settlement fund," as set forth in Treas. Reg. § 1.468B-2(k)(3). The Lead Class Counsel, Bayer and the Escrow Agent shall take all steps necessary for establishing and treating the Escrow Account as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B-1(a). The Escrow Agent shall prepare a "Regulation 1.468B-3 Statement" pursuant to Treas. Reg. § 1.468B-3(e) on behalf of Bayer and provide copies to Bayer's counsel for review and approval. In addition, the Escrow Agent and, as required, the parties hereto, shall timely make such elections as are necessary or advisable to carry out the provisions of this Section 12, including, if necessary, the "relation-back election" (as defined in Treas. Reg. § 1.468B-1), back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in the regulations under Section 468B of the Internal Revenue Code. It shall be the responsibility of the Escrow Agent to timely and properly prepare and deliver the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing(s) to occur. The Escrow Agent shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Escrow Account (including without limitation the returns described in Treas. Reg. § 1.468B-2). All Taxes (including, without limitation, expenses of tax attorneys and accountants retained by the Escrow Agent) shall be paid out of the Escrow Account in accordance with Section III.F of the Bayer Settlement Agreement. Notwithstanding anything herein to the contrary, the Escrow Agent shall be entitled





IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered on the date first above written.

BAYER:

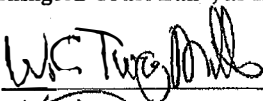


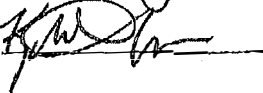
CLASS LEAD COUNSEL:

\_\_\_\_\_

ESCROW AGENT:

Washington Trust Bank, as Escrow Agent

By:  Its: W.C. Twigg Mills  
Vice President  
Trust Officer

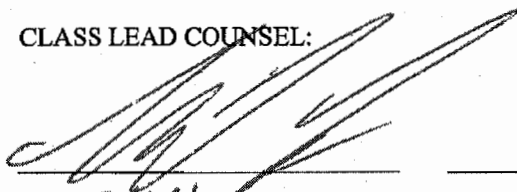
By:  Its: Kristine V. Maas  
Trust Officer

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered on the date first above written.

BAYER:

\_\_\_\_\_

CLASS LEAD COUNSEL:

  
5/16/12

ESCROW AGENT:

**Washington Trust Bank, as Escrow Agent**

By: \_\_\_\_\_ By: \_\_\_\_\_

Its: \_\_\_\_\_ By: \_\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered on the date first above written.

BAYER:

\_\_\_\_\_

CLASS LEAD COUNSEL:

\_\_\_\_\_

*E. Meja*  
5/16/12

ESCROW AGENT:

**Washington Trust Bank, as Escrow Agent**

By: \_\_\_\_\_ By: \_\_\_\_\_

Its: \_\_\_\_\_ By: \_\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered on the date first above written.

BAYER:

\_\_\_\_\_

CLASS LEAD COUNSEL:

\_\_\_\_\_

ESCROW AGENT:

Washington Trust Bank, as Escrow Agent

By: <u>W.C. Twig Mills</u>	Its: <u>W.C. Twig Mills</u>
	<u>Vice President</u>
	<u>Trust Officer</u>
By: <u>Kristine V. Maas</u>	Its: <u>Kristine V. Maas</u>
	<u>Trust Officer</u>

**EXHIBIT 1**

**ESCROW ACCOUNT**

Wire Instructions to send funds to Washington Trust Bank:

Bank Name:	Marshall & Ilsley Bank
Bank Address:	11270 West Park Place, Suite 400 Milwaukee, WI 53224
ABA Number:	075000051
Account Number:	18-24-5997
Account Name:	Washington Trust Bank #74-2038-01-1
For Further Credit:	Bayer Settlement Escrow #75-9240-01-3

**EXHIBIT 2**

**ESCROW FEE SCHEDULE for WASHINGTON TRUST BANK**

Annual:	First Year: \$8,500 minimum Thereafter: \$525 per month
Market Value of Securities:	0.05% of FMV (1/20 <sup>th</sup> of 1 percent) pro-rated monthly [to be applied towards minimum annual fee]
Security Settlement:	Purchases, sales, maturities, & redemptions will be charged \$25.00 per security settlement. Money market and mutual funds are not charged.
Extraordinary Services:	Tax return preparation fees (including all IRS matters related to qualified settlement fund reporting), and other professional fees (such as legal and accounting fees) will be charged when incurred; Additional fees may be charged for extraordinary services rendered or out-of-pocket costs (i.e., wires, postage, courier expenses, etc.)

# **Exhibit B**

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## LARKSPUR DESIGN GROUP - NOTICE PLAN SUMMARY

### GENERAL ASSUMPTIONS:

#### CASE BACKGROUND

Thirteen class actions arising out of Bayer's sale and marketing of Bayer Aspirin With Heart Advantage and Bayer Women's Low-Dose Aspirin + Calcium were filed against Bayer in federal court. Specifically, Plaintiffs claim that Bayer overcharged consumers for the Combination Aspirin Products or that these products should not have been sold, because these products were not FDA-approved, could not provide all advertised health benefits and were inappropriate for long term use.

#### TARGET AUDIENCE ("TA") DEFINITION:

Defined TA: U.S. Adults who Purchase Bayer Aspirin and are Watching Diet for Cholesterol or Taking Non-Prescription Drugs for Osteoporosis (approximately 6.7 million U.S. Adults)

#### DIRECT NOTICE

#### ESTIMATED NUMBER OF ADDRESSES

##### Print/Mail 4.25" x 6" Summary Notice Postcard

553,480

Direct Notice Reach = between 8% and 10% of the Class Members

#### PRINT PUBLICATION

#### CIRCULATION OR ESTIMATED IMPRESSIONS

**Publish 1/3 page Summary Notice in national magazines appropriate for the target audience and two national newspapers.**

Magazine TA Reach = 65%

Magazine TA Avg. Frequency = 2.9

<i>Reader's Digest</i>	5,500,000
<i>Good Housekeeping</i>	4,613,000
<i>Woman's Day</i>	3,910,000
<i>People</i>	3,656,000
<i>Time</i>	3,445,000
<i>Cooking Light</i>	1,775,000
<i>National Enquirer</i>	700,000
<i>Smithsonian</i>	2,054,000
<i>USA Today</i>	1,200,000
<i>The Wall Street Journal</i>	1,800,000
<i>AARP Bulletin</i>	22,407,421

**1/3 page is approximately 3.5" x 10"**

#### INTERNET

Internet Reach = approximately 10 million unique individuals

##### Sponsored Links

1,000,000

Google, Yahoo, & Bing

##### Targeted Content Advertising (Utilizing Pulsepoint)

5,000,000

Health Target

General News, Weather, Sports

Comscore Top 250 Websites

##### Social Media

15,000,000

Develop and Maintain Facebook Case Page

Banner and Link Ads on the Facebook Network

#### NEWSWIRE

2 Press Releases through Businesswire and/or PR Newswire

TBD

#### TOTAL MAGAZINE CIRCULATION:

51,060,421

#### TOTAL NUMBER OF ONLINE IMPRESSIONS:

21,000,000

**Exhibit C**

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Legal Notice

If you purchased either of the following Bayer Aspirin products in the U.S., you may be entitled to compensation.

**Bayer® Aspirin With Heart Advantage  
Bayer® Women's Low-Dose Aspirin + Calcium**

1/1/08 – Month DD, 2012  
1/1/00 – Month DD, 2012

**WHAT IS THIS LAWSUIT ABOUT?**

Plaintiffs claim that Bayer overcharged consumers for Bayer® Aspirin With Heart Advantage and Bayer® Women's Low-Dose Aspirin + Calcium ("Combination Aspirin Products") or that these products should not have been sold, because these products were not FDA-approved, could not provide all advertised health benefits and were inappropriate for long-term use. Bayer denies it did anything wrong. The Court has not decided who is right and who is wrong.

**WHAT ARE THE TERMS OF THE SETTLEMENT?**

Under the terms of the proposed settlement, each Settlement Class member who submits a valid claim may be entitled to money. Bayer has agreed to make payments totaling \$15,000,000.00 to settle Plaintiffs' claims, including attorneys' fees and costs. For more details, write to the address or visit the website identified below.

**ARE YOU AFFECTED?**

If you purchased either of the listed Combination Aspirin Products in the U.S. for personal, family or household uses within the specific time stated, then you are a member of a Settlement Class. Be sure to visit the website for complete class member definitions.

**WHAT ARE MY LEGAL RIGHTS?**

You have a choice of whether to stay in any Settlement Class or not, and you must decide now. **Stay In:** you will be legally bound by the terms of the settlement, and you won't be able to sue Bayer—as part of any other lawsuit—for any claims arising from or related to the Combination Aspirin Products. **To receive benefits from the settlement, you must submit a valid, sworn Claim Form.** The Claim Form must be postmarked, or submitted online by Month, DD, 2012. Any member of any Settlement Class that does not timely submit a valid,

sworn Claim Form will not be entitled to settlement benefits. To file a Claim Form, visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com). **Get Out:** If you get out, you will not receive benefits from the proposed settlement, but you will keep rights to sue Bayer for these claims, and will not be bound by the terms of the settlement. To be excluded from the Settlement Classes, you must act before [ ], 20\_\_\_. If you wish to be excluded from one or more of the Settlement Classes visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com).

**WHO REPRESENTS ME?**

The Court has appointed Hagens Berman Sobol Shapiro LLP and Douglas & London P.C. to represent the Settlement Classes. You may hire your own attorney, if you wish, at your own expense.

**THE PROPOSED SETTLEMENT:**

The Court, will hold a Fairness Hearing on Month DD, 2012 at \_\_\_\_\_ (a.m./p.m.), to determine whether the proposed settlement is fair, reasonable, and adequate and to approve attorney fees and costs. The Hearing is at the U.S. District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201. If you are a member of a Settlement Class who did not seek to be excluded, you may write to the Court to object to the proposed settlement, and you may ask to speak at the hearing about the fairness of the proposed settlement.

**HOW CAN I GET MORE INFORMATION?**

If you have questions, visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com), call 1-877-257-5766, or write to Bayer Combination Aspirin Litigation Settlement, c/o Gilardi & Co. LLC, P.O. Box. 808061, Petaluma, CA 94975-8061.

# **Exhibit D**

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## **UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK**

**If you purchased either of the following Bayer Aspirin products in the U.S., you may be entitled to compensation.**

<b>Product:</b>	<b>Purchased for personal, family or household uses in the U.S. between:</b>
<b>Bayer® Aspirin With Heart Advantage</b>	January 1, 2008 – Month DD, 2012
<b>Bayer® Women's Low-Dose Aspirin + Calcium</b>	January 1, 2000 - Month DD, 2012

*A federal court authorized this Notice. This is not a solicitation from a lawyer.*

- Consumers sued Bayer HealthCare LLC ("Defendant" or "Bayer") and claimed that Bayer violated state consumer fraud and deceptive business practices acts, express and implied warranty statutes, and unjust enrichment laws, in connection with the sale and marketing of Bayer® Women's Low-Dose Aspirin + Calcium, an 81 mg aspirin pill combined with calcium, and (2) Bayer® Aspirin With Heart Advantage, an 81 mg aspirin pill combined with phytosterols. These two products are jointly called the "Combination Aspirin Products."
- Plaintiffs claim that Bayer overcharged consumers for these products or that these products should not have been sold, because these products were not FDA-approved, could not provide all advertised health benefits and were inappropriate for long-term use.
- Bayer disputes these claims. It denies engaging in any unlawful conduct. No court, or other authority, has found that Bayer engaged in any wrongdoing.
- Judge Brian M. Cogan (the "Court") has certified this lawsuit, called *In re Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, to proceed as a class action for purposes of settlement on behalf of all persons who purchased one or both of the above products for personal, family or household uses in the U.S. during the specified time periods.
- Bayer has agreed to settle these lawsuits with the Settlement Classes (defined in Paragraph 2.1 below). For the benefit of the Settlement Classes and to resolve all claims, Bayer has agreed to make a payment in the amount of \$15,000,000 (the "Settlement Amount").

**TO DETERMINE WHETHER YOU ARE AFFECTED BY THE PROPOSED SETTLEMENT IN THESE CASES, PLEASE READ THIS NOTICE CAREFULLY.**

Your rights and options – **and the deadlines to exercise them** – are explained in this Notice.

Please visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com) or contact the claims administrator at: Gilardi & Co. LLC, P.O. Box 808061, Petaluma CA 94975-8061 for court documents about the proposed settlement, frequently asked questions, and more information.

**DO NOT CONTACT THE COURT IF YOU HAVE QUESTIONS REGARDING THIS NOTICE**

### **PART 1: GENERAL INFORMATION**

#### **WHAT IS THIS NOTICE ABOUT?**

##### ***1.1 Why have I received this Notice?***

This Notice has been sent to notify you:

- a. that a proposed settlement has been reached on behalf of the Settlement Classes with the Defendant;
- b. that an allocation of the Settlement Amount has been proposed regarding how to distribute the settlement funds among members of the Settlement Classes;
- c. that Class Counsel will petition the Court for an award of attorneys' fees and reimbursement of expenses;
- d. that Class Counsel will petition the Court for service awards for Settlement Class Representatives; and
- e. how to obtain proceeds from the Settlement reached in the case by filing the accompanying Claim Form.

Your rights and options regarding these matters are described in this Notice.

##### ***1.2 What are these lawsuits about?***

On October 29, 2008 the first of thirteen class actions arising out of Bayer's sale and marketing of the Combination Aspirins was filed against Bayer in federal court. On April 14, 2009, all actions were centralized before Judge Brian M. Cogan in the Eastern District of New York by the Judicial Panel on Multidistrict Litigation.

Plaintiffs claim that Bayer overcharged consumers for the Combination Aspirin Products or that these products should not have been sold, because these products were not FDA-approved, could not provide all advertised health benefits and were inappropriate for long-term use. Plaintiffs assert that, as a result of Bayer's alleged conduct, consumers were overcharged for the Combination Aspirin Products. You can read the Plaintiffs' Master Complaint at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com). Plaintiffs have sought to recover damages that they allege the Defendant's conduct caused, as well as attorneys' fees and costs. Bayer denies that its conduct was unlawful. No court or other authority has found that Bayer participated in any wrongdoing. The Court has not yet resolved the merits of the lawsuit, or determined whether the Plaintiffs' or Bayer's contentions are true.

This lawsuit does not include the two products known as Bayer® Women's Low Dose Aspirin (with a calcium carbonate buffer) or Bayer® Heart Health Advantage.

### **1.3 What is a Class Action?**

In a class action lawsuit, one or more people called "Class Representatives" sue on behalf of people who have similar claims. The people together are called the "Class" or "Class Members." In this lawsuit, Plaintiffs alleged claims on behalf of separate Classes for the two products at issue. Accordingly, the people who sued on behalf of the Class Members are called "Settlement Class Representatives," and the people who purchased a Combination Aspirin Product are considered part of a "Settlement Class" or "Class Members." People who purchased both Combination Aspirin Products will be a member of both Settlement Classes. One court resolves the issues for everyone in the Settlement Classes—except for those people who choose to exclude themselves from the Settlement Classes. U.S. District Court Judge Brian M. Cogan is overseeing these class action lawsuits.

The Court has decided to conditionally certify the Settlement Classes. More information about why the Court allowed the lawsuit to be a class action is in the Court's Orders which are available at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com).

### **1.4 What is the current status of the lawsuits?**

Several lawsuits were originally filed in late 2008, and the cases were consolidated by the Judicial Panel for Multidistrict Litigation before Judge Cogan in the Eastern District of New York. Plaintiffs filed a Master Complaint, Defendant moved to dismiss, and following extensive briefing by both parties, the Court denied the motion to dismiss. *See generally In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356 (E.D.N.Y. 2010).

Over the next 20 months, the parties engaged in nearly-complete discovery into the merits of Plaintiffs' lawsuit, including document production and review, depositions of current and former Bayer employees, depositions of Plaintiffs, and expert witness disclosures and depositions. On February 17, 2011, Plaintiffs filed their Motion for Class Certification together with a Proffer of Facts. Defendant filed its opposition to Plaintiffs' motion on June 7, 2011. Plaintiffs filed their reply brief on July 22, 2011. Additionally, on June 15, 2011, Plaintiffs moved to strike and/or exclude the expert reports and testimony of all of Bayer's experts submitted by Bayer in support of its class certification opposition. Bayer filed its opposition to Plaintiffs' motions on July 27, 2011, and Plaintiffs' filed their replies on August 19, 2011. The case has essentially been put on hold pending a ruling on Plaintiffs' motion for class certification and Plaintiffs' motion to strike Bayer's experts.

On May 15, 2012, the Plaintiffs reached a settlement agreement with the Defendant. This settlement agreement covers all of the allegations in the lawsuit. On Month DD, 2012, the Court granted preliminary approval to the settlement.

Section 2 of this Notice explains your legal rights and options regarding the proposed settlement.

## **DISTRIBUTION OF SETTLEMENT MONEY**

### **1.5 What purchases qualify me to receive money from the settlement?**

Whether you are a member of the Bayer Heart Advantage Class or the Bayer Women's Class (collectively referred to as the "Settlement Classes") – and thus eligible to receive money from the related settlement – depends on (1) which Combination Aspirin Product you purchased, (2) whether you purchased it for personal, family or household uses, and (3) when it was purchased. Each Settlement Class only includes purchases of specific Combination Aspirin Products during specific periods of time.

If you purchased one or more of the Combination Aspirin Products for personal, family or household uses then you are eligible to participate in one or both of the Settlement Classes described in this Notice, provided that your purchase occurred during the time periods specified for each Settlement Class. Please see the chart in Paragraph 2.1 of this Notice for a description of the products and time periods covered by each of the Settlement Classes.

### **1.6 How will the settlement money be distributed?**

Settlement funds will be distributed only after the Court grants final approval to the settlement and proposed allocation method for distributing the funds among the Settlement Classes. As of the date of this Notice, the settlement and proposed allocation await final approval.

Upon preliminary approval of the settlement, Bayer advanced funds adequate to pay for the class notice program and related administrative expenses. Within 10 business days after final approval (*i.e.*, when time has expired for any appeals from a final approval order of Judge Cogan, or any such appeals have been resolved in favor of the proposed settlement), the remaining settlement funds will be deposited into an interest-bearing escrow account. The settlement funds (reduced by any amounts approved by the Court for settlement notice and claims administration, payment of attorneys' fees, reimbursement of Plaintiffs' litigation expenses, and service awards to Settlement Class Representatives), will be apportioned among the Settlement Classes in accordance with an agreed method of allocating the funds among the Settlement Classes. Each Settlement Class Member will be eligible to receive money from any Settlement Class in which he or she is a member.

For each Settlement Class, the available settlement funds will be distributed to members of that Settlement Class who do not ask to be excluded from the settlement and who file a proper, validly sworn and timely Claim Form ("Authorized Claimant"). Authorized Claimants who do not have documentary proof of purchase, but who complete and timely submit a valid Claim Form, shall be entitled to a one-time cash Settlement Payment of \$4.00 for all purchases of Bayer Women's and/or \$6.00 for all purchases of Bayer Heart Advantage from each Settlement Class fund for which the Claims Administrator has determined they are eligible, subject to pro rata reductions if the claims for payment exceed the settlement fund. Authorized Claimants who submit documents that the Claims Administrator in its sole discretion determines is valid proof of purchase proof(s) of purchase shall be entitled to a payment for \$4.00 for each purchase of Bayer Women's and/or \$6.00 for each purchase of Bayer Heart Advantage, subject to pro rata reductions if the

claims for payment exceed the settlement fund. If you are a member of more than one Settlement Class, you are eligible to receive settlement proceeds based on your membership in each Settlement Class.

Once the Court grants final approval to the settlement, the distribution will take place as soon as practicable after (i) the time has expired for any appeals from a final approval order of Judge Cogan, or any such appeals have been resolved in favor of this Agreement and (ii) after review, determination, and audit of the Claim Forms by the Claims Administrator and approval by the Court of the Claims Administrator's recommendations as to the specific amounts to be paid to the Claimants.

Once the time for Settlement Class Members to submit verified Claim Forms has ended, the Claims Administrator will determine if the claims of Authorized Claimants would use all of the funds allocated to each Settlement Class through the distribution plan described above. If there are excess funds allocated to one or both of the Settlement Classes ("Excess Funds"), the Excess Funds will be distributed as *cy pres* payments to charities agreed to by the parties and approved by the Court.

#### ***1.7 How do I receive money from the settlement?***

In order to obtain money from the Settlement, you need to complete and timely submit a Claim online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com) or send a written claim, which is also available on the website, to the Claims Administrator at Bayer Combination Aspirin Litigation Settlement, c/o Gilardi & Co. LLC, P.O. Box 808061, Petaluma CA 94975-8061. Even if you belong to both Settlement Classes, you need only submit one Claim Form, and the Claims Administrator will determine the Settlement Classes for which you qualify and the Settlement Class allocations from which you will receive money. The Claim Form must be postmarked or submitted online by Month DD, 2012, to be timely returned. Any member of any Settlement Class that does not complete and timely return the Claim Form will not be entitled to share in any settlement proceeds.

**WARNING:** There are companies that may contact Settlement Class Members upon learning of a pending class action distribution and offer to help Settlement Class Members file claim forms in exchange for a share of the money that the Settlement Class Members may ultimately recover. Please be advised that you do not need to use one of these companies. Assistance is available from the Claims Administrator at no cost to you.

### **THE LAWYERS**

#### ***1.8 Do I have a lawyer in this case and how will they be paid?***

The Court appointed the following two individuals to represent both Settlement Classes:

Elizabeth A. Fegan, Esq.  
**HAGENS BERMAN SOBOL SHAPIRO LLP**  
(Co-Lead Counsel)  
1144 West Lake Street, Suite 400  
Oak Park, IL 60301-1043  
(708) 628-4949  
Fax: (708) 628-4950

Michael A. London, Esq.  
**DOUGLAS & LONDON, P.C.**  
(Co-Lead and Liaison Counsel)  
111 John Street, 14th Floor  
New York, NY 10038  
(212) 566-7500  
Fax: (212) 566-7501

These individuals and their law firms are referred to as Class Counsel. They are experienced in handling class actions. More information about these law firms, their practices, and their lawyers' experience is available at [www.hbsslaw.com](http://www.hbsslaw.com) and [www.douglasandlondon.com](http://www.douglasandlondon.com).

You will not be personally charged for the services of Class Counsel in litigating these cases. You do not need to hire your own lawyer because Class Counsel is working on your behalf. But, if you want your own lawyer, you may hire one at your own expense. You have the right to enter an appearance in the case through your lawyer if you wish.

To date, Class Counsel have not been paid any attorneys' fees. In compensation for their time and risk in prosecuting the litigation on a wholly contingent fee basis, Class Counsel will petition the Court for an award from the settlement fund of attorneys' fees and for reimbursement of litigation expenses incurred, including costs expended in providing Notice to the Settlement Classes and in administering the settlement fund. After this motion is filed with the Court, a copy of this motion will be available at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com). Class Counsel will request an award of attorneys' fees that will not exceed 30 percent of the total amount of the settlement. Class Counsel will also petition the Court to provide service awards to Settlement Class Representatives in the amount of \$2,500 each.

Any attorneys' fees and reimbursement of litigation expenses will be awarded only as approved by the Court in amounts determined to be fair and reasonable. If you wish to object to the petition for attorneys' fees and reimbursement of litigation expenses, you may do so, but you must do so following the procedures set forth below.

### **OBJECTING**

#### ***1.9 May I object to the proposed settlement; the proposed Settlement Class allocations and/or distributions; Class Counsel's requests for an award of attorneys' fees and reimbursement of litigation expenses; or Class Counsel's requests for service awards for the Settlement Class Representatives?***

Only members of one or both of the Settlement Classes who do not request exclusion from the Settlement may object to (1) the proposed settlement; (2) the proposed Settlement Class allocations and/or distributions; (3) Class Counsel's request for an award of attorney's fees and reimbursement of litigation expenses; and/or (4) Class Counsel's request for service awards for Settlement Class Representatives.

If you wish to make an objection, you must mail your written objection, including a statement of your reason(s) for your objection, to, or file it with, the Clerk of the Court at the following address: Clerk of Court, 225 Cadman Plaza East, Brooklyn, New York, 11201. The written objection must be received and filed with the Clerk of Court no later than Month DD, 2012. Copies of any objections must be sent to counsel for the Plaintiffs and counsel for the Defendant, and the names and addresses of those lawyers are identified at the end of this Notice.

## **PART 2: THE SETTLEMENT CLASSES**

<b>SUMMARY OF YOUR LEGAL RIGHTS AND OPTIONS AS A MEMBER OF THE SETTLEMENT CLASSES:</b>	
Exclude Yourself from One or Both of the Settlement Classes	If you are a member of any of the Settlement Classes but do not want to be bound by the proposed settlement or proposed allocation, you must exclude yourself ("opt-out") from the Settlement Class(es) to which you belong. To ask to be excluded, you must send a written "Exclusion Request" in the form of a letter sent by mail, stating that you want to be excluded from <i>Bayer Corp. Combination Aspirin Products Marketing &amp; Sales Practices Litigation</i> , No. 09-MD-2023. (See Paragraphs 2.3 – 2.4 of this Notice for further information about your right to exclude yourself from the Settlement Classes.)
File Claim Form	If you are a member of any of the Settlement Classes, and have not asked to be excluded, you may be eligible to receive a share of the proceeds from the proposed settlement. In order to obtain any money from the settlement, you must submit a Claim Form. The Claim Form must be postmarked or submitted online by Month DD, 2012 to be considered for distribution.
Object	If you are a member of any of the Settlement Classes and have not requested exclusion from the Settlement, you have the option to object to: (1) the proposed settlement; (2) the proposed Settlement Class allocations and/or distributions for the Settlement Classes; (3) Class Counsel's request for an award of attorney's fees and reimbursement of litigation expenses; and/or (4) Class Counsel's request for service awards for Settlement Class Representatives. Your written objection to one or more of these matters must be received by the Court no later than Month DD, 2012. (See Paragraph 1.9 of this Notice for further information about your right to object.)
Attend the Fairness Hearing	If you are a member of any of the Settlement Classes, and have not requested exclusion, you may ask to <del>spe</del> ak at the Fairness Hearing regarding the proposed settlement and proposed Settlement Class allocations. However, you may only speak at the hearing if you first follow certain procedures described in Paragraph 2.12 of this Notice.
Hire Your Own Lawyer	If you are a member of any of the Settlement Classes, you may, but are not required to, hire your own lawyer at your expense to advise you of your rights with respect to (1) the proposed settlement; (2) the proposed Settlement Class allocations and/or distributions for the Settlement Classes; (3) Class Counsel's request for an award of attorney's fees and reimbursement of litigation expenses; and/or (4) Class Counsel's request for service awards for Settlement Class Representatives. You have the right to enter an appearance in the lawsuit through your lawyer if you wish.
Do Nothing	If you are a member of any of the Settlement Classes and do nothing, you will not receive money from the Settlement. You must submit a Claim Form to obtain money from the settlement. Even if you do nothing, you will be bound by the Releases and Reservations provisions contained in the Settlement Agreement with the Defendant.

### **ARE YOU A MEMBER OF THE SETTLEMENT CLASSES?**

#### **2.1 How do I know if I am a member of the any of the Settlement Classes?**

You can determine if you are part of one or both of the Settlement Classes by using the following chart:

**Master Class Chart**

Settlement Class	Date of Purchase	Product Purchased for Personal, Family or Household uses in the U.S.	Percentage Allocation
<b>BAYER ASPIRIN WITH HEART ADVANTAGE CLASS</b>	January 1, 2008 to Month DD, 2012	Bayer® Aspirin With Heart Advantage	40%
<b>BAYER WOMEN'S LOW-DOSE ASPIRIN + CALCIUM CLASS</b>	January 1, 2000 to Month DD, 2012	Bayer® Women's Low-Dose Aspirin + Calcium	60%

**RECEIPT OF THIS NOTICE DOES NOT NECESSARILY MEAN THAT YOU ARE A MEMBER OF ANY OF THE SETTLEMENT CLASSES OR ARE ENTITLED TO RECEIVE MONEY FROM THE SETTLEMENT.**

#### **2.2 Can I be in more than one Settlement Class and receive money from both Settlement Class allocations?**

Yes. If you fit into the definition of both Settlement Classes, then you are a member of each such Settlement Class, unless you exclude yourself from one or more of them. Read Paragraph 2.1 to determine whether you belong to one or both of the Settlement Classes and to learn of your legal rights and options.



### **2.3 Why would I ask to be excluded from the Settlement Classes?**

If you exclude yourself from the Settlement Classes - which also means to remove yourself from the Settlement Classes, and is sometimes called "opting-out" of the Settlement Class - you won't get any money or benefits from this settlement. However, you may then be able to sue Bayer for claims that would otherwise be released as a result of the Settlement. If you exclude yourself, you will not be legally bound by any terms in the Settlement Agreement. If you start your own lawsuit against Defendant after you exclude yourself, you will have to hire and pay your own lawyer for that lawsuit, and you will have to prove your claims. If you do exclude yourself so you can start your own lawsuit against Defendant, you should talk to your own lawyer soon, because your claims may be subject to a statute of limitations.

You may exclude yourself from the Settlement Classes for any reason.

### **2.4 How do I ask the Court to exclude me from the Settlement?**

To be excluded, you must send a written "Exclusion Request" letter by mail, stating that you want to be excluded from *Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*. Be sure to include your name, address, and the Settlement Class(es) to which you belong, and sign the letter. You must mail your Exclusion Request postmarked by Month DD, 2012, to: Bayer Combination Aspirin Litigation, c/o Gilardi & Co. LLC, P.O. Box 808061, Petaluma CA 94975-8061.

### **2.5 What if I still do not know whether I am a member of one or both of the Settlement Classes?**

If you still do not know whether you are included in one or both of the Settlement Classes, please visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com), call 1-877-257-5766, or write to:

#### **BAYER COMBINATION ASPIRIN PRODUCTS LITIGATION SETTLEMENT**

c/o Gilardi & Co. LLC

P.O. Box 808061

Petaluma CA 94975-8061

[www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)

[claims@bayercombinationaspirinsettlement.com](mailto:claims@bayercombinationaspirinsettlement.com)

#### **WHAT THE PROPOSED SETTLEMENT AND ALLOCATION MEAN TO YOU**

### **2.6 Which allocations are members of the Settlement Classes eligible to receive money from?**

If you are a member of one or both of the Settlement Classes, you are eligible to receive money from the proposed allocation for each Settlement Class in which you are a member.

### **2.7 What does the proposed settlement and proposed allocation provide to the Settlement Classes; what does the proposed settlement provide to Bayer?**

As part of the proposed settlement, the Defendant has agreed to make payments totaling \$15,000,000. Allocation Counsel will propose an allocation based on factors they determine, which would provide the percentage allocation to each of the Settlement Classes as described in the chart in Paragraph 2.1 and as may be adjusted as ordered by the Court.

In exchange, Settlement Class Members give up all legal rights to sue Bayer for any and all claims arising from or related to the Combination Aspirin Products. Bayer, its parent(s) and predecessors, affiliates, assigns, successors, related companies, subsidiary companies, and holding companies (including but not limited to Bayer Corporation, Bayer Healthcare AG, and Bayer AG) and insurance carriers, current and former attorneys, and their current and former members, partners, officers, directors, agents, and employees, and any distributors, retailers, and wholesalers of Bayer Aspirin With Heart Advantage or Bayer Women's Low-Dose Aspirin + Calcium will be released from all claims of Settlement Class Members for all purchases of relevant Combination Aspirin Products during the respective Settlement Class periods as more fully described in the Releases and Reservations provisions contained in the Settlement Agreement. However, Settlement Class Members retain all legal rights to sue for claims for personal injury. Whether you choose to object, attend the Fairness Hearing, hire your own counsel or do nothing, Settlement Class Members will be bound by the Releases and Reservations provisions contained in the Settlement Agreement.

### **2.8 Why did the Plaintiffs and Defendant agree to the proposed settlement?**

Although the Court has not ruled on the merits of the Plaintiffs' claims, the parties have agreed to settle the lawsuits against Bayer. Based on Class Counsel's extensive investigation of the facts and the law relevant to the lawsuit, the Plaintiffs and Class Counsel have concluded that the settlement with Bayer is in the best interests of the Settlement Classes.

Bayer vigorously denies that it acted unlawfully in any respect and asserted defenses to all of the Plaintiffs' claims. The proposed settlement does not represent an admission of liability or that the Court has reached a final decision with respect to the merits of the *Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation* lawsuit.

### **2.9 How do I receive money from the proposed Settlement Class allocations resulting from the proposed settlement with Bayer?**

In order to obtain money from the Settlement, you need to complete and timely submit a Claim online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com) or complete and timely submit the Claim Form available online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com). Even if you belong to more than one Settlement Class, you need only submit one Claim Form. The Claim Form must be postmarked or submitted online by Month DD, 2012 to be considered for distribution. Any member of any Settlement Class that does not complete and timely return the Claim Form will not be entitled to share in any settlement money unless the Court otherwise permits.

**2.10 How will the proceeds from the proposed Settlement Class allocations resulting from the proposed settlement with Bayer be distributed?**

The Settlement Amount, reduced by any amounts approved by the Court for payment of settlement notice and claims administration, attorneys' fees, reimbursement of litigation expenses and service awards to the Settlement Class Representatives, will be apportioned among the Settlement Classes based upon the proposed allocation described in Paragraphs 1.6, 2.1 and 2.7. Each Settlement Class allocation will be distributed among the members of the respective Settlement Classes that do not request exclusion and file timely and valid Proofs of Claim according to the proposed Settlement Agreement, which is available online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com).

**2.11 Will I owe any attorney's fees or expenses if I participate in the settlement?**

Since they first filed this case in 2008, Class Counsel have not received any payment for their services in prosecuting the lawsuit, nor have they been reimbursed for any out-of-pocket expenses. If the Court approves the proposed settlement, Class Counsel will ask the Court to award them fees of up to 30% of the Settlement Fund, plus reimbursement of litigation expenses actually incurred. Defendant has agreed not to oppose such an award of fees and expenses from the Settlement Fund.

**2.12 Are the class representatives receiving anything for the time and effort they contributed to the lawsuit?**

As part of the Settlement, and subject to the Court's final approval of the Settlement, Class Counsel will ask the Court to award the Plaintiffs for the time and effort they contributed to the prosecution in the amount of \$2,500 each. These awards would be paid from the Settlement Fund.

**OBJECTING**

**2.11 How do I object to the proposed settlement; one or both of the proposed Settlement Class allocations and/or distributions; Class Counsel's requests for an award of attorneys' fees and reimbursement of litigation expenses; and/or Class Counsel's requests for service awards for the Settlement Class Representatives?**

If you are a member of one or both of the Settlement Classes, you may object to one or more of the following: (1) the proposed settlement with the Defendant; (2) the proposed Settlement Class allocations and/or distributions; (3) Class Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses; and/or (4) Class Counsel's request for service awards for Settlement Class Representatives. If you wish to make an objection, follow the procedures described in Paragraph 1.9 of this Notice.

**FAIRNESS HEARING**

**2.12 Fairness Hearing**

Judge Brian M. Cogan will hold a hearing at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201 on \_\_\_\_\_, 2012 at \_\_\_\_\_ (a.m./p.m.), for the purpose of determining whether the proposed settlement with Bayer, and the proposed Settlement Class allocations should be approved as fair, adequate and reasonable. This hearing is known as the Fairness Hearing. The hearing may be rescheduled without further announcement.

You do not have to attend the hearing. Class Counsel will answer any questions Judge Cogan may have. If you send a written objection, you do not have to attend the hearing to discuss it. As long as you mailed your written objection on time, following the instructions in Paragraph 1.9 of this Notice, the Court will consider it. You may also pay your own lawyer to attend.

You may attend the hearing at your own expense. You may speak at the hearing only if you have submitted your objection as provided in Paragraph 1.9 of this Notice and have stated in your objection letter that you wish to be heard at the Fairness Hearing.

**IF YOU TAKE NO ACTION**

**2.13 What happens if I do nothing at all?**

If you are a member of one or both of the Settlement Classes and you do nothing, you will be bound by the terms of the Settlement with Bayer, but you will not receive any money from the Settlement. In order to obtain money from the Settlement, you must submit a Claim Form. The Claim Form must be postmarked or submitted online by Month DD, 2012 to be considered for distribution.

**GETTING MORE INFORMATION**

**2.14 How can I get more information on the proposed settlement with Bayer?**

This Notice is only a summary of the proposed settlement. You may obtain a copy of the Settlement Agreement by visiting [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com), or writing:

**BAYER COMBINATION ASPIRIN PRODUCTS LITIGATION SETTLEMENT**

c/o Gilardi & Co. LLC

P.O. Box 808061

Petaluma CA 94975-8061

[www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)

1-877-257-5766

[claims@bayercombinationaspirinsettlement.com](mailto:claims@bayercombinationaspirinsettlement.com)

The Settlement Agreement is also on file with the Clerk of the Court.

**Please do not contact the Clerk of the Court or the Judge regarding this Notice. Instead, please direct any inquiries to any of the Class Counsel listed above on page 3 or contact the Claims Administrator.**

# **Exhibit E**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

IN RE BAYER CORP. COMBINATION  
ASPIRIN PRODUCTS MARKETING &  
SALES PRACTICES LITIGATION

No. 09-MD-2023 (BMC) (JMA)

ALL CASES

**[PROPOSED] ORDER  
GRANTING PRELIMINARY APPROVAL OF THE SETTLEMENT, DIRECTING  
NOTICE TO THE CLASSES, AND SCHEDULING FAIRNESS HEARING**

WHEREAS, Plaintiffs, individually and as representatives of the Settlement Classes described below, and Defendant, Bayer HealthCare LLC, have agreed to a proposed Settlement Agreement and Release dated May 15, 2012 (“Settlement”), which is subject to review under Rule 23 of the Federal Rules of Civil Procedure and which sets forth the terms and conditions for the proposed settlement of the Litigation; and

WHEREAS, the Court finds that it has jurisdiction over this action and each of the parties for purposes of settlement; and

WHEREAS, the Court has conducted a preliminary approval hearing on [insert date]; and

WHEREAS, the Court, having read and considered the Settlement Agreement, the proposed Notice of Pendency of Class Action and Proposed Settlement, the proposed Summary Notice of Pendency and Proposed Settlement of Class Action, the proposed Claim Form, and submissions made relating thereto, and finding that substantial and sufficient grounds exist for entering this Order; and capitalized terms used herein having the meanings defined in the Settlement Agreement;

NOW, THEREFORE, IT IS HEREBY ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2012:

1. **Preliminary Approval.** The terms of the Settlement are hereby approved on a preliminary basis, and, Defendant is ordered to advance funds adequate to pay for the class notice program and related administrative expenses no later than 10 business days after entry this Order. All proceedings in the *Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, other than those necessary to administer and evaluate the Settlement pursuant to Rule 23, are hereby stayed.

2. **Certification of Settlement Classes.** Pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure and for the purposes of the Settlement only, the following Settlement Classes are certified and the following plaintiffs are appointed as Class Representatives:

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(a) “Bayer Aspirin With Heart Advantage” Class: All persons who from January 1, 2008 to the date of this Order, purchased Bayer® Aspirin With Heart Advantage in the United States for personal, family or household uses. Excluded from the Settlement Class are any Judges to whom this Action is assigned and any member of their immediate families. Plaintiffs William Blank, Beverlysue Blank and Douglas Vinson are appointed as the Class Representatives for this “Bayer Aspirin With Heart Advantage” Class.

(b) “Bayer Women’s Low-Dose Aspirin + Calcium” Class: All persons who from January 1, 2000 to the date of this Order, purchased Bayer® Women’s Low-Dose Aspirin + Calcium in the United States for personal, family or household uses. Excluded from the Settlement Class are any Judges to whom this Action is assigned and any member of their immediate families. Plaintiffs Beverlysue Blank and Anne McCabe are appointed as the Class Representatives for this “Bayer Women’s Low-Dose Aspirin + Calcium” Class.

3. The Court finds, preliminarily and for purposes of Settlement only, that the

prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that, for each Settlement Class, (a) the number of Settlement Class Members is so numerous that joinder of all Settlement Class Members is impracticable; (b) there are questions of law and fact common to each member of the Settlement Classes; (c) the claims of the Settlement Class Representatives are typical of the claims of the respective Settlement Classes they seek to represent; (d) the Settlement Class Representatives will fairly and adequately represent the interests of the respective Settlement Classes they seek to represent; (e) the questions of law and fact common to the members of the Settlement Classes predominate over any questions affecting only individual members of the Settlement Classes; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, preliminarily and for the purposes of Settlement only, Elizabeth A. Fegan of Hagens Berman Sobol Shapiro LLP and Michael A. London of Douglas & London PC are appointed as Lead Class Counsel for the Settlement Classes. Lead Class Counsel has the authority to enter into the Settlement Agreement on behalf of the Settlement Classes and is authorized to act on behalf of the members of the Settlement Classes with respect to all acts or consents required by or that may be given pursuant to the Settlement Agreement or such other acts that are reasonably necessary to consummate the Settlement.

5. The Court also appoints Gilardi & Co. LLC/Larkspur Design Group as the Claims Administrator to carry out those acts set forth in the Settlement Agreement, by agreement of Lead Class Counsel and Defendant, or as set forth in any future order of the Court.

6. **Notice.**

(a) The Court approves the form, substance and requirements of (a) the Long-Form Notice and Publication Notice, attached hereto as Exhibits 1 and 2 respectively, and (b) the Claim Form, attached as Exhibit 3.

(b) The form and method of notifying the Settlement Classes of the Settlement and its terms and conditions set forth in the Declaration of Daniel Burke submitted with Plaintiffs' Motion For Preliminary Approval meet the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure, constitutes the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled thereto. Under no circumstances shall any Settlement Class Member be relieved from the terms of the Settlement, including the releases provided for therein, based upon the contention or proof that such Settlement Class Member failed to receive actual or adequate notice.

(c) Lead Class Counsel shall cause the Notice, Publication Notice and Claim Form, substantially in the forms annexed hereto, to be distributed by the Claims Administrator or its designees as set forth in the Notice Plan.

(d) Lead Class Counsel, or the Claims Administrator, also will provide electronic addressing that links to a landing page [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com) where an electronic downloadable version of the Notice and Claim Form may be found. The Notice and Claim Form will remain on the webpage continuously until the first business day following the Claim Deadline or until the termination of the Settlement Agreement.

(e) Class Counsel shall post the Notice and Claim Form on their respective websites, if practicable. The Notice and Claim Form will remain posted on Class Counsel's websites until the first business day following the Claim Deadline or until the termination of the

Settlement Agreement, whichever occurs sooner.

(f) Lead Class Counsel shall, at or before the Fairness Hearing, file with the Court an affidavit or declaration by a competent affiant or declarant, attesting that the Notice and Publication Notice have been disseminated and published in accordance with this Order.

7. **Claims Deadline.** In order to be entitled to participate in the Settlement Fund, as defined in the Settlement Agreement, in the event the Settlement is effected in accordance with all of the terms and conditions thereof, each Settlement Class Member shall take the following action and be subject to the following conditions:

(a) A properly executed Claim Form, substantially in the form attached hereto as Exhibit 3, must be submitted to the Claims Administrator no later than two-hundred seventy (270) days from the entry of this Order, by (1) electronic submission, (2) facsimile transmission, or (3) at the Post Office Box indicated in the Notice. Such deadline may be further extended by Order of the Court. Each Claim Form shall be deemed to have been submitted when postmarked (if properly addressed and mailed by first class mail) provided such Claim Form is actually received prior to the filing of a motion for an Order of the Court approving distribution of the Settlement Fund. Any Claim Form submitted in any other manner shall be deemed to have been submitted when it was actually received at the address designated in the Notice.

(b) The Claim Form submitted by each Settlement Class Member must satisfy the following conditions: (i) it must be properly filled out, signed under penalties of perjury and submitted in a timely manner in accordance with the provisions of the preceding subparagraph; (ii) it must be accompanied by adequate supporting documentation including valid proof of purchase and/or otherwise sworn as set forth in the Claim Form; (iii) if the person executing the Claim Form is acting in a representative capacity, a certification of his or her or its current



authority to act on behalf of the Settlement Class Member must be included with the Claim Form; and (iv) the Claim Form must be complete and contain no material deletions or modifications of any of the printed matter contained therein.

(c) Once the Claims Administrator has considered a timely submitted Claim Form, the Claims Administrator shall determine whether such claim is valid, deficient or rejected. For each claim determined to be either deficient or rejected, the Claims Administrator shall send a deficiency letter or rejection letter as appropriate, describing the basis on which the claim was so determined. If within the time provided, the Class Member cures the deficiencies identified by the Claims Administrator, and the Claims Administrator thereafter determines that the Class Member's Claim is complete, the Claims Administrator shall include the Class Member in the List of Class Members who have been determined by the Claims Administrator to be eligible to receive Settlement Payments under the Allocation Order.

(d) As part of the Claim Form, each Settlement Class Member shall submit to the jurisdiction of the Court with respect to the claim or claims submitted.

#### **8. Requests for Exclusion.**

(a) Class Members shall be bound by all determinations and judgments in this Litigation, whether favorable or unfavorable, unless such persons request exclusion from the Settlement Classes in a timely and proper manner, as hereinafter provided.

(b) A Class Member wishing to make such request shall mail the request in written form, by first class mail, postage prepaid, to the Post Office Box address listed in the Notice, and must be postmarked within one hundred and fifty (150) days of the entry of this Order. Such request for exclusion shall clearly indicate the name and address of the person seeking exclusion, that the sender specifically requests to be excluded from the Settlement

Classes (as defined in the Settlement Agreement) and must be signed by such person. The request for exclusion shall not be effective unless the request for exclusion provides the required information and is made within the time stated above, or the exclusion is otherwise accepted by the Court.

(c) Class Members requesting exclusion from the Settlement Classes shall not be entitled to receive any payment out of the Settlement Fund as described in the Settlement Agreement and Notice.

(d) Within five (5) days of the deadline to postmark requests for exclusion, the Claims Administrator shall provide Lead Class Counsel, counsel for Bayer, and the Court with a list of the persons that have requested to opt out of any of the Settlement Classes (the "Opt-Out List").

9. **Motion for Final Approval of the Settlement and Application for Attorneys' Fees and Expenses and Plaintiff Service Awards.** If Bayer does not exercise its right to terminate under Section IX A of the Agreement, all papers in support of the Settlement and any application for attorneys' fees or expenses, together with a declaration from the Claims Administrator regarding completion of the notice program, shall be filed and served twenty-eight (28) calendar days after receipt of the Opt-Out List.

10. **Comments or Objections.**

(a) The Court will consider comments and/or objections to the Settlement and/or Plaintiffs' Application for Attorneys' Fees and Expenses and Plaintiff Service Awards from Settlement Class Members, only if such comments or objections and any supporting papers are postmarked within fourteen (14) calendar days of the filing of Plaintiffs' Motion for Final Approval of the Settlement and Plaintiffs' Application for Attorneys' Fees and Expenses and

Plaintiff Service Awards, and sent in writing to the Clerk of the Court, United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, with a copy to each of the following:

Elizabeth A. Fegan  
HAGENS BERMAN SOBOL  
SHAPIRO LLP  
1144 W. Lake Street, Suite 400  
Oak Park, IL 60301  
Tel.: (708) 628-4949  
Fax: (708) 628-4950

Adam L. Hoefflich  
BARTLIT BECK HERMAN PALENCHAR &  
SCOTT LLP  
54 W. Hubbard Street  
Chicago, IL 60654  
Tel.: (312) 494-4400  
Fax: (312) 494-4440

COUNSEL FOR PLAINTIFFS AND THE  
SETTLEMENT CLASSES

COUNSEL FOR DEFENDANT BAYER  
HEALTHCARE LLC

All responses to timely comments and/or objections shall be filed and served twenty-eight (28) days of the filing of Plaintiffs' Motion for Final Approval of the Settlement and Plaintiffs'

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Application for Attorneys' Fees and Expenses and Plaintiff Service Awards

(b) Attendance at the hearing is not necessary; however, persons wishing to be heard orally in opposition to the approval of the Settlement are required to indicate in their written objection their intention to appear at the hearing.

(c) An objecting Settlement Class Member must state, specifically and in writing, all objections and the basis for any such objections, and provide a statement of whether he/she intends to appear at the Fairness Hearing, either with or without counsel.

(d) Any Settlement Class Member who fails to file and serve timely a written objection and notice of his or her intent to appear at the Fairness Hearing pursuant to this Paragraph, as detailed in the Notice, shall not be permitted to object to the approval of the Settlement at the Fairness Hearing and shall be foreclosed from seeking any review of the Settlement or the terms of the Agreement by appeal or other means.

(e) Any Settlement Class Member who does not object in the manner prescribed above shall be deemed to have waived all such objections and shall forever be foreclosed from making any objection to the fairness, adequacy or reasonableness of the Settlement and the Final Approval Order to be entered approving the Settlement.

**11. Fairness Hearing.**

(a) A hearing (the "Fairness Hearing") pursuant to Federal Rule of Civil Procedure 23(e) is hereby scheduled to be held before the Court on \_\_\_\_\_ at \_\_\_\_\_ .m. for the following purposes:

(i) to finally determine whether this Litigation satisfies the applicable prerequisites for class action treatment under Federal Rules of Civil Procedure 23(a) and (b);

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(ii) to determine whether the Settlement is fair, reasonable, and adequate, and should be approved by the Court;

(iii) to determine whether the Final Order and Judgment Approving Settlement and Certifying Settlement Classes as provided under the Settlement Agreement should be entered, dismissing the Litigation, on the merits and with prejudice, and to determine whether the release by the Settlement Class Members of the Releasees, as set forth in the Settlement Agreement, should be ordered;

(iv) to consider the application of Lead Class Counsel for an award of attorneys' fees and expenses and determine whether the Fee and Expense Award should be entered; and

(v) to rule upon such other matters as the Court may deem appropriate.

12. The Court reserves the right to approve the Settlement with or without modification and with or without further notice of any kind. The Court further reserves the right to enter its Final Approval Order approving the Settlement Agreement and dismissing the Litigation, on the merits and with prejudice, regardless of whether it has approved the Fee and Expense Award.

13. The Court reserves the right to adjourn the Fairness Hearing or any adjournment thereof without any further notice other than an announcement at the Fairness Hearing or any adjournment thereof, and to approve the Settlement without further notice to the Settlement Classes.

14. Pending final determination of whether the Settlement should be approved, all Settlement Class Members, and each of them, and anyone who acts or purports to act on their behalf shall not institute, commence or prosecute any action which asserts Released Claims against any of the Releasees.

15. In the event that the Settlement shall not be consummated pursuant to its terms, the Settlement Agreement, except as otherwise provided therein, including any amendment(s) thereto, and this Order, shall be null and void, of no further force or effect, and without prejudice to any party, and may not be introduced as evidence or referred to in any action or proceedings by any person or entity, and each party shall be restored to his, her or its respective position as it existed prior to the execution of the Settlement Agreement.

16. The Court retains exclusive jurisdiction over the action to consider all further matters arising out of, or connected with, the Settlement.

**SO ORDERED.**

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Judge Brian M. Cogan

# **Exhibit F**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

In re Bayer Corp. Combination Aspirin  
Products Marketing & Sales Practices  
Litigation

No. 09 MD-2023 (BMC)

**BAYER COMBINATION ASPIRIN PRODUCTS LITIGATION SETTLEMENT**

c/o Gilardi & Co. LLC  
P.O. Box 808061  
Petaluma, CA 94975-8061  
1-877-257-5766  
claims@bayercombinationaspirinsettlement.com

**Your Signed Claim Must be Postmarked, or Sent  
Electronically To The Claims Administrator No Later than  
Month DD, 2012**

**CLAIM FORM**

If you purchased Bayer® Women's Low-Dose Aspirin + Calcium or Bayer® Aspirin With Heart Advantage, you may be entitled to compensation if you complete this Claim Form and follow the instructions to submit the Claim Form.

**Please read the Full Notice (available at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)) regarding the Settlement carefully before filling out this Form.**

**A. ELIGIBLE PAYMENTS**

You may be eligible to recover money for either of the following "Combination Aspirin Products" you purchased in the United States for personal, family, or household uses:

- **Bayer® Women's Low-Dose Aspirin + Calcium** between January 1, 2000 to Month DD, 2012.
- **Bayer® Aspirin With Heart Advantage** between January 1, 2008 and the present [Date of Preliminary Approval Order].

Neither these lawsuits nor this settlement includes the products Bayer® Women's Low Dose Aspirin (with a calcium carbonate buffer) or Bayer® Heart Health Advantage.

You may be eligible to recover money for all purchases of Bayer Women's Low-Dose Aspirin + Calcium or Bayer Aspirin with Heart Advantage for which you provide a sworn statement and proofs of purchase. You may also be eligible to recover money if you provide a sworn statement but do not have proof of purchase. Any money available to you may be reduced if the total amount of money due to eligible consumers

**Questions or Need Help? Call the Claims Administrator at 1-877-257-5766 or visit  
[www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)**

in this settlement exceeds the total amounts of money available for the settlement. This is described in greater detail in the Full Notice available at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com).

## B. HOW YOU CAN RECEIVE MONEY

To be eligible for and receive compensation under the settlement, you must:

- fill out this Claim Form in its entirety;
- sign the verification statement at the end of the Claim Form;
- return this completed Claim Form with your proofs of purchase, if any, no later than Month DD, 2012.

**OR**

- file a claim online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)

Your information will be kept confidential.

### 1. Your Information

Your Name (First, Middle, Last)																																							
Street Address																																							
City																				State		Zip Code																	
Country																																							
Area code										Telephone number (home)										Area code										Telephone number (work)									
Email address (optional)																																							

### 2. Combination Aspirin Products Purchase Information

You may be entitled to money for the Combination Aspirin Products you purchased in the United States for personal, family or household uses during the time periods indicated. To recover the maximum amount you can from the Settlement Fund, attach documents showing your purchase of one or more of the products listed above. Acceptable proof of purchase(s) include product bottles, product packaging, receipts, records from a retailer that identify you and your purchases, or other records showing you purchased the Combination Aspirin Products. To allow the Claims Administrator to verify your purchase(s), you must complete one or both of the following charts.

**Questions or Need Help? Call the Claims Administrator at 1-877-257-5766 or visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)**



- a. **Bayer® Aspirin With Heart Advantage.** List qualifying purchases of Bayer® Aspirin With Heart Advantage, but not Bayer Heart Health Advantage.

Date of Purchase	Place of Purchase	Proof of Purchase Attached
<div> <div> <div></div> <div></div> </div> <div>/</div> <div> <div></div> <div></div> </div> <div>/</div> <div> <div></div> <div></div> </div> </div>	On-Line Y <input type="checkbox"/> N <input type="checkbox"/> Store _____ City _____ State _____	Y <input type="checkbox"/> N <input type="checkbox"/>
<div> <div> <div></div> <div></div> </div> <div>/</div> <div> <div></div> <div></div> </div> <div>/</div> <div> <div></div> <div></div> </div> </div>	On-Line Y <input type="checkbox"/> N <input type="checkbox"/> Store _____ City _____ State _____	Y <input type="checkbox"/> N <input type="checkbox"/>
	State _____	

(Add additional pages, if necessary)

- b. **Bayer® Women's Low-Dose Aspirin + Calcium.** List qualifying purchases of Bayer® Women's Low-Dose Aspirin + Calcium, but not Bayer® Women's Low-Dose Aspirin (with a calcium carbonate buffer).

Date of Purchase	Place of Purchase	Proof of Purchase Attached
<div> <div> <div></div> <div></div> </div> <div>/</div> <div> <div></div> <div></div> </div> <div>/</div> <div> <div></div> <div></div> </div> </div>	On-Line Y <input type="checkbox"/> N <input type="checkbox"/> Store _____ City _____ State _____	Y <input type="checkbox"/> N <input type="checkbox"/>

Questions or Need Help? Call the Claims Administrator at 1-877-257-5766 or visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)

Date of Purchase	Place of Purchase	Proof of Purchase Attached
<div> <div> <div></div> <div></div> </div> <div>/</div> <div> <div></div> <div></div> </div> <div>/</div> <div> <div></div> <div></div> </div> </div>	On-Line Y <input type="checkbox"/> N <input type="checkbox"/> Store _____ City _____ State _____	Y <input type="checkbox"/> N <input type="checkbox"/>

(Add additional pages, if necessary)

### 3. Verification

I declare under penalty of perjury of the laws of the United States of America that all the information provided in this Claim Form is, to the best of my knowledge, accurate and correct.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**Please keep a copy of your completed Claim Form and copies of any proof of purchase(s) for your records. Note: if the person executing this Claim Form is acting as a representative for a Settlement Class Member, a certification of current authority to act on behalf of the Settlement Class Member must be included with the Claim Form.**

Please mail your completed Claim Form to the Claims Administrator so that it is postmarked no later than **Month DD, 2012**, with any proof of purchase(s), to:

**BAYER COMBINATION ASPIRIN PRODUCTS LITIGATION SETTLEMENT**

c/o Gilardi & Co. LLC

P.O. Box 808061

Petaluma, CA 94975-8061

1-877-257-5766

claims@bayercombinationaspirinsettlement.com

**Or you can file a claim online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)**

**Questions or Need Help? Call the Claims Administrator at 1-877-257-5766 or visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)**

## **Exhibit 2**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

AMENDMENT TO SETTLEMENT  
AGREEMENT AND RELEASE

-----  
IN RE: BAYER CORP. COMBINATION  
ASPIRIN PRODUCTS MARKETING AND  
SALES PRACTICES LITIGATION

09-MD-2023 (BMC)

THIS DOCUMENT RELATES TO:  
All Actions

AMENDMENT TO SETTLEMENT AGREEMENT AND RELEASE

Subject to Court approval, this Amendment to the Settlement Agreement and Release ("Agreement")<sup>1</sup> is entered into between and among the following parties (the "Parties"), by and through their respective counsel: (i) Anne McCabe, Douglas Vinson, BeverlySue Blank and William Blank, as Class Representatives on behalf of themselves and the Settlement Classes (as such classes are hereinafter defined) (collectively, "Class Plaintiffs"); and (ii) Bayer HealthCare LLC ("Bayer"). Except as otherwise provided herein, the terms of the Agreement remain unchanged.

WHEREAS, the Court granted Preliminary Approval of the Settlement on July 23, 2012;

WHEREAS, on or before September 7, 2012, Gilardi caused direct notice to be mailed to 454,036 mailing addresses based on Purchase Records from CVS and Wal-Mart's Sam's Club. (See Dkt # 195).

WHEREAS, on September 10, 2012, Gilardi caused direct notice to be mailed to 62,898 mailing addresses based on the Purchase Records received from BJ's Wholesale Club. (See Dkt # 195).

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<sup>1</sup> All capitalized terms herein shall have the same meaning as set forth in the Agreement.

WHEREAS, on or about September 25, 2012, Costco caused direct notice to be mailed to 129,474 mailing addresses based on its Purchase Records. (*See* Dkt 196).

WHEREAS, on or before November 5, 2012, Gilardi caused direct notice to be mailed to 49,686 mailing addresses based on Purchase Records received from Safeway. (*See* Dkt # 195).

WHEREAS, Class Counsel have concluded that is in the best interests of the Class to distribute additional monies to the Class based on the Purchase Records, and Bayer has agreed;

WHEREAS, Class Counsel has concluded that it would be in Class Plaintiffs' best interests to enter into this Amendment to avoid the uncertainties, burdens, and risks of litigation, and to assure that the substantial benefits reflected herein are obtained for Class Plaintiffs, and further, that this Agreement is fair, reasonable, adequate, and in the best interests of all putative members of the Settlement Classes;

WHEREAS, Bayer has agreed to enter into this Amendment to reduce and avoid further expense, burden, and inconvenience of protracted litigation, and to resolve finally and completely the claims of the Class Plaintiffs;

NOW, THEREFORE, the undersigned counsel on behalf of Bayer and Class Plaintiffs agree that the MDL Class Actions shall be settled, compromised, and/or dismissed with prejudice on the terms and conditions set forth in the Agreement, as amended by this Amendment,<sup>2</sup> and without costs to Bayer (except as provided in the Agreement), subject to Court approval.

## II. OTHER DEFINITIONS

\* \* \*

- C. "Authorized Claimant" means any Settlement Class Member whose claim for recovery has been allowed pursuant to the terms of this Agreement or for which the Claims Administrator or its designee has Purchase Records.

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<sup>2</sup> Only terms of the Agreement that have been amended are reflected below and those amendments are underlined.

\* \* \*

- I. "Claimant" means any Settlement Class Member who files a Claim Form in such form and manner, and within such time, as the Court shall prescribe or for which the Claims Administrator or its designee has Purchase Records.

### III. SETTLEMENT TERMS

\* \* \*

- E. Plan of Allocation

\* \* \*

2. Allocation to Settlement Class Members

Unless otherwise directed in this Agreement, the Claims Administrator shall make payments from each Individual Settlement Fund to Authorized Claimants as follows:

a. Each Authorized Claimant who files a valid, sworn and timely Claim Form identifying (i) the products(s) purchased; the approximate date of such purchase(s); and (iii) the location of such purchase(s), and who submits documents that the Claims Administrator determines are valid proof(s) of purchase shall be entitled to payment from the Settlement Class Amounts for \$4.00 for each purchase of "Bayer Women's Low Dose Aspirin + Calcium" and/or \$6.00 for each purchase of "Bayer Aspirin With Heart Advantage," subject to any pro rata reductions described below.

b. Each Authorized Claimant for which the Claims Administrator or its designee has Purchase Records shall be entitled to payment from the Settlement Class Amounts for \$4.00 for each purchase of "Bayer Women's Low Dose Aspirin + Calcium" and/or \$6.00 for each purchase of "Bayer Aspirin With Heart Advantage," subject to any pro rata reductions described below. The amounts computed for any Authorized

Claimant as set forth in these sub-paragraphs (a) and (b) shall be referred to as “Initial Authorized Payments.”

c. If an Authorized Claimant submits a valid, sworn and timely Claim Form, including a written attestation that identifies (i) the products(s) purchased; the approximate date of such purchase(s); and (iii) the location of such purchase(s), but does not submit valid proof of purchase and the Claims Administrator or its designee does not have Purchase Records for the Claimant, he or she shall be entitled to a one-time payment of \$4.00 for all purchases of “Bayer Women’s Low Dose Aspirin + Calcium” and/or \$6.00 for all purchases of “Bayer Aspirin With Heart Advantage,” subject to any pro rata reductions described below. The amounts computed for Authorized Claimants as set forth in this sub-paragraph shall be referred to as “Single Payments.”

d. Valid proof of purchase may include but is not limited to product bottles, product packaging, receipts, records from a retailer that identify the claimant and the purchases, or other records that show the Authorized Claimant purchased the Class Product(s). It does not include any written attestations or affidavits from the claimant or other individuals.

### 3. Remaining Funds

Any portion of the Settlement Amount remaining in a Net Settlement Fund for either Class after calculation of all Initial Authorized Payments and Single Payments shall be considered “Excess Amounts.” If the calculation of the total of the Single Payments and the Initial Authorized Payments for a particular Settlement Class would exceed the Net Settlement Fund from which they are to be made, then the Net Settlement Fund for that Settlement Class shall be referred to as an “Exhausted Settlement Fund.” If

there are Excess Amounts, the Excess Amounts, after deduction of any further fees and expenses for administration approved by the Court, shall be distributed as provided below.

a. If there are no Excess Amounts after the calculations above, then all payments shall be made to Authorized Claimants solely from the respective Settlement Classes' Net Settlement Funds and all payments to Authorized Claimants, including both Single Payments and Initial Authorized Payments, in any Exhausted Settlement Fund shall be reduced pro rata.

b. If there are both Excess Amounts and an Exhausted Settlement Fund, the Excess Amounts shall be reallocated to the Exhausted Settlement Fund up to the amount necessary that would provide sufficient amounts in the Exhausted Settlement Fund to pay the Single Payments and the Initial Authorized Payment to each Authorized Claimant.

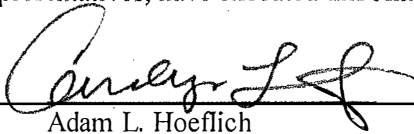
c. Within one-hundred-twenty (120) days of the Claims Deadline, the Claims Administrator shall identify and submit to Lead Class Counsel an accounting of all Single Payments, Initial Authorized Payments, and all pro rata payments, if any, the Claims Administrator intends to pay. At the same time, the Claims Administrator will provide Bayer with sufficient information to (i) identify, for each Settlement Class, the aggregate of all amounts the Claims Administrator intends to pay to Authorized Claimants, and (ii) explain, for each Settlement Class Amount, the calculation as provided for in this section. Within fourteen (14) days of such notice, Lead Class Counsel shall identify any issues or communicate their agreement with the payments proposed to be made by the Claims Administrator. If Lead Class Counsel and the Claims



Administrator are unable to agree on the appropriate payments to be made or the resolution of any outstanding issues, or if Bayer has an objection, they shall request an Order from the Court resolving any such issues. No payments shall be made until so ordered by the Court.

d. If there are any Excess Amounts remaining after all payments ordered by the Court have been made ("Final Excess Amount"), the Claims Administrator shall notify Lead Class Counsel and counsel for Bayer of the Final Excess Amount. The parties shall then apply to the Court for an order pursuant to Section III.G of the Agreement to distribute the Final Excess Amount as *cy pres* payments to charities agreed to by the parties and approved by the Court.

IN WITNESS WHEREOF, the Parties hereto, by and through their fully authorized representatives, have executed this Amendment as of March 1, 2013.



Adam L. Hoeflich  
Carolyn J. Frantz  
BARTLIT BECK HERMAN  
PALENCHAR & SCOTT LLP  
54 W. Hubbard St.  
Chicago, IL 60654  
Ph: (312) 494-4400  
Fax: (312) 494-4440  
*Counsel for Bayer HealthCare  
LLC*

Eric M. Anielak  
James P. Muehlberger  
SHOOK HARDY & BACON, LLP  
2555 Grand Boulevard  
Kansas City, MO 64108  
Tel: (816) 474-6550  
Fax: (816) 421-5547  
*Counsel for Bayer HealthCare  
LLC*

Michael A. London  
Douglas & London, P.C.  
111 John Street, 14<sup>th</sup> Floor  
New York, NY 10038  
Ph: (212) 566-7500  
Fax: (210) 566-7501  
*Co-Lead and Liaison Counsel  
for Plaintiffs*

Elizabeth A. Fegan  
Hagens Berman Sobol Shapiro  
LLP  
1144 W. Lake Street, Suite 400  
Oak Park, IL 60301  
Ph: (708) 628-4960  
Fax: (708) 628-4950  
*Co-Lead Counsel for Plaintiffs*

Administrator are unable to agree on the appropriate payments to be made or the resolution of any outstanding issues, or if Bayer has an objection, they shall request an Order from the Court resolving any such issues. No payments shall be made until so ordered by the Court.

d. If there are any Excess Amounts remaining after all payments ordered by the Court have been made ("Final Excess Amount"), the Claims Administrator shall notify Lead Class Counsel and counsel for Bayer of the Final Excess Amount. The parties shall then apply to the Court for an order pursuant to Section III.G of the Agreement to distribute the Final Excess Amount as *cy pres* payments to charities agreed to by the parties and approved by the Court.

IN WITNESS WHEREOF, the Parties hereto, by and through their fully authorized representatives, have executed this Amendment as of March 1, 2013.

\_\_\_\_\_  
Adam L. Hoeflich  
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PALENCHAR & SCOTT LLP  
54 W. Hubbard St.  
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*Counsel for Bayer HealthCare  
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Fax: (816) 421-5547  
*Counsel for Bayer HealthCare  
LLC*

\_\_\_\_\_  
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111 John Street, 14<sup>th</sup> Floor  
New York, NY 10038  
Ph: (212) 566-7500  
Fax: (212) 566-7501  
*Co-Lead and Liaison Counsel  
for Plaintiffs*

Elizabeth A. Fegan  
Hagens Berman Sobol Shapiro  
LLP  
1144 W. Lake Street, Suite 400  
Oak Park, IL 60301  
Ph: (708) 628-4960  
Fax: (708) 628-4950  
*Co-Lead Counsel for Plaintiffs*

## **Exhibit 3**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK**

**If you purchased either of the following Bayer Aspirin products in the U.S., you may be entitled to compensation.**

<b>Product:</b>	<b>Purchased for personal, family or household uses in the U.S. between:</b>
<b>Bayer® Aspirin With Heart Advantage</b>	January 1, 2008 – July 23, 2012
<b>Bayer® Women’s Low-Dose Aspirin + Calcium</b>	January 1, 2000 - July 23, 2012

*A federal court authorized this Notice. This is not a solicitation from a lawyer.*

- Consumers sued Bayer HealthCare LLC (“Defendant” or “Bayer”) and claimed that Bayer violated state consumer fraud and deceptive business practices acts, express and implied warranty statutes, and unjust enrichment laws, in connection with the sale and marketing of (1) Bayer® Women’s Low-Dose Aspirin + Calcium, an 81 mg aspirin pill combined with calcium, and (2) Bayer® Aspirin With Heart Advantage, an 81 mg aspirin pill combined with phytosterols. These two products are jointly called the “Combination Aspirin Products.”
- Plaintiffs claim that Bayer overcharged consumers for these products or that these products should not have been sold, because these products were not FDA-approved, could not provide all advertised health benefits and were inappropriate for long-term use.
- Bayer disputes these claims. It denies engaging in any unlawful conduct. No court, or other authority, has found that Bayer engaged in any wrongdoing.
- Judge Brian M. Cogan (the “Court”) has conditionally certified this lawsuit, called *In re Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, to proceed as a class action for purposes of settlement on behalf of all persons who purchased one or both of the above products for personal, family or household uses in the U.S. during the specified time periods.
- Bayer has agreed to settle these lawsuits with the Settlement Classes (defined in Paragraph 2.1 below). For the benefit of the Settlement Classes and to resolve all claims, Bayer has agreed to make a payment in the amount of \$15,000,000 (the “Settlement Amount”).

**TO DETERMINE WHETHER YOU ARE AFFECTED BY THE PROPOSED SETTLEMENT IN THESE CASES, PLEASE READ THIS NOTICE CAREFULLY.**

Your rights and options – **and the deadlines to exercise them** – are explained in this Notice.

Please visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com) or contact the claims administrator at: Gilardi & Co. LLC, P.O. Box 808061, Petaluma, CA 94975-8061 for court documents about the proposed settlement, frequently asked questions, and more information.

**DO NOT CONTACT THE COURT IF YOU HAVE QUESTIONS REGARDING THIS NOTICE**

**PART 1: GENERAL INFORMATION**

**WHAT IS THIS NOTICE ABOUT?**

***1.1 Why have I received this Notice?***

This Notice has been sent to notify you:

- a. that a proposed settlement has been reached on behalf of the Settlement Classes with the Defendant;
- b. that an allocation of the Settlement Amount has been proposed regarding how to distribute the settlement funds among members of the Settlement Classes;
- c. that Class Counsel will petition the Court for an award of attorneys’ fees and reimbursement of expenses;
- d. that Class Counsel will petition the Court for service awards for Settlement Class Representatives; and
- e. how to obtain proceeds from the Settlement reached in the case by filing the Claim Form.

Your rights and options regarding these matters are described in this Notice.

## ***1.2 What are these lawsuits about?***

On October 29, 2008 the first of thirteen class actions arising out of Bayer's sale and marketing of the Combination Aspirins was filed against Bayer in federal court. On April 14, 2009, all actions were centralized before Judge Brian M. Cogan in the Eastern District of New York by the Judicial Panel on Multidistrict Litigation.

Plaintiffs claim that Bayer overcharged consumers for the Combination Aspirin Products or that these products should not have been sold, because these products were not FDA-approved, could not provide all advertised health benefits and were inappropriate for long-term use. Plaintiffs assert that, as a result of Bayer's alleged conduct, consumers were overcharged for the Combination Aspirin Products. You can read the Plaintiffs' Master Complaint at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com). Plaintiffs have sought to recover damages that they allege the Defendant's conduct caused, as well as attorneys' fees and costs. Bayer denies that its conduct was unlawful. No court or other authority has found that Bayer participated in any wrongdoing. The Court has not yet resolved the merits of the lawsuit, or determined whether the Plaintiffs' or Bayer's contentions are true.

This lawsuit does not include the two products known as Bayer® Women's Low Dose Aspirin (with a calcium carbonate buffer) or Bayer® Heart Health Advantage.

## ***1.3 What is a Class Action?***

In a class action lawsuit, one or more people called "Class Representatives" sue on behalf of people who have similar claims. The people together are called the "Class" or "Class Members." In this lawsuit, Plaintiffs alleged claims on behalf of separate Classes for the two products at issue. Accordingly, the people who sued on behalf of the Class Members are called "Settlement Class Representatives," and the people who purchased a Combination Aspirin Product are considered part of a "Settlement Class" or "Class Members." People who purchased both Combination Aspirin Products will be a member of both Settlement Classes. One court resolves the issues for everyone in the Settlement Classes—except for those people who choose to exclude themselves from the Settlement Classes. U.S. District Court Judge Brian M. Cogan is overseeing these class action lawsuits.

The Court has decided to conditionally certify the Settlement Classes. More information about why the Court allowed the lawsuit to be a class action is in the Court's Orders, which are available at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com).

## ***1.4 What is the current status of the lawsuits?***

Several lawsuits were originally filed in late 2008, and the cases were consolidated by the Judicial Panel for Multidistrict Litigation before Judge Cogan in the Eastern District of New York. Plaintiffs filed a Master Complaint, Defendant moved to dismiss, and following extensive briefing by both parties, the Court denied the motion to dismiss. *See generally In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356 (E.D.N.Y. 2010).

Over the next 20 months, the parties engaged in nearly-complete discovery into the merits of Plaintiffs' lawsuit, including document production and review, depositions of current and former Bayer employees, depositions of Plaintiffs, and expert witness disclosures and depositions. On February 17, 2011, Plaintiffs filed their Motion for Class Certification together with a Proffer of Facts. Defendant filed its opposition to Plaintiffs' motion on June 7, 2011. Plaintiffs filed their reply brief on July 22, 2011. Additionally, on June 15, 2011, Plaintiffs moved to strike and/or exclude the expert reports and testimony of all of Bayer's experts submitted by Bayer in support of its class certification opposition. Bayer filed its opposition to Plaintiffs' motions on July 27, 2011, and Plaintiffs filed their replies on August 19, 2011. The case has essentially been put on hold pending a ruling on Plaintiffs' motion for class certification and Plaintiffs' motion to strike Bayer's experts.

On May 15, 2012, the Plaintiffs reached a settlement agreement with the Defendant. This settlement agreement covers all of the allegations in the lawsuit. On July 23, 2012, the Court granted preliminary approval to the settlement.

Section 2 of this Notice explains your legal rights and options regarding the proposed settlement.

## **DISTRIBUTION OF SETTLEMENT MONEY**

## ***1.5 What purchases qualify me to receive money from the settlement?***

Whether you are a member of the Bayer Heart Advantage Class or the Bayer Women's Class (collectively referred to as the "Settlement Classes") – and thus eligible to receive money from the related settlement – depends on (1) which Combination Aspirin Product you purchased, (2) whether you purchased it for personal, family or household uses, in the United States, and (3) when it was purchased. Each Settlement Class only includes purchases of specific Combination Aspirin Products during specific periods of time.

If you purchased one or more of the Combination Aspirin Products in the United States for personal, family or household uses then you are eligible to participate in one or both of the Settlement Classes described in this Notice, provided that your purchase occurred during the time periods specified for each Settlement Class. Please see the chart in Paragraph 2.1 of this Notice for a description of the products and time periods covered by each of the Settlement Classes.

### ***1.6 How will the settlement money be distributed?***

Settlement funds will be distributed only after the Court grants final approval to the settlement and proposed allocation method for distributing the funds among the Settlement Classes. As of the date of this Notice, the settlement and proposed allocation await final approval.

Upon preliminary approval of the settlement, Bayer advanced funds adequate to pay for the class notice program and related administrative expenses. Within 10 business days after final approval becomes final (*i.e.*, when time has expired for any appeals from a final approval order of Judge Cogan, or any such appeals have been resolved in favor of the proposed settlement), the remaining settlement funds will be deposited into an interest-bearing escrow account. The settlement funds (reduced by any amounts approved by the Court for settlement notice and claims administration, payment of attorneys' fees, reimbursement of Plaintiffs' litigation expenses, and service awards to Settlement Class Representatives), will be apportioned among the Settlement Classes in accordance with an agreed method of allocating the funds among the Settlement Classes. Each Settlement Class Member will be eligible to receive money from any Settlement Class in which he or she is a member.

For each Settlement Class, the available settlement funds will be distributed to members of that Settlement Class who do not ask to be excluded from the settlement and who file a proper, validly sworn and timely Claim Form ("Authorized Claimant"). Authorized Claimants who do not have documentary proof of purchase, but who complete and timely submit a valid Claim Form, shall be entitled to a one-time cash Settlement Payment of \$4.00 for all purchases of Bayer Women's and/or \$6.00 for all purchases of Bayer Heart Advantage from each Settlement Class fund for which the Claims Administrator has determined they are eligible, subject to pro rata reductions if the claims for payment exceed the settlement fund. Authorized Claimants who submit documents that the Claims Administrator in its sole discretion determines is valid proof of purchase proof(s) of purchase shall be entitled to a payment for \$4.00 for each purchase of Bayer Women's and/or \$6.00 for each purchase of Bayer Heart Advantage, subject to pro rata reductions if the claims for payment exceed the settlement fund. If you are a member of more than one Settlement Class, you are eligible to receive settlement proceeds based on your membership in each Settlement Class.

Once the Court grants final approval to the settlement, the distribution will take place as soon as practicable after (i) the time has expired for any appeals from a final approval order of Judge Cogan, or any such appeals have been resolved in favor of this Agreement and (ii) after review, determination, and audit of the Claim Forms by the Claims Administrator and approval by the Court of the Claims Administrator's recommendations as to the specific amounts to be paid to the Claimants.

Once the time for Settlement Class Members to submit verified Claim Forms has ended, the Claims Administrator will determine if the claims of Authorized Claimants would use all of the funds allocated to each Settlement Class through the distribution plan described above. If there are excess funds allocated to one or both of the Settlement Classes ("Excess Funds"), the Excess Funds will be distributed to charities agreed to by the parties and approved by the Court.

### ***1.7 How do I receive money from the settlement?***

In order to obtain money from the Settlement, you need to submit a Claim online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com) or complete and submit by mail the Claim Form available at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com). Even if you belong to both Settlement Classes, you need only submit one Claim Form, and the Claims Administrator will determine the Settlement Classes for which you qualify and the Settlement Class allocations from which you will receive money. The Claim Form must be postmarked or submitted online by **April 29, 2013**, to be timely returned. Any member of any Settlement Class that does not complete and timely return the Claim Form will not be entitled to share in any settlement proceeds.

**WARNING:** There are companies that may contact Settlement Class Members upon learning of a pending class action distribution and offer to help Settlement Class Members file claim forms in exchange for a share of the money that the Settlement Class Members may ultimately recover. Please be advised that you do not need to use one of these companies. Assistance is available from the Claims Administrator at no cost to you.

THE LAWYERS
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***1.8 Do I have a lawyer in this case and how will they be paid?***

The Court appointed the following two individuals to represent both Settlement Classes:

Elizabeth A. Fegan, Esq.  
**HAGENS BERMAN SOBOL SHAPIRO LLP**  
(Co-Lead Counsel)  
1144 West Lake Street, Suite 400  
Oak Park, IL 60301-1043  
(708) 628-4949  
Fax: (708) 628-4950

Michael A. London, Esq.  
**DOUGLAS & LONDON, P.C.**  
(Co-Lead and Liaison Counsel)  
111 John Street, 14th Floor  
New York, NY 10038  
(212) 566-7500  
Fax: (212) 566-7501

These individuals and their law firms are referred to as Class Counsel. They are experienced in handling class actions. More information about these law firms, their practices, and their lawyers' experience is available at [www.hbsslaw.com](http://www.hbsslaw.com) and [www.douglasandlondon.com](http://www.douglasandlondon.com).

You will not be personally charged for the services of Class Counsel in litigating these cases. You do not need to hire your own lawyer because Class Counsel is working on your behalf. But, if you want your own lawyer, you may hire one at your own expense. You have the right to enter an appearance in the case through your lawyer if you wish.

To date, Class Counsel have not been paid any attorneys' fees. In compensation for their time and risk in prosecuting the litigation on a wholly contingent fee basis, Class Counsel will petition the Court for an award from the settlement fund of attorneys' fees and for reimbursement of litigation expenses incurred, including costs expended in providing Notice to the Settlement Classes and in administering the settlement fund. After this motion is filed with the Court, a copy of this motion will be available at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com). Class Counsel will request an award of attorneys' fees that will not exceed 30 percent of the total amount of the settlement. Class Counsel will also petition the Court to provide service awards to Settlement Class Representatives not to exceed \$2,500 each.

Any attorneys' fees, reimbursement of litigation expenses and service awards will be awarded only as approved by the Court in amounts determined to be fair and reasonable. If you wish to object to the petition for attorneys' fees, reimbursement of litigation expenses, and/or service awards, you may do so, but you must do so following the procedures set forth below.

OBJECTING
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***1.9 May I object to the proposed settlement; the proposed Settlement Class allocations and/or distributions; Class Counsel's requests for an award of attorneys' fees and reimbursement of litigation expenses; or Class Counsel's requests for service awards for the Settlement Class Representatives?***

Only members of one or both of the Settlement Classes who do not request exclusion from the Settlement may object to (1) the proposed settlement; (2) the proposed Settlement Class allocations and/or distributions; (3) Class Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses; and/or (4) Class Counsel's request for service awards for Settlement Class Representatives.

If you wish to make an objection, you must mail your written objection, including a statement of your reason(s) for your objection, to, or file it with, the Clerk of the Court at the following address: Clerk of Court, 225 Cadman Plaza East, Brooklyn, New York, 11201. The written objection must be postmarked and sent in writing to the Clerk of Court no later than **February 5, 2013**. Copies of any objections must be sent to counsel for the Plaintiffs and counsel for the Defendant at the addresses provided below:

To Plaintiffs:  
Elizabeth A. Fegan, Esq.  
**HAGENS BERMAN SOBOL SHAPIRO LLP**  
1144 West Lake Street, Suite 400  
Oak Park, IL 60301-1043

To Defendant:  
Adam Hoeflich, Esq.  
**BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP**  
Courthouse Place  
54 West Hubbard Street, Suite 300  
Chicago, IL 60654

## **PART 2: THE SETTLEMENT CLASSES**

<b>SUMMARY OF YOUR LEGAL RIGHTS AND OPTIONS AS A MEMBER OF THE SETTLEMENT CLASSES:</b>	
Exclude Yourself from One or Both of the Settlement Classes	If you are a member of any of the Settlement Classes but do not want to be bound by the proposed settlement or proposed allocation, you must exclude yourself (“opt-out”) from the Settlement Class(es) to which you belong. To ask to be excluded, you must send a written “Exclusion Request” in the form of a letter sent by mail, postmarked by December 20, 2012 stating that you want to be excluded from <i>Bayer Corp. Combination Aspirin Products Marketing &amp; Sales Practices Litigation</i> , No. 09-MD-2023. (See Paragraphs 2.3 – 2.4 of this Notice for further information about your right to exclude yourself from the Settlement Classes.)
File Claim Form	If you are a member of any of the Settlement Classes, and have not asked to be excluded, you may be eligible to receive a share of the proceeds from the proposed settlement. In order to obtain any money from the settlement, you must submit a Claim Form. The Claim Form must be postmarked or submitted online by <b>April 29, 2013</b> to be considered for distribution.
Object	If you are a member of any of the Settlement Classes and have not requested exclusion from the Settlement, you have the option to object to: (1) the proposed settlement; (2) the proposed Settlement Class allocations and/or distributions for the Settlement Classes; (3) Class Counsel’s request for an award of attorney’s fees and reimbursement of litigation expenses; and/or (4) Class Counsel’s request for service awards for Settlement Class Representatives. Your written objection to one or more of these matters must be postmarked no later than <b>February 5, 2013</b> . (See Paragraph 1.9 of this Notice for further information about your right to object.)
Attend the Fairness Hearing	If you are a member of any of the Settlement Classes, and have not requested exclusion, you may ask to speak at the Fairness Hearing regarding the proposed settlement and proposed Settlement Class allocations. However, you may only speak at the hearing if you first follow certain procedures described in Paragraph 2.12 of this Notice.
Hire Your Own Lawyer	If you are a member of any of the Settlement Classes, you may, but are not required to, hire your own lawyer at your expense to advise you of your rights with respect to (1) the proposed settlement; (2) the proposed Settlement Class allocations and/or distributions for the Settlement Classes; (3) Class Counsel’s request for an award of attorney’s fees and reimbursement of litigation expenses; and/or (4) Class Counsel’s request for service awards for Settlement Class Representatives. You have the right to enter an appearance in the lawsuit through your lawyer if you wish.
Do Nothing	If you are a member of any of the Settlement Classes and do nothing, you will not receive money from the Settlement. You must submit a Claim Form to obtain money from the settlement. Even if you do nothing, you will be bound by the Releases and Reservations provisions contained in the Settlement Agreement with the Defendant.

### **ARE YOU A MEMBER OF THE SETTLEMENT CLASSES?**

#### **2.1 How do I know if I am a member of the any of the Settlement Classes?**

You can determine if you are part of one or both of the Settlement Classes by using the following chart:

**Master Class Chart**

Settlement Class	Date of Purchase	Product Purchased for Personal, Family or Household uses in the U.S.	Percentage Allocation
<b>BAYER ASPIRIN WITH HEART ADVANTAGE CLASS</b>	January 1, 2008 to July 23, 2012	Bayer® Aspirin With Heart Advantage	40%
<b>BAYER WOMEN’S LOW-DOSE ASPIRIN+ CALCIUM CLASS</b>	January 1, 2000 to July 23, 2012	Bayer® Women’s Low-Dose Aspirin + Calcium	60%

**RECEIPT OF THIS NOTICE DOES NOT NECESSARILY MEAN THAT YOU ARE A MEMBER OF ANY OF THE SETTLEMENT CLASSES OR ARE ENTITLED TO RECEIVE MONEY FROM THE SETTLEMENT.**



## ***2.2 Can I be in more than one Settlement Class and receive money from both Settlement Class allocations?***

Yes. If you fit into the definition of both Settlement Classes, then you are a member of each such Settlement Class, unless you exclude yourself from one or more of them. Read Paragraph 2.1 to determine whether you belong to one or both of the Settlement Classes and to learn of your legal rights and options.

## ***2.3 Why would I ask to be excluded from the Settlement Classes?***

If you exclude yourself from the Settlement Classes - which also means to remove yourself from the Settlement Classes, and is sometimes called “opting-out” of the Settlement Class - you won’t get any money or benefits from this settlement. However, you may then be able to sue Bayer for claims that would otherwise be released as a result of the Settlement. If you exclude yourself, you will not be legally bound by any terms in the Settlement Agreement. If you start your own lawsuit against Defendant after you exclude yourself, you will have to hire and pay your own lawyer for that lawsuit, and you will have to prove your claims. If you do exclude yourself so you can start your own lawsuit against Defendant, you should talk to your own lawyer soon, because your claims may be subject to a statute of limitations.

You may exclude yourself from the Settlement Classes for any reason.

## ***2.4 How do I ask the Court to exclude me from the Settlement?***

To be excluded, you must send a written “Exclusion Request” letter by mail, stating that you want to be excluded from *Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*. Be sure to include your name, address, and the Settlement Class(es) to which you belong, and sign the letter. Your Exclusion Request must be postmarked by **December 20, 2012**, to: Bayer Combination Aspirin Litigation, c/o Gilardi & Co. LLC, P.O. Box 808061, Petaluma CA 94975-8061.

## ***2.5 What if I still do not know whether I am a member of one or both of the Settlement Classes?***

If you still do not know whether you are included in one or both of the Settlement Classes, please visit [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com), call 1-877-257-5766, or write to:

### **BAYER COMBINATION ASPIRIN PRODUCTS LITIGATION SETTLEMENT**

c/o Gilardi & Co. LLC

P.O. Box 808061

Petaluma CA 94975-8061

[www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)

[claims@bayercombinationaspirinsettlement.com](mailto:claims@bayercombinationaspirinsettlement.com)

### **WHAT THE PROPOSED SETTLEMENT AND ALLOCATION MEAN TO YOU**

## ***2.6 Which allocations are members of the Settlement Classes eligible to receive money from?***

If you are a member of one or both of the Settlement Classes, you are eligible to receive money from the proposed allocation for each Settlement Class in which you are a member.

## ***2.7 What does the proposed settlement and proposed allocation provide to the Settlement Classes; what does the proposed settlement provide to Bayer?***

As part of the proposed settlement, the Defendant has agreed to make payments totaling \$15,000,000. Counsel will propose an allocation based on factors they determine, which would provide the percentage allocation to each of the Settlement Classes as described in the chart in Paragraph 2.1 and as may be adjusted as ordered by the Court.

In exchange, Settlement Class Members give up all legal rights to sue Bayer for any and all claims arising from or related to the Combination Aspirin Products. Bayer, its parent(s) and predecessors, affiliates, assigns, successors, related companies, subsidiary companies, and holding companies (including but not limited to Bayer Corporation, Bayer Healthcare AG, and Bayer AG) and insurance carriers, current and former attorneys, and their current and former members, partners, officers, directors, agents, and employees, and any distributors, retailers, and wholesalers of Bayer Aspirin With Heart Advantage or Bayer Women’s Low-Dose Aspirin + Calcium will be released from all claims of Settlement Class Members for all purchases of relevant Combination Aspirin Products during the respective Settlement Class periods as more fully described in the Releases and Reservations provisions contained in the Settlement Agreement. However, Settlement Class Members retain all legal rights to sue for claims for personal injury. Whether you choose to object, attend the Fairness Hearing, hire your own counsel or do nothing, Settlement Class Members will be bound by the Releases and Reservations provisions contained in the Settlement Agreement.

## **2.8 Why did the Plaintiffs and Defendant agree to the proposed settlement?**

Although the Court has not ruled on the merits of the Plaintiffs' claims, the parties have agreed to settle the lawsuits against Bayer. Based on Class Counsel's extensive investigation of the facts and the law relevant to the lawsuit, the Plaintiffs and Class Counsel have concluded that the settlement with Bayer is in the best interests of the Settlement Classes.

Bayer vigorously denies that it acted unlawfully in any respect and asserted defenses to all of the Plaintiffs' claims. The proposed settlement does not represent an admission of liability or that the Court has reached a final decision with respect to the merits of the *Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation* lawsuit.

## **2.9 How do I receive money from the proposed Settlement Class allocations resulting from the proposed settlement with Bayer?**

In order to obtain money from the Settlement, you need to complete and timely submit a Claim online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com) or send a written claim, which is also available on the website, to the Claims Administrator at Bayer Combination Aspirin Litigation Settlement, c/o Gilardi & Co. LLC, P.O. Box 808061, Petaluma CA.94975-8061. Even if you belong to more than one Settlement Class, you need only submit one Claim Form. The Claim Form must be postmarked or submitted online by **April 29, 2013** to be considered for distribution. Any member of any Settlement Class that does not complete and timely return the Claim Form will not be entitled to share in any settlement money unless the Court otherwise permits.

## **2.10 How will the proceeds from the proposed Settlement Class allocations resulting from the proposed settlement with Bayer be distributed?**

The Settlement Amount, reduced by any amounts approved by the Court for payment of settlement notice and claims administration, attorneys' fees, reimbursement of litigation expenses and service awards to the Settlement Class Representatives, will be apportioned among the Settlement Classes based upon the proposed allocation described in Paragraphs 1.6, 2.1 and 2.7. Each Settlement Class allocation will be distributed among the members of the respective Settlement Classes that do not request exclusion and file timely and valid Proofs of Claim according to the proposed Settlement Agreement, which is available online at [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com).

## **2.11 Will I owe any attorney's fees or expenses if I participate in the settlement?**

Since they first filed this case in 2008, Class Counsel have not received any payment for their services in prosecuting the lawsuit, nor have they been reimbursed for any out-of-pocket expenses. If the Court approves the proposed settlement, Class Counsel will ask the Court to award them fees of up to 30% of the Settlement Fund, plus reimbursement of litigation expenses actually incurred. Defendant has agreed not to oppose such an award of fees and expenses from the Settlement Fund.

## **2.12 Are the class representatives receiving anything for the time and effort they contributed to the lawsuit?**

As part of the Settlement, and subject to the Court's final approval of the Settlement, Class Counsel will ask the Court to award the Plaintiffs for the time and effort they contributed to the prosecution in an amount not to exceed \$2,500 each. These awards would be paid from the Settlement Fund.

### **OBJECTING**

## **2.13 How do I object to the proposed settlement; one or both of the proposed Settlement Class allocations and/or distributions; Class Counsel's requests for an award of attorneys' fees and reimbursement of litigation expenses; and/or Class Counsel's requests for service awards for the Settlement Class Representatives?**

If you are a member of one or both of the Settlement Classes, you may object to one or more of the following: (1) the proposed settlement with the Defendant; (2) the proposed Settlement Class allocations and/or distributions; (3) Class Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses; and/or (4) Class Counsel's request for service awards for Settlement Class Representatives. If you wish to make an objection, follow the procedures described in Paragraph 1.9 of this Notice.

### **FAIRNESS HEARING**

## **2.14 Fairness Hearing**

Judge Brian M. Cogan will hold a hearing at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201 on **March 13, 2013**, at 10 a.m. Eastern, for the purpose of determining whether the proposed settlement with Bayer, and the proposed Settlement Class allocations should be approved as fair,

adequate and reasonable. This hearing is known as the Fairness Hearing. The hearing may be rescheduled without further announcement.

You do not have to attend the hearing. Class Counsel will answer any questions Judge Cogan may have. If you send a written objection, you do not have to attend the hearing to discuss it. As long as you mailed your written objection on time, following the instructions in Paragraph 1.9 of this Notice, the Court will consider it. You may also pay your own lawyer to attend.

You may attend the hearing at your own expense. You may speak at the hearing only if you have submitted your objection as provided in Paragraph 1.9 of this Notice and have stated in your objection letter that you wish to be heard at the Fairness Hearing.

<b>IF YOU TAKE NO ACTION</b>
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***2.15 What happens if I do nothing at all?***

If you are a member of one or both of the Settlement Classes and you do nothing, you will be bound by the terms of the Settlement with Bayer, but you will not receive any money from the Settlement. In order to obtain money from the Settlement, you must submit a Claim Form. The Claim Form must be postmarked or submitted online by **April 29, 2013** to be considered for distribution.

<b>GETTING MORE INFORMATION</b>
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***2.16 How can I get more information on the proposed settlement with Bayer?***

This Notice is only a summary of the proposed settlement. You may obtain a copy of the Settlement Agreement by visiting [www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com), or writing:

**BAYER COMBINATION ASPIRIN PRODUCTS LITIGATION SETTLEMENT**

c/o Gilardi & Co. LLC

P.O. Box 808061

Petaluma CA 94975-8061

[www.bayercombinationaspirinsettlement.com](http://www.bayercombinationaspirinsettlement.com)

1-877-257-5766

[claims@bayercombinationaspirinsettlement.com](mailto:claims@bayercombinationaspirinsettlement.com)

The Settlement Agreement is also on file with the Clerk of the Court.

**Please do not contact the Clerk of the Court or the Judge regarding this Notice. Instead, please direct any inquiries to any of the Class Counsel listed above on page 4 or contact the Claims Administrator.**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

IN RE: BAYER CORP. COMBINATION  
ASPIRIN PRODUCTS MARKETING AND  
SALES PRACTICES LITIGATION

THIS PLEADING RELATES TO:

ALL CASES

09-md-2023 (BMC)(JMA)

**COGAN**, District Judge

**[PROPOSED] FINAL ORDER AND JUDGMENT**

This matter, having come before the Court on Plaintiffs' Motion for Final Approval, the Court after conducting a fairness hearing, considering all arguments in support of and/or in opposition to the Settlement Agreement and Release,<sup>1</sup> as amended by the Amendment to the Settlement Agreement and Release dated March 1, 2013 ("Amendment" or "Settlement Agreement, as amended"), finds and/or orders the following:

1. The Court has personal jurisdiction over the Class Plaintiffs and all members of the Settlement Classes. This Court also determines that it possesses subject matter jurisdiction to approve the Settlement Agreement and Release, all Exhibits thereto, and the Amendment.

2. The Court certifies the following Settlement Classes solely for purposes of this Settlement, finding that the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied:

**"Bayer Aspirin With Heart Advantage" Class:** All persons who from January 1, 2008 to July 23, 2012, purchased Bayer® Aspirin With Heart Advantage in the United States for personal, family or household uses. Excluded from the Settlement Class are any

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<sup>1</sup> Terms not otherwise defined herein shall have the meanings ascribed to them in the Settlement Agreement, as amended.

Judges to whom this Action is assigned and any member of their immediate families.

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

3. Regarding the Rule 23(a) requirements, the Court finds that each requirement is satisfied here:

a. First, the Court finds that Rule 23(a)(1) is met here, which requires that the proposed class be 'so numerous that joinder of all members is impracticable.' Fed. R. Civ. P. 23(a)(1)). "A finding of numerosity may be supported by common sense assumptions... ." *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998). Further, the Second Circuit has commented that "numerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, direct notice was mailed to 696,094 Class Member mailing addresses. Moreover, since the members of the Classes included in the Settlement purchased Bayer's Combination Aspirins across the country, there can be no doubt that the number of class members far exceeds the threshold for satisfying the numerosity standard.

b. Next, the Court also finds the commonality requirement of Rule 23(a)(2) is met, which requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23 (a)(2). The Court also finds that the typicality requirement of Rule 23(a)(3) is met, which requires that "the claims ... of the representative parties are typical of the claims ... of the class ..." Fed. R. Civ. P. 23 (a)(3). "As a practical matter, the two requirements [of commonality and typicality] merge in the Second Circuit's inquiry." *Alleyne v. Time Moving & Storage, Inc.*, 264

F.R.D. 41, 48 (E.D.N.Y. 2010) (citing *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999)). Here, each of Class Plaintiffs' and the Class Members' claims arise from the same course of events, *i.e.* their purchase of Bayer's Combination Aspirins for which there is a common question: was there a false statement on the product?

c. Finally, adequacy examines whether the Class Plaintiffs and attorneys "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23 (a)(4). The requirements of Rule 23(a)(4) are satisfied here. With this inquiry, the proposed Class Plaintiffs must "demonstrate that they have no interests that are antagonistic to the proposed class members" and class counsel must be qualified. *Myers v. Hertz Corp.*, No. 02 Civ. 4325 (BMC)(MLO), 2007 WL 2126264, at\*6 (E.D.N.Y. July 24, 2007). Under the facts presented, Plaintiffs do not have any unique relationships with Defendant, do not have interests that are antagonistic to the Class' claims, and are fully aligned with the interests of other Class Members. In addition, each proposed Class Plaintiff has demonstrated their willingness and ability to take the required role in the litigation and to protect the interests of those they seek to represent. Class Plaintiffs' efforts are reflected in their respective consultations with counsel, preparing for and sitting for their depositions, responding to interrogatories, gathering documents and more. And, Class Counsel have fairly and adequately represented the interests of the Classes. The requirements of Rule 23(a)(4) are satisfied here.

4. The Court also finds that the proposed Class meets the requirements of Rule 23(b)(3):

a. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). This test is "readily met in certain cases alleging consumer or

securities fraud.” *Id.* at 625. In reviewing a settlement class certification, “the certifying court must...determine whether the ‘the legal or factual questions that qualify each class member's case as a genuine controversy’ are sufficiently similar as to yield a cohesive class,” focusing its “analysis is on ‘questions that preexist any settlement.’” *In re Am. Int’l Group, Inc. Sec. Litig.*, 689 F.3d 229, 240 (2d Cir. 2012) (quoting *Amchem*, 521 U.S. at 623). As previously discussed above as to commonality and typicality, all Class Members share a common legal grievance arising from Bayer’s practice of selling Combination Aspirins that allegedly could not provide benefits over aspirin alone. Common legal and factual questions are central to all Class Members’ claims and predominate over any individual questions that may exist. These include the questions of whether there were false statements on Bayer’s products and/or whether Bayer violated state statutory and common laws when it allegedly misrepresented material facts on its products’ labels. Thus, “[i]ssues of predominance and fairness do not undermine this settlement. All plaintiffs here claim injury that by reason of defendants' conduct ... has caused a common and measurable form of economic damage.... All claims arise out of the same course of defendants' conduct; all share a common nucleus of operative fact, supplying the necessary cohesion.” *In re Am. Int’l Group, Inc. Sec. Litig.*, 689 F.3d 229, 240 (2d Cir. 2012) (quoting *Sullivan v. DB Investments*, 667 F.3d 273, 338 (3d Cir. 2011)).

b. Resolution of these common legal claims through a class-wide settlement and claims process is also a superior way to proceed. Rule 23(b)(3) lists four factors for courts to consider in determining whether a class action is superior, and each of these factors supports a class-wide resolution. *See* Fed. R. Civ. P. 23(b)(3)(A)-(D) (“(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the

desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.”).

i. First, Class Members have little interest in individually controlling separate lawsuits and settlement given the relatively small individual economic injuries involved, and those who do may choose to opt out of the Settlement.

ii. Second, it appears that no individual Class Members have chosen to commence litigation concerning this controversy except through class litigation, further suggesting that a collective action is indeed the superior method of recovery.

iii. Third, the Judicial Panel on Multidistrict Litigation has already determined that this Court is an appropriate forum in which to concentrate class members’ claims.

iv. Fourth, there will be no difficulties in managing a class-wide trial, “for the proposal is that there be no trial.” *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

5. The Court grants final approval to the Settlement, as amended, as being fair, reasonable and adequate (within the meaning of Fed. R. Civ. P. 23 or other applicable law) as to all Parties and consistent and in compliance with all requirements of due process and applicable law, as to and in the best interests of all Parties. The Court directs the Parties and their counsel to implement and consummate the Settlement Agreement, as amended, in accordance with its terms and provisions.

6. Under Rule 23(e), “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e). And, “[i]f the proposal would bind class members, the court may approve it only after a



hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). The law strongly favors settlement. “Courts are wary of disturbing settlements, because they represent compromise and conservation of judicial resources, two concepts highly regarded in American jurisprudence.” *Anita Foundations, Inc. v. ILGWU Nat. Ret. Fund*, 902 F.2d 185, 190 (2d Cir. 1990).

7. The law for evaluating the fairness of a class action settlement is well-established in this Circuit. “Courts in the Second Circuit evaluate the substantive fairness, adequacy, and reasonableness of a settlement according to the factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).” *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at \*4 (E.D.N.Y. Oct. 23, 2012). The nine *Grinnell* factors include: “(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.” *Id.* (quoting *Grinnell*, 495 F.2d at 463). However, in reviewing and approving a settlement, “a court need not conclude that all of the *Grinnell* factors weigh in favor of a settlement,” rather courts “should consider the totality of these factors in light of the particular circumstances.” *Id.* (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)). The *Grinnell* factors favor final approval.

8. Upon a review of the *Grinnell* factors, this Court approves the Settlement, as amended, as fair, reasonable, and adequate:

a. The first factor requires the Court to consider “the complexity, expense and likely duration of the litigation.” *Vitamin C*, 2012 WL 5289514, at \*4 (quoting *Grinnell*, 495 F.2d at 463). This litigation has been on file since 2008, pending before this Court since 2009, and involves complex legal and factual issues, with an added layer of complexity given that this case is a class action as opposed to ordinary litigation. The completed briefing on Plaintiffs’ Motion for Class Certification, as well as Plaintiffs’ motions to strike the reports offered by Defendant’s experts in opposition to class certification, reflects this reality. Further, if the Court granted, in whole or in part, Plaintiffs’ motion for class certification, an appeal under Rule 23(f) would inevitably have followed, requiring the Parties to incur additional time and expense re-litigating class certification issues. Additionally, if the Second Circuit reversed certification, an additional round of certification briefing may have taken place. And, if the litigation continued, additional time would have been implicated in preparing and opposing any motions for summary judgment. Depending on the scope of the Court’s class certification order, additional, follow-up discovery efforts may have been required in order to finally prepare the case for the jury. Simply put, “[l]itigation through trial would be complex, expensive, and long.” *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at \*3 (E.D.N.Y. Nov. 20, 2012). The Settlement satisfies the first *Grinnell* factor.

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

overwhelmingly positive. Even though the Notice informed Class Members that they could object to or exclude themselves from the Settlement, and explained how to object or opt-out, few chose to do so. In entering final approval, this Court has recognized that “[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication” of fairness. *Massiah*, 2012 WL 5874655, at \*4 (citations omitted). Another indicia of reasonableness is exemplified in the fact that no recipients of mandatory notice of the proposed settlement in this manner under the Class Action Fairness Act of 2005, 28 U.S.C. § 1711 et seq. (“CAFA Notice”), have objected. This second factor weighs in favor of final approval.

c. The third factor, “the stage of the proceedings and the amount of discovery completed,” also calls for final approval. *Vitamin C*, 2012 WL 528 9514, at \*4 (quoting *Grinnell*, 495 F.2d at 463). “Extensive discovery ensures that the parties have had access to sufficient material to evaluate their case and to assess the adequacy of the settlement proposal in light of the strengths and weaknesses of their positions.” *MetLife*, 689 F. Supp. 2d at 333-34 (citation omitted). Here, the record confirms the Parties’ extensive investigation into the facts and law. They nearly completed full merits discovery, (1) producing and/or reviewing approximately 2.5 million pages of documents from Bayer and non-parties, (2) conducting and defending fifteen depositions of fact witnesses, (3) conducting and defending depositions of each of the four Class Representatives, and (4) conducting and defending depositions of nine former named Plaintiffs. And, Class Counsel fully briefed Plaintiffs’ Motion for Class Certification, supported by an extensive Proffer of Facts. In addition, Class Plaintiffs’ filed detailed motions to strike the reports and/or testimony of Bayer’s expert witnesses. After years of heavy litigation, the Parties “have ‘had sufficient information to act intelligently.’” *MetLife*, 689 F. Supp. 2d at

334 (quoting *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y.1997)).

This factor has been met.

d. “The fourth, fifth, and sixth *Grinnell* factors all relate to continued litigation risks,” i.e., the risks of establishing liability, damages and maintaining the class action through trial. *Vitamin C*, 2012 WL 5289514, at \*4, 5 (citing *Grinnell*, 495 F.2d at 463). “Litigation inherently involves risks.” *Massiah*, 2012 WL 5874655, at \*4 (quotation omitted). “One purpose of a settlement is to avoid the uncertainty of a trial on the merits.” *Id.* (quotation omitted). Undoubtedly, this case involved risks related to establishing, on a nationwide basis, that Bayer engaged in unfair, deceptive, or unlawful conduct in marketing the Combination Aspirin Products. Here, “[t]he risk of obtaining and maintaining class status throughout trial also weighs in favor of final approval,” particularly where “[a] motion to certify and/or decertify the class would likely require more extensive discovery and briefing, possibly followed by an appeal, which would require additional rounds of briefing.” *Id.* at \*5. The Court’s comments at the Preliminary Approval hearing further reflect the risks favoring settlement. While the Court found the Rule 23(a) factors were satisfied, the Court cited possible certification risks in connection with the predominance inquiry for certifying a litigation class under Rule 23(b)(3): “Predominance is a trickier question here. I thought the defendants really wrote an excellent brief in opposing class certification.” Preliminary Approval Tr. at 43. Accordingly, the fourth, fifth, and sixth *Grinnell* factors weigh in favor of the Settlement.

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

f. With the last two *Grinnell* factors, courts look to “the range of reasonableness of the settlement fund in light of the best possible recovery” as well as “the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.” *Id.* However, “[t]he determination of a reasonable settlement is not susceptible of a mathematical equation yielding a particularized sum, but turns on whether the settlement falls within a range of reasonableness.” *MetLife*, 689 F. Supp. 2d at 340 (citing *PaineWebber*, 171 F.R.D. at 130) (internal quotations omitted). “This range of reasonableness recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Id.* (citing *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.1972)) (internal quotations omitted). Thus, there “is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.” *Id.* (quoting *Grinnell*, 495 F.2d at 455 n. 2). Here, the Settlement provides reasonable monetary relief and substantially fulfills the purposes and objectives of this class action. Plaintiffs have obtained a \$15 million recovery. The recovery represents significant percentages of recovery: (1) between 9.63% and 87.14% of the damages alleged for Bayer Women’s Class Members, and (2) between 13.05% and 83.51% of the damages alleged for Bayer Heart Advantage Class Members. Courts in the Second Circuit “often approve class settlements even where the benefits represent only a fraction of the potential recovery,” ranging from 1.6% to 12% of claimed damages. *Velez v. Novartis Pharms. Corp.*, 2010 U.S. Dist. LEXIS 125945, \*40-41 (S.D.N.Y. Nov. 30, 2010). Thus, taking into account the risks of continued litigation, and the fact that the Settlement was reached after intensive, the result of the settlement, and the fact of arm’s-length negotiations conducted by experienced counsel, the eighth and ninth *Grinnell* factors favor final approval.

9. The Court also approves the proposed Plan of Allocation, as revised by the Amendment. Generally, the Plan of Allocation provides for the distribution of the Net Settlement Fund after payment of required expenses and payments due from any Fee and Expense Reward. Each Class Member is eligible for payment based on his or her purchases during the relevant time period. And, Class Members can be members of both Classes. The Plan of Allocation allocates 60% to the “Bayer Women’s Low-Dose Aspirin + Calcium” Class, and 40% to the “Bayer Aspirin With Heart Advantage” Class.

10. “As a general rule, the adequacy of an allocation plan turns on...whether the proposed apportionment is fair and reasonable under the particular circumstances of the case.” *Vitamin C*, 2012 WL 5289514, at \*7 (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 (E.D.N.Y. 2003)). “An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.” *Id.* (quoting *In re Am. Bank Note Holographies, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001)). “As numerous courts have held, a plan of allocation need not be perfect.” *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 WL 2230177, at \*11 (S.D.N.Y. July 27, 2007). Here, the Settlement provides monetary benefits to two settlement classes, the “Bayer Women’s Low-Dose Aspirin + Calcium” Class and the “Bayer Aspirin With Heart Advantage” Class. The proposed allocation is derived as the result of informed, arm’s length negotiations conducted by separately appointed Allocation Counsel. *See* Settlement, §§ II(B), III(E)(1). The record reveals that each counsel, experienced in complex actions like this case, conducted arm’s length negotiations over the course of a month, arriving at the 60%/40% allocation values.

11. The Court also finds that the Amendment is fair, adequate and reasonable because it addresses the low rate of claims received to date and increases Class Member participation in the Settlement.

12. Each Authorized Claimant who files a valid, sworn and timely Claim Form identifying (i) the products(s) purchased; the approximate date of such purchase(s); and (iii) the location of such purchase(s), and who submits documents that the Claims Administrator determines are valid proof(s) of purchase, shall be entitled to payment from the Settlement Class Amounts for \$4.00 for each purchase of “Bayer Women’s Low Dose Aspirin + Calcium” and/or \$6.00 for each purchase of “Bayer Aspirin With Heart Advantage,” subject to any pro rata reductions. In addition, each Authorized Claimant for which the Claims Administrator or its designee has Purchase Records shall be entitled to payment from the Settlement Class Amounts for \$4.00 for each purchase of “Bayer Women’s Low Dose Aspirin + Calcium” and/or \$6.00 for each purchase of “Bayer Aspirin With Heart Advantage,” subject to any pro rata reductions. And, if an Authorized Claimant submits a valid, sworn and timely Claim Form, including a written attestation that identifies (i) the products(s) purchased; the approximate date of such purchase(s); and (iii) the location of such purchase(s), but does not submit valid proof of purchase and the Claims Administrator or its designee does not have Purchase Records for the Claimant, he or she shall be entitled to a one-time payment of \$4.00 for all purchases of “Bayer Women’s Low Dose Aspirin + Calcium” and/or a one-time payment of \$6.00 for all purchases of “Bayer Aspirin With Heart Advantage,” subject to any pro rata reductions.

13. The Court also finds that if there are any Excess Amounts remaining after all payments contemplated by the Settlement, as amended, and ordered by the Court have been made (“Final Excess Amount”), the Final Excess Amount shall be distributed *cy pres* as follows:

fifty (50) percent of the Final Excess Amount shall be distributed in a *cy pres* payment to the AARP Foundation to fund education about how to prevent and manage osteoporosis, high cholesterol, and/or heart disease and fifty (50) percent of the Final Excess Amount shall be distributed in a *cy pres* payment to the American Heart Association. The Court further determines that the selection of each organization to receive any unclaimed funds, with their missions nationwide in scope, will ensure that the distribution of remaining money from the Settlement Amount will “will go to organizations devoting resources to issues that are closely related to the interests of the members of [the Classes].” *In re Visa Check/MasterMoney Antitrust Litig.*, 2011 WL 5029841, at \*9 (E.D.N.Y. Oct. 24, 2011).

14. The Settlement Agreement, as amended, and this Final Order and Judgment are binding on and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings encompassed by the Release (as set forth in Section VI of the Settlement) maintained by or on behalf of the Class Plaintiffs and all other Settlement Class Members, as well as their successors, heirs, executors, trustees, administrators, and assigns.

15. The Settlement Class Notice Program implemented pursuant to the Settlement Agreement and the Court’s Preliminary Approval Order: (i) constituted the best practicable notice, (ii) constituted notice that was reasonably calculated under the circumstances to apprise Settlement Class Members of the pendency of the Litigation, of their right to object to or exclude themselves from the proposed Settlement, of their right to appear at the Fairness Hearing and of their right to seek monetary and other relief, (iii) constituted reasonable, due, adequate and sufficient notice to all persons entitled to receive notice, and (iv) met all applicable requirements of due process and any other applicable law. Supplemental notice is not required because the Settlement Agreement, as amended, does not provide for any material changes to Settlement;



rather the Settlement Agreement, as amended, serves to increase class member participation in the Settlement.

16. The Court approves the Claim Form that was distributed to Settlement Class Members, the content of which was without material alteration from Exhibit F to the Settlement Agreement.

17. The Court finds that Class Counsel and the Class Plaintiffs adequately represented the Settlement Class for purposes of entering into and implementing the Settlement and Agreement, as amended.

18. The Class Plaintiffs and the Settlement Classes have conclusively compromised, settled, dismissed and released any and all Released Claims against Defendants and the Released Persons.

19. Without affecting the finality of this Final Order and Judgment for purposes of appeal, the Court reserves jurisdiction over the Claims Administrator, Defendant, the Class Plaintiffs and the Settlement Classes as to all matters relating to the administration, consummation, enforcement and interpretation of the terms of the Settlement, as amended, and Final Order and Judgment, and for any other necessary purposes.

20. Upon the Effective Date, the Class Plaintiffs and all Settlement Class Members who have not been excluded from the Settlement Classes, whether or not they return a Claim Form within the time and in the manner provided for, shall be barred from asserting any Released Claims against Defendants and/or any Releasees, and any such Settlement Class Members shall have released any and all Released Claims as against Defendants and all Released Persons.

21. This Final Judgment and Order bars and permanently enjoins all Settlement Class Members who have not been properly excluded from the Settlement Classes from any and all claims that were or could have been asserted by the Class Releasors arising from or related to Bayer Heart Advantage and Bayer Women's including, but not limited to, any and all claims, causes of action, demands, actions, suits, rights, obligations, controversies or the like, known or unknown, including, but not limited to, understatement consumer fraud, warranty, or unjust enrichment law (the "Released Claims"). Released Claims shall not include claims for personal injury. Released Claims are subject to the Reservation of Claims and Rights as described in Section VI.B in the Settlement.

22. The Court approves the Opt-Out List and determines that the Opt-Out List is a complete list of all Settlement Class Members who have timely requested exclusion from the Settlement Classes and, accordingly, shall neither share in nor be bound by the Final Order and judgment except for Opt-Outs who subsequently elect to submit Claim Forms during the Claim Period.

23. The Parties, without further approval from the Court, are authorized to agree to and adopt such amendments, modifications and expansions of the Settlement, as amended, and all Exhibits thereto as (i) shall be consistent in all material respects with the Final Order and Judgment and (ii) do not limit the rights of the Parties or Settlement Class Members.

24. Pursuant to Fed. R. Civ. P. 54(b), the Court expressly determines that there is no just reason for delay and directs that separate judgments with respect to all claims by Settlement Class Members of the Bayer Heart Advantage Class and the Bayer Women's Low Dose Aspirin + Calcium Class are deemed as final judgments.

25. The Court dismisses this lawsuit, *In re: Bayer Corp. Combination Aspirin Products Marketing and Sales Practices Litigation*, 09-MD-2023 (MBC)(JMA) (E.D.N.Y.), and all of the underlying suits transferred to the Court by the Judicial Panel on Multidistrict Litigation and all individual and class claims presented thereby, on the merits and with prejudice and without fees or costs except as provided herein or any other Order entered by the Court, in accordance with the terms of this Final Order and Judgment.

IT IS SO ORDERED

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Hon. Brian M. Cogan  
UNITED STATES DISTRICT JUDGE