UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE INSULIN PRICING LITIGATION	:	Civil Action No. 2:17-cv-00699-BRM-ESK

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND OBJECTION TO PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

GENOVA BURNS LLC
Jennifer Borek, Esq.
494 Broad Street
Newark, New Jersey 07102
Tel: 973-533-0777
jborek@genovaburns.com
Attorneys for State of Arizona and State of Mississippi

LITE DEPALMA GREENBERG & AFANADOR, LLC
Bruce Greenberg, Esq.
570 Broad Street, Suite 1201
Newark, New Jersey 07102
Tel: (973) 877-3820
bgreenberg@litedepalma.com
Attorneys for State of Minnesota

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

INTRODUCTION

Eli Lilly and Company ("Lilly") lacks the authority to release claims brought by State Attorneys General, including claims for equitable restitution. The Amended Proposed Settlement Agreement ("Tentative Settlement") that Lilly and the Class Plaintiffs have submitted for preliminary approval, however, illegally purports to do so. The States of Mississippi, Minnesota, and Arizona by and through their Attorneys General, ("Intervenor States") have attempted to work with Lilly to modify the Tentative Settlement, but, late last month, the company confirmed it was attempting to leverage the Tentative Settlement, which it reached with Class Plaintiffs, to bar State Attorneys General from seeking equitable restitution and potentially other remedies. Lilly's brazen attempt to weaponize its Tentative Settlement against other Attorneys General litigating against the company threatens the sovereign interests of states, including the Intervenor States to enforce their state laws. The Intervenor States, through their Attorneys General, therefore respectfully file this Motion to Intervene and Objection to Preliminary Approval of the Tentative Settlement for the limited purpose of challenging the provisions in the Tentative Settlement that purport to release State Attorneys General claims. The Intervenor States take no position on any other aspect of the Tentative Settlement.

BACKGROUND

I. THE TENTATIVE SETTLEMENT PURPORTS TO RELEASE SOVEREIGN CLAIMS.

Class Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement on Friday, May 26, 2023. (ECF No. 639.) The following week, the Intervenor States discussed their shared concerns with several problematic terms in the proposed Class Action Settlement and reached out to Class Plaintiffs to relay these concerns. (Affidavit of Director and Assistant Attorney General Crystal Utley Secoy ("Utley Secoy Aff.") ¶ 3.) Throughout these discussions, the Intervenor States noted their primary concern was that the Class Action Settlement's Paragraph

24 definition of "Releasing Party" and the release language found in Paragraph 66 purport to release State Attorneys General's claims for restitution, among other potential remedies such as civil penalties and attorneys' fees that State Attorneys General are authorized to pursue as the chief law enforcement officers of their states. (*Id.* ¶ 9-11.)[1]

The Intervenor States, Class Plaintiffs, and Lilly then exchanged redlines to the Class Action Settlement in an effort to resolve the Intervenor States' concerns. (*Id.* ¶ 6-9.) But throughout this process, Lilly refused to agree to language that would preserve State Attorneys General's *parens patriae* authority. (*Id.* ¶ 9-11.) Instead, Lilly attempted to insert ambiguous language into the Class Action Settlement stating that State Attorneys General's claims would not be affected by the Class Action Settlement to the extent States sought to vindicate "exclusively sovereign interests." (*Id.*) During a meet-and-confer on Friday, July 21, 2023, counsel for Lilly confirmed that it intended to use this "exclusively sovereign interests" release language contained in the Class Action Settlement to preclude State Attorneys General from seeking restitution in their own actions. (*Id.* ¶ 11.)

On Monday July 24, 2023, Class Plaintiffs filed the Tentative Settlement that Class Plaintiffs represented was intended to "thoughtfully address several of the issues" raised by the Intervenor States. (ECF No. 656 at 2.) Class Plaintiffs also filed a redline version of the original settlement. (ECF No. 656-1.) That document shows that Class Plaintiffs and Lilly have left Paragraph 24 unchanged, and modified Paragraph 66, with the paragraphs reading as follows:

> 24. "Releasing Parties" or "Releasing Party" means the Settlement Class, Plaintiffs, and each Settlement Class Member, on behalf of themselves and their heirs, beneficiaries, estates, executors, administrators, representatives, agents, counsel, insurers, reinsurers, subsidiaries, corporate parents, predecessors,

[1] Additionally, the "[Proposed] Preliminary Approval Order" filed along with the Class Action Settlement could be construed to improperly stay currently pending State Attorneys General litigation against Lilly. *See* ECF No. 649-4 ¶ 8.

successors, indemnitors, subrogees, plans, payors, sponsors, and assigns, and any legal, juridical, elected or appointed official, or natural person or entity who may claim by, through, under, or on behalf of them.

…

66. In consideration for the Settlement, effective automatically upon the entry of the Final Judgment, the Releasing Parties fully, finally, and forever release, relinquish, acquit, waive, discharge with prejudice, covenant not to sue, and hold harmless the Released Party from any and all causes of action, claims, demands, suits, arbitrations, mediations, petitions, liabilities, rights, and damages of any kind and/or type (including, but not limited to, compensatory, benefit-of-the-bargain, diminished value, lost time, lost earnings or other losses, unjust enrichment, out-of-pocket, illegal profits, injunctive or other equitable relief, exemplary, punitive, penalties, liens, restitution, disgorgement, expert and/or attorneys' fees or by multipliers), whether past, present, or future, mature or not yet mature, existing now or arising in the future, whether or not concealed or hidden, developed or undeveloped, foreseen or unforeseen, known or unknown, suspected or unsuspected, contingent or noncontingent, derivative or direct, asserted or unasserted, liquidated or unliquidated, whether or not such claims were or could have been raised or asserted in the Action, whether based on federal, state or local law, statute, ordinance, regulation, code, contract, common law, antitrust law, RICO, consumer fraud, unfair business practices, fraudulent concealment, gross negligence, recklessness, willful misconduct, or any other source or theory, whether in law or in equity, that any of the Releasing Parties had, now has or have, or hereafter can, shall or may have, or could assert directly or indirectly in any forum against the Released Party, in each case, arising out of, due to, resulting from, connected with, or involving or relating in any way to, directly or indirectly, the subject matter of the Action or the Lilly Insulin Products, or that are, or could have been, defined, alleged, or described in the Third Amended Class Action Complaint, including, but not limited to, those relating to the manufacturing, distribution, marketing, advertising, pricing, or sale of the Lilly Insulin Products. This includes, but is not limited to, claims for relief brought on behalf of the Releasing Parties by any other Person, entity representative, or official. The Releasing Parties shall not now or hereafter institute, maintain, prosecute, assert, and/or cooperate in the institution, commencement, filing, or prosecution of any suit, action, and/or proceeding, against the Released Party, either directly or indirectly, on their own behalf, on behalf of a class, or on behalf of any other Person, including a representative doing such on their behalf or in connection with their purchase of Lilly Insulin Products, with respect to the claims, causes of action and/or any other matters released through the Settlement Class Members' Release. The Releasing Parties specifically acknowledge that the relief provided for in this Agreement is in compensation for, adequate consideration regarding, and discharges entirely, any possible causes of action, claims, demands, suits, arbitrations, mediations, petitions, liabilities, rights, and damages of any kind and/or type related to conduct arising out of, due to, resulting from, connected with, or involving or relating in any way

> to, directly or indirectly, the subject matter of the Action, the Lilly Insulin Products, or that are, or could have been, defined, alleged or described in the Third Amended Class Action Complaint, including, but not limited to, those relating to or arising out of the manufacturing, distribution, marketing, advertising, pricing, or sale of the Lilly Insulin Products. The relief provided for in this Agreement shall be the sole and exclusive remedy for or on behalf of all Releasing Parties with respect to any released claim, injury, and damage, as described in this Paragraph 66, and the Released Party shall not be subject to liability or expense of any kind with respect to any released claims brought by or on behalf of any Releasing Party other than as set forth in this Agreement. For the avoidance of doubt, the Settlement Class Members' Release shall be construed to the maximum extent allowed by law. Nothing in this Agreement shall be construed to bar a state from pursuing, obtaining, or enforcing an investigation, settlement, or action, whether denominated as parens patriae, law enforcement, or sovereign, to the extent a state seeks to vindicate exclusively sovereign interests as permitted by applicable law, including through injunctive relief. Nothing in this Agreement shall be construed to prevent any Plaintiff or Settlement Class Member from responding to, cooperating with or communicating with any state, federal or local government body or official, including an appearance as a witness for testimony or the production of information. Also for the avoidance of doubt, the term "Settlement Class Members" does not include the sovereign states, territories, or their agencies, and the Settlement Class Members' Release does not limit any Releasing Party's ability to pursue claims against anyone who is not a Released Party.

(ECF No. 656-1 ¶¶ 24 and 66.)[2] That same day, Lilly filed its opposition to the Motion to Intervene filed by the States of Illinois, Nebraska, and Utah, and confirmed its intent to use the "exclusively sovereign interests" language in the Tentative Settlement to bar State Attorneys General claims for restitution. *See* Opposition to Motion to Intervene and Objection to Preliminary Approval of Class Action Settlement (ECF No. 658) at 18-20 (arguing proposed Intervenor States lacked sovereign interests in pursuing restitution against defendants).

The Tentative Settlement purports to preserve only "exclusively sovereign interests" of State Attorneys General and the ability to pursue an injunction against Lilly. Lilly intends to use this language to prevent States from pursuing equitable restitution, and the language of the Tentative Settlement is ambiguous enough for Lilly to potentially seek to preclude States from

[2] Class Plaintiffs did not file an Amended [Proposed] Preliminary Approval Order.

obtaining civil penalties or attorneys' fees as well. Further, the [Proposed] Preliminary Approval Order could be construed to stay pending State Attorneys General's actions. Given these problems, the Intervenor States informed Lilly and Class Plaintiffs that the Intervenor States would formally present their concerns to the Court. (Utley Secoy Aff. ¶ 12 and Ex. A.)

II. MINNESOTA AND MISSISSIPPI HAVE LONG-STANDING ENFORCEMENT ACTIONS PENDING AGAINST LILLY.

The State of Minnesota, by and through its Attorney General, filed its consumer-protection enforcement action against the three largest manufacturers of insulin on October 16, 2018 before this Court. *See* Complaint (ECF No. 1), *State of Minnesota v. Sanofi-Aventis U.S. LLC, et al.,* No. 18-cv-14999 (D.N.J. Oct. 16, 2018). The State of Minnesota seeks monetary relief, including equitable restitution, through its Complaint, and in rejecting Defendants' Motion to Dismiss, the Court has already determined that the State of Minnesota could pursue claims for monetary relief, including restitution, through its consumer protection claims generally. *See* Opinion (ECF No. 74), *Minnesota v. Sanofi et al.,* No. 18-cv-14999 (D.N.J. Mar. 31 2020) (holding defendants failed to sustain burden to dismiss Minnesota Attorney General's claims for monetary relief under Minnesota consumer protection statutes). The Minnesota Attorney General has completed fact discovery, and its case will proceed to expert discovery following the Court's decision on Class Plaintiffs' Motion for Class Certification. *See, e.g.,* Case Management Order (ECF. No. 154), *Minnesota v. Sanofi et al.,* No. 18-cv-14999 (D.N.J. Nov. 15, 2022).

The State of Mississippi, through its Attorney General, filed its consumer-protection action on June 7, 2021, in the Hinds County Chancery Court. Compl. (MEC No. 2), *Mississippi v. Eli Lilly & Co., et al*., 25CH1:21-CV-00738. On October 21, 2021, the case was removed to the United States District Court for the Southern District of Mississippi. Notice of Removal (ECF No. 1), *Mississippi v. Eli Lilly & Co., et al*., 3:21-CV-00674-KHJ-MTP (S.D. Miss.). On August 7,

2023, the case was transferred to its current location—the District Court of the District of New Jersey—and assigned to the Honorable Brian R. Martinotti. Transfer Order, *Mississippi v. Eli Lilly & Co., et al*., 3:21-CV-00674-KHJ-MTP, (ECF No. 260.) The State of Mississippi is currently in discovery, and the State seeks injunctive relief, damages, restitution, penalties, disgorgement, pre- and post-judgment interest, attorneys' fees, litigation costs, and all other additional relief the court deems necessary. Third Am. Compl. at 115 (ECF No. 71), *Mississippi v. Eli Lilly & Co., et al*., 3:21-cv-00674-KHJ-MTP (S.D. Miss. Feb. 17, 2022). Mississippi has likewise survived the motion to dismiss stage. Orders Denying Motions to Dismiss, (ECF No. 111 and 114), *Mississippi v. Eli Lilly & Co., et al*., 3:21-cv-00674-KHJ-MTP (S.D. Miss. Feb. 17, 2022).

To the extent Arizona seeks to intervene, Arizona is limited in its objections to the proposed settlement as provided above. Arizona is not currently in litigation with the defendant parties, but seeks to preserve all of its rights without waiver or exclusion that could be caused by the currently proposed settlement.

ARGUMENT

I. THE COURT SHOULD PERMIT THE INTERVENING STATES TO INTERVENE.

A. The Intervenor States Have a Right to Intervene Under Rule 24(a) of the Federal Rules of Civil Procedure.

A party that timely files a motion has the right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure if it can demonstrate: "(1) a sufficient interest in the litigation; (2) a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and (3) that its interest is not adequately represented by the existing parties to the litigation." *Commonwealth of Pennsylvania v. President United States of Am.*, 888 F.3d 52, 57 (3d Cir. 2018). A "very strong" demonstration that one of these requirements is satisfied "may result in requiring a lesser showing of another requirement." *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987).

As a matter of judicial economy, courts "favor[] intervention over subsequent collateral attacks" to pending litigation. *Kleissler v. U.S. Forest Service*, 157 F.3d 964, 970 (3d Cir. 1998).

1. The Threat to the Intervenor States' Sovereign Authority Represents a Sufficient Interest in this Litigation.

"A proposed intervenor must demonstrate that its interest is specific to it, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." *Corman v. Sec'y Commonwealth of Pennsylvania*, 751 F. App'x 157, 160 (3d Cir. 2018). "A proposed intervenor's interest need not be a legal interest, provided that he or she will be practically disadvantaged by the disposition of the action." *City of Newark v. City of New York, et al.*, 2020 WL 10505722, at *2 (D.N.J. May 1, 2020).

The Tentative Settlement threatens the Intervenor States' unique sovereign interests and *parens patriae* authority to enforce their state laws. Private parties cannot be permitted to usurp and nullify the rights of the chief law enforcement officers of each state. The Tentative Settlement's direct threat to the Intervenor States' sovereign authority provides the Intervenor States with sufficient interest in this litigation to intervene as a matter of right.

Each state, including Minnesota, Mississippi, and Arizona has a sovereign interest in the enforcement of its own laws. *See, e.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008); *State v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. App. 1987); *Mississippi v. Stewart*, 184 So. 44, 46 (Miss. 1938). *Babbitt v. Herndon*, 119 Ariz. 454, 581 P.2d 688 (Ariz., 1978); *Waste Manufacturing and Leasing Corp. v Hambicki*, 183 Ariz. 84, 900 P.2d 1220 (Ariz. App. Div. 1, 1995). State Attorneys General, including the Minnesota, Mississippi, and Arizona Attorneys General, are the chief law officers of their respective states and are charged with applying their sovereign law enforcement powers. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 536 (2009); *State v. Robinson*, 112 N.W. 269, 272 (Minn. 1907); *Frazier v. Mississippi*, 504 So. 2d 675, 690 (Miss.

1987) ("[T]he Attorney General… is by common law, statute, and our Constitution the chief legal officer for this State."); Ariz. Rev. Stat. Ann. § 44-1524.

State Attorneys General have broad and comprehensive statutory powers to investigate violations of the laws respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade. These include Minnesota's Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69, *et seq*., and Deceptive Trade Practices Act, Minn. Stat. § 325D.44, *et seq*., Mississippi's Consumer Protection Act, Miss. Code Ann. § 75-24-1 *et seq*., and Arizona's Consumer Fraud Act Ariz. Rev. Stat. Ann. §44-1521 *et seq.* These laws are broad remedial consumer protection statutes that State Attorneys General aggressively prosecute. *See* Minn. Stat. §§ 8.31, subd. 1; 8.32, subd. 2(a); *Curtis v. Altria Grp., Inc.*, 813 N.W.2d 891, 898 (Minn. 2012); *State v. Phillip Morris, Inc.*, 551 N.W.2d 490, 495-96 (Minn. 1996) Miss. Code Ann. §§ 75-21-9; 75-24-11; 75-24-19; 75-24-23; *Madsen v. Western American Mortgage Company*, 143 Ariz. 614, 694 P.2d 1228 (Ct. App. 1985); *People ex rel. Babbitt v. Green Acres Trust*, 127 Ariz. 160, 618 P.2d 1086 (Ct. App. 1980). State Attorneys General also have "extensive common-law powers which are inherent in [their] office." *Dunn v. Schmid*, 60 N.W.2d 14, 17, n.8 (Minn. 1953); *Mississippi v. Warren*, 254 Miss. 293, 308-309 (Miss. 1965); *Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648, 659 (Miss. 1973) ("The Attorney General is a constitutional officer possessed of all the power and authority inherited from the common law as well as that specifically conferred upon [her] by statute."). As well as robust statutory powers as in the case of Arizona. *Madsen v. Western American Mortgage Company*, 143 Ariz. 614, 694 P.2d 1228 (Ct. App. 1985); *Corbin v. Pickrell*, 136 Ariz. 589, 667 P.2d 1304 (Ariz. 1983).

State Attorneys General's statutory and common law *parens patriae* authority permit them to seek the remedies of: (1) injunctive relief; (2) equitable restitution; (3) civil penalties; and (4)

the State's costs of investigation and attorneys' fees. Miss. Code Ann. §§ 11-45-11; 75-24-9; 75-24-11; 75-24-19; 75-24-23; Ariz. Rev. Stat. Ann. § 44-1528; Minn. Stat. § 8.31, subds. 3, 3a; *Curtis*, 813 N.W.2d 891, 898-99 (Minn. 2012); *Ri-Mel, Inc.*, 417 N.W.2d at 112-13. The remedy of equitable restitution permits State Attorneys General to seek restitution for all consumers impacted by a pattern and practice of unlawful conduct. *See, e.g., State v. Minn. Sch. of Bus., Inc.*, 935 N.W.2d 124, 133-134 (Minn. 2019); *State v. Nw. Bell Tel. Co.*, 304 N.W.2d 872, 877 (Minn. 1981); *State v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 896 n.4 (Minn. App. 1992), *aff'd* 500 N.W.2d 788 (Minn. 1993); *Ri-Mel, Inc.*, 417 N.W.2d at 112; *State v. Standard Oil Co.*, 568 F. Supp. 556, 563 (D. Minn. 1983); *Mississippi v. BASF Corp.*, 2006 WL 308378 at *13 (Miss. Ch. 2006); *In re Arizona Theranos, Inc., Litig.*, 308 F. Supp. 3d 1026 (D. Ariz. 2018). Although restitution can take many forms including direct payments to consumers, it may require a defendant to forfeit all funds it fraudulently obtained from consumers, as Minnesota's Supreme Court has observed:

> [Defendants] fundamentally misunderstand the remedy that the Attorney General seeks in this case . . . The Attorney General seeks equitable restitution [which] unlike money damages, is intended to force a wrongdoer to divest money improperly gained at the expense of another party. It is aimed as much (or more) at preventing the wrongdoer from profiting from its misdeeds as it is to make the injured party whole.

Minn. Sch. of Bus., 935 N.W.2d at 138-39. Courts have long recognized that in obtaining such relief under the *parens patriae* doctrine, the Attorney General is asserting a quasi-sovereign, public interest of the state—namely, protecting the economic health of Minnesota's citizens—that "surpasses the interests of individual citizens." *See, e.g., id.*; *Ri-Mel, Inc.*, 417 N.W.2d at 112; *State v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 569-70 (Minn. Ct. App. 2005). Restitution is central to Minnesota's law enforcement scheme, as "future violations may be best deterred" by the Attorney General through "seeking victim-specific monetary relief." *Cross Country Bank*, 703

N.W.2d at 570. It is also expressly provided by statute in Mississippi pursuant to Section 75-24-11. *Mississippi v. Entergy Mississippi, Inc.*, 2012 WL 3704935 at *8 (S.D. Miss. Aug. 25, 2012) ("Mississippi law provides precedent supporting the ability of the State to recover restitution under Section 75–24–11 for both itself, in its proprietary interests, and for Mississippi residents, under a theory of unjust enrichment."); *see also Fletcher v. Security Pacific Nat'l Bank*, 23 Cal.3d 442, 153 Cal. Rptr. 28, 591 P.2d 51 (1979) (Approving across-the-board order of restitution to all consumers without individualized proof that each consumer lacked knowledge of the fraud.); *Horne v. Autozone*, 229 Ariz. 358, 275 P.3d 1278 (Ariz. 2012) (The Arizona Consumer Fraud Act expressly provides for restitution to consumers).

As the chief law enforcement officers of their states, the Intervenor States' interests are specific, definable, and will clearly be impaired by the Tentative Settlement, which purports to release the Intervenor States' ability to pursue the full set of remedies they are entitled to seek under their authority. This interest easily clears the "practical disadvantage" standard. *See Newark*, 2020 WL 10505722 at *2.

2. The Tentative Settlement Threatens the Intervenor's Sovereign Rights and Interests.

Demonstrating that a party's interest will be "impaired or affected" requires the Court to consider whether the proposed intervenor's interest "is in jeopardy in the lawsuit." *Pennsylvania*, 888 F.3d at 59. This means there must be a "tangible threat" to the proposed intervenor's interest. *Brody v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992). The Court may consider "any significant legal effect" on the proposed intervenor's interest to satisfy this standard. *Id.* at 1122-23.

The Tentative Settlement purports to preserve only the Intervenor States' ability to pursue the "exclusively sovereign" remedies, including injunctive relief. The Tentative Settlement does not merely impair or affect the Intervenor States' interest in pursuing equitable restitution and

potentially other remedies—it extinguishes those remedies. The Tentative Settlement is clearly a tangible threat that jeopardizes the Intervenor States' interests in enforcing their state laws and pursuing the full set of remedies available to them as their states' chief legal officers.

3. The Intervenor States' Interests are Not Adequately Represented by Class Plaintiffs or Lilly.

A party may demonstrate its interests are not adequately represented by showing its interest "diverge sufficiently from the interests of the existing party." *Pennsylvania*, 888 F.3d at 60. This burden is "treated as minimal" and requires the proposed intervenor only to demonstrate that its interest "may be inadequate." *Mountain Top Condo. Ass'n v. Dave Stabber Master Builder, Inc*., 72 F.3d 361, 368 (3d Cir. 1995).

Class Plaintiffs and Lilly cannot adequately represent the Intervenor States' interests. The Intervenor States have sued Lilly for consumer protection violations that harm the public interest, and the company's attempts to use a private settlement to thwart a public law enforcement action plainly demonstrates that Lilly does not represent the Intervenor States' interests. Class plaintiffs also cannot represent the Intervenor States's law enforcement interests, as a private litigant's attempt to seek money damages is distinct from a State Attorney General's interest in pursuing equitable restitution for the public interest.

The states' public, quasi-sovereign interests in obtaining equitable restitution are wholly separate and distinct from a class member's interests in private compensatory damages. This is deeply rooted in Minnesota law. *See, e.g., Minn. Sch. of Bus.*, 935 N.W.2d at 138-39 (explaining history of Minnesota Attorney General's sovereign authority to seek equitable restitution). Likewise, *Cross Country Bank* rejected the notion that "because the facts underlying the state's claim are the same facts that would permit private relief, the state is necessarily seeking to protect only private interests." 703 N.W.2d at 569. The court in *Cross Country Bank* explained:

> Just as the state does not step into the shoes of victims of crime when it acts in its prosecutorial role, the state does not step into the shoes of individual card holders in this case but acts as an independent party. The state is asserting a state interest that is based on the facts involving individual card holders. . . . It is not dispositive that the attorney general seeks victim-specific relief or that the claim is based on the facts that could permit an individual to obtain relief through a private tort claim. . . . The state's purpose in bringing the claim is to secure protection of a public interest. The United States Supreme Court specifically recognized that future violations may be best deterred by seeking victim-specific monetary relief, rather than non-victim-specific injunctive relief.

Id.; *Ri-Mel, Inc.*, 417 N.W.2d at 112 (recognizing that restitution remedy furthered Minnesota's public, quasi-sovereign interest in protecting citizens' economic health).

Minnesota and Mississippi's currently pending enforcement actions against Lilly, seek to vindicate their public, sovereign and quasi-sovereign interests in protecting the economic health of citizens and aggressively enforcing each state's consumer protection laws that are distinct from the claims of private litigants. *See* Second Amended Complaint (ECF No. 75) RELIEF ¶ 455, *Minnesota v. Sanofi et al.*, No. 18-cv-14999 (D.N.J. Mar. 31 2020); Third Amended Complaint, *Mississippi v. Eli Lilly et al.*, Case No. 3:21-cv-00674 (S.D. Miss. Feb. 17, 2022).[3]

B. In the Alternative, the Intervenor States Should Be Permitted to Intervene under Rule 24(b) of the Federal Rules of Civil Procedure.

Under Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure, the Court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." *Islamic Soc'y of Basking Ridge v. Twp. of Bernards*, 2016 WL 7332732, at *2 (D.N.J. Dec. 16, 2016)**Error! Bookmark not defined.**, *aff'd*, 681 F. App'x 110 (3d Cir. 2017). Under Rule 24(b)(2) of the Federal Rules of Civil Procedure, "a federal or state

[3] The Intervenor States incorporate these Complaints as the pleading setting forth the claim or defense for which intervention is sought pursuant to Rule 24(c) of the Federal Rules of Civil Procedure.

governmental officer or agency" may intervene when its "claim or defense is based: (A) on a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2).

1. The Intervenor States Should Be Permitted to Intervene Under Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure.

The Intervenor States have claims that share a common question or law or fact with the underlying litigation; the parties are litigating the common question of the harms caused by the insulin manufacturers' deceptive practices under some of the same consumer protection statutes, with the Class Plaintiffs focusing on the harm to patients, while the states are seeking to vindicate the quasi-sovereign interests implicated in their *parens patriae* authority unique to State Attorneys General as described above.[4] For the reasons identified in the preceding section, the Court should grant the Intervenor States the ability to permissibly intervene under Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure. *See Kleissler*, 157 F.3d at 969 (analyzing permissive intervention under same standard as intervention as a matter of right); *Reunion Francaise Soc. Anon. D'Assurances Es Des Reassurances v. J.E. Brenneman Co.*, 2005 WL 8174846, at *2 (D.N.J. Mar. 31, 2005) ("The analysis is substantially the same under intervention of right or permissive intervention.").

2. The Intervenor States Should Be Permitted to Intervene Under Rule 24(b)(2) of the Federal Rules of Civil Procedure.

Rule 24(b)(2) permits state governmental officers to intervene if the party's claim or defense is based on "(A) a statute or executive order administered by the officer or agency; or (B)

[4] Additionally, Mississippi's Complaint is more encompassing to also include the conduct of pharmacy benefit managers and have named pharmacy benefit managers as defendants in their actions.

any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2). When considering a request for permissive intervention by a governmental entity, district courts should be "hospitable" to motions to intervene by governmental entities. *Metro Transp. Co. v. Balboa Ins. Co.*, 118 F.R.D. 423, 424 (E.D. Pa. 1987); *see also First Am. Bank Co.*, 2018 WL 11246702, at *1–2 ("[T]he Court must be mindful that Rule 24(b)(2) requires that intervention be granted liberally to governmental agencies because they purport to speak for the public interest.").

As explained in the previous section, the Intervenor States are the chief law enforcement officers of their states, and they administer and enforce their state consumer protection statutes, which are at issue in their own litigation, as well as this action. Given this framework and the lenient standard for permissive intervention for state government officers, the Intervenor States respectfully request that they be permitted to intervene under Rule 24(b)(2) of the Federal Rules of Civil Procedure.

C. The Intervenor States Seek Intervention for a Specific Purpose to Challenge the Release Language and Injunction.

A proposed intervenor need not "possess an interest in each and every aspect of the litigation" but may be entitled to intervene as "to specific issues." *Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pennsylvania*, 701 F.3d 938, 951 (3d Cir. 2012). In *Benjamin*, the Third Circuit found that a group of intermediate care residents should be permitted to intervene to "have the opportunity to challenge the parties' Settlement Agreement." *Id.* at 948. If the Court grants the Intervenor States' motion, the Intervenor States will, like the plaintiffs in *Benjamin*, intervene to challenge the specific provisions of the Tentative Settlement that purport to interfere with the Intervenor States' pending litigation against Lilly, as well as the proposed injunction that could be construed to stay State Attorneys General's pending actions.

D. The Intervenor States' Motion is Timely.

In determining whether a motion to intervene is timely, courts consider the time between filing the motion and when it became readily apparent that the movant's rights were at risk. *Conforti v. Hanlon*, 2023 WL 2744020, at *4 (D.N.J. Mar. 31, 2023). A court may find a motion timely when the intervenor files the motion after receiving notice of a settlement agreement. *Benjamin*, 701 F.3d at 948; *Demarco v. Avalonbay Communities, Inc.*, 2016 WL 5934704 *4 (D.N.J. Oct. 12, 2016) ("The Court agrees that the motion was timely considering the limited and specific purpose of the requested intervention. The Proposed Intervenors acted promptly after the Plaintiffs filed their 'Unopposed Motion for Preliminary Approval of the Class Action Settlement.'"). Intervention may be timely even if it is sought after entry of judgment. *Mountain Top Condo*, 72 F.3d at 370. The Court must analyze the "timeliness" factor relative to "the specific purpose intervention will serve." *Hartman v. Duffy*, 158 F.R.D. 525, 532 (D.D.C. 1994). When a proposed intervenor "takes reasonable steps to protect its interest, its application should not fail on timeliness grounds." *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182 (3d Cir. 1994).

The Intervenor States seek to challenge only those objectionable provisions of the Tentative Settlement that purport to interfere with their sovereign authority to enforce their state laws and seek all remedies available to them under their consumer protection statutes, as well as the [Proposed] Preliminary Approval Order that could be construed to stay their claims for equitable restitution. The time for the Intervenor States' objection therefore arose only after confirmation from Lilly on July 21 that it would not modify the release language, and the subsequent filing of July 24, 2023 Tentative Settlement and Lilly's opposition to the motion to intervene brough by Illinois, Nebraska, and Utah, that confirmed Lilly's intent to use the Tentative

Settlement to release State Attorneys General's claims for equitable restitution. *See Duffy*, 158 F.R.D. at 532 (analyzing timeliness in context of purpose of intervention).

There will be no undue delay if the Court grants the Intervenor States' Motion. The Court can refuse to preliminarily approve the Tentative Settlement until the parties agree to a simple modification of the release language to note that the Tentative Settlement does not impact in any way any State Attorney General Action. This minimal delay will not prejudice the parties, who should have already agreed to modify the language at the Intervenor States' requests earlier this summer. As courts have noted, "While any intervention could potentially cause delay, Rule 24(b) requires the court to consider whether this intervention will cause 'undue delay,' or prejudice the adjudication of the original parties' rights." *Appleton v. Comm'r*, 430 F. App'x 135, 138 (3d Cir. 2011). In fact, it would be the Intervenor States who would be greatly prejudiced by denial of their Motion, given that the Tentative Settlement purports to release several of their available remedies.

II. THE TENTATIVE SETTLEMENT SHOULD BE MODIFIED TO MAKE CLEAR IT DOES NOT AFFECT STATE ATTORNEYS GENERAL'S LITIGATION

A. Private Parties Lack the Authority to Release Claims Belonging to States.

As the preceding section of this memorandum makes clear, State Attorneys General are the chief law enforcement officers of their states, and they have unique sovereign interests in enforcing their laws to protect the health and well-being of their state. When a State Attorney General pursues equitable restitution, the State seeks to vindicate a quasi-sovereign interest through a remedy that is distinct from, and superior to, a private litigant's request for monetary damages.

In recognizing these distinctions between private litigation and public enforcement actions, courts, including the Third Circuit, have routinely held that private parties lack the authority to release a government agency's superior claims for relief to vindicate sovereign or quasi-sovereign interests belonging to the state or government. For example, in *Sec'y United States Dep't of Lab.*

v. Kwasny, the court considered whether a previous, private judgement entered against Mr. Kwansy for violations of the Employee Retirement Income Security Act ("ERISA") could preclude a subsequent enforcement action brought by the Secretary of Labor against Mr. Kwansy, even where the Secretary of Labor sought recovery of funds implicated in the prior judgment. 853 F.3d 87, 90 (3d Cir. 2017). The Court recognized that a "private litigant cannot represent" the Secretary of Labor's "interest in maintaining the integrity of, and public confidence in, the pension system" which is "broader than the interests of private litigants" involved in the earlier action. *Id.* at 95-96; *see also Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326, 340 (4th Cir. 2007) (holding private plaintiffs do not adequately represent interests of Secretary of Labor in ERISA suits and "is not bound by the results reached by private litigants"); *Spinelli v. Capital One Bank, USA*, 2012 WL 3609028 at *2 (M.D. Fla. Aug. 22, 2012) (holding court approval of private settlement did not bind the states of Mississippi and Hawaii because their Attorneys General did not participate in the litigation); *Commodity Futures Trading Comm'n v. Commercial Hedge Servs., Inc.*, 422 F. Supp. 2d 1057, 1061 (D. Neb. 2006) (concluding that prior private settlement did not bar the Commodities Future Trading Commission ("Commission") from seeking restitution from defendants because "when private parties settle their disputes without the approval or consent of the Commission, those settlements cannot preclude the Commission from later seeking additional or more full restitution or any other remedy."); *Sec'y of Lab. v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) ("The Government is not barred … from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded."); *cf. Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 690 (1961) (noting "the Government is not bound by private antitrust litigation to which it is a stranger"). Non-governmental parties'

settlements do not provide distinct deterrence function reserved to law enforcement and are therefore not binding on the government.

Similarly, as the Eighth Circuit has recognized:

> Even though a private litigant understandably may believe it wise to compromise claims to gain prompt and definitive relief, such a settlement does not further the broader national public interests represented by the [government agency] and reflected in Congress's delegation of [the Act's] enforcement powers to the [government agency]. Indeed, and quite apart from whether the individual victims are satisfied with their private settlements, full and ample restitution, and other equitable remedies such as disgorgement of profits, serve distinct deterrence functions that are vital to the national public interest. Therefore, when private parties settle their disputes without the approval or consent of the [government agency], those settlements cannot preclude the [government agency] from later seeking additional or more full restitution or any other remedy.

U.S. Commodity Future Trading Comm'n v. Kratville, 796 F.3d 873, 889 (8th Cir. 2015) (quotations and citations omitted); *see also Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1424 (11th Cir. 1998) (holding private class settlement did not bar government agency's restitution claims because the government's enforcement action was pursuing "national public interests separate and distinct from those of the private litigants"); *Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177, 1181 n.4 (7th Cir. 1987) (holding Illinois Attorney General was not bound by prior private litigation, stating that "to assume that private individuals can be properly viewed as representative of a particular government is a . . . daring analytical leap").

In fact, in recognizing the distinction between and the superiority of a public enforcement action to a private lawsuit, courts have even gone so far as to hold that State Attorneys General have the authority to release private claims but not vice versa. For example, in *Curtis*, the Minnesota Attorney General brought a public enforcement action against tobacco companies in 1994 for violation of Minnesota's consumer protection statutes and sought remedial relief, including restitution and disgorgement in 1994 for violation of Minnesota's consumer protection statutes and sought remedial relief, including restitution and disgorgement. 813 N.W.2d at 896.

The Minnesota Attorney General's case subsequently settled which, among other things, required the tobacco companies to pay over $100 million to Minnesota annually in perpetuity. *Id.* at 896-97. Later, a private class filed a lawsuit under Minn. Stat. § 8.31, subd. 3a—Minnesota's private attorney general statute—for alleged violations of the same consumer protection statutes that Minnesota had previously settled in its enforcement action. *Id*. at 897. The Minnesota Supreme Court affirmed the dismissal of the class action based on of the language of the release from Minnesota's enforcement action, holding "the State AG has the authority to settle and release a private litigant's subdivision 3a claims." *Id*. at 901. Following the long-tradition of the cases cited above, however, the Court held that the inverse was not permissible:

> *We conclude that a private litigant pursuing a subdivision 3a claim does not have the authority to settle or release the section 8.31 claims of the State without the express consent of the State.* A private litigant, however, does have the authority to settle its own subdivision 3a claim with a responsible party, and a district court may approve a settlement of a subdivision 3a class action of all similarly situated private litigants who could bring a subdivision 3a lawsuit. *But that settlement agreement and release are not binding on the State without express written consent of the State AG, approved by the court.*

Id. (emphasis added.)

Lilly's Tentative Settlement violates this well-settled caselaw by purporting to bind State Attorneys General to the company's private settlement. The Court should reject Lilly's unlawful attempt to interfere with State Attorneys General's right to vindicate their quasi-sovereign, *parens patriae*, and law enforcement interests through their own litigation against Lilly. [5]

[5] To the extent that State Attorneys General obtain equitable restitution in the form of monetary payments derived from transactions involving class members who receive financial compensation under the Tentative Settlement, the Court can set off the amounts paid to class members against any recovery by the State Attorneys General through well-established precedent. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002) (noting EEOC could not obtain double recovery based on prior settlement and acknowledging prior private settlement amounts would be offset from government recovery).

B. The Parties' Attempt to Release State Law Enforcement Claims Is Contrary to the Requirements of Article III Standing.

As explained *supra*, "a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). State attorneys general, as the chief law enforcement officers of their state, have broad and unique authority to act in a *parens patriae* capacity to vindicate these quasi-sovereign interests.

Class representatives are required to satisfy the standing requirements of Article III. But Plaintiffs are individual consumers and cannot satisfy these requirements as to claims brought by States in their quasi-sovereign or sovereign capacities, including their *parens patriae* and proprietary capacities.

To demonstrate constitutional standing, a plaintiff must satisfy the Article III minima of injury-in-fact, causation and redressability. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Article III standing requirements must be satisfied in every federal action but are particularly important here because of the effect the proposed settlement would have on wholly separate claims belonging to the states. "The law of Article III standing . . . is built on separation-of-powers principles." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). It "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id*. One purpose of Article III is to limit the reach of judicial power into such areas. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("[A]llowing courts to oversee legislative or executive action would significantly alter the allocation of power . . . away from a democratic form of government.") (quotations and citations omitted).

Here, Plaintiffs lack standing with regard to the State Attorneys General *parens patriae* claims because they cannot satisfy the injury-in-fact requirement of Article III. Under the *parens*

patriae doctrine, "'States litigate to protect 'quasi-sovereign' interests.'" *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 215 (2d Cir. 2013), quoting *Connecticut v. Cahill*, 217 F.3d. 93, 97 (2d Cir. 2000). A State's quasi-sovereign interests are "distinct from the interests of particular private parties" and include a State's "interest in the health and well-being — both physical and economic — of its residents in general." *Id*. (quoting *Snapp*, 458 U.S. at 607). In a *parens patriae* action, a State satisfies the injury-in-fact requirement of Article III by demonstrating an injury to its quasi-sovereign interests. *See Snapp*, 458 U.S. at 601 ("[T]o have . . . standing the State must assert an injury to . . . a 'quasi-sovereign' interest.").

As private parties, Class Plaintiffs have no quasi-sovereign interests. By definition, quasi-sovereign interests are "distinct from the interests of particular private parties[.]" *See Purdue Pharma L.P.*, 704 F.3d at 215. Because they have no quasi-sovereign interests, Class Plaintiffs cannot demonstrate any injury-in-fact to those interests. Class Plaintiffs therefore have no Article III standing with regard to the States' *parens patriae* claims.

Class Plaintiffs cannot remedy their lack of Article III standing to bring *parens patriae* claims by showing injury-in-fact for other claims. "It is well established that a plaintiff must demonstrate standing for each claim [s]he seeks to press. . . . *[W]ith respect to each asserted claim,* [a] plaintiff must always have suffered a distinct and palpable injury to [her]self." *Mahon*, 683 F.3d at 64 (emphasis in original; quotations and citations omitted). Even assuming *arguendo* that there is an arguable basis for *parens patriae* standing for a putative private class (and to be clear, there is not) that fact would not establish Article III standing. Class Plaintiffs themselves must have Article III standing and injury-in-fact. *Id*. (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)) "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured. *See*

Cent. States SE. & SW. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 199 (2d Cir. 2005) (quoting *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring and dissenting): "it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.").

In sum, Article III "Standing is a federal jurisdictional question determining the power of the court to entertain the suit, and a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Boley v. Universal Health Services, Inc.*, 36 F.4th 124, 131 (3d Cir. 2022) (citing, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2280 (2021). Where, as here, class representatives and Lilly attempt to invoke the power of a court through the class action settlement mechanism to release claims that the class representatives have no standing to assert, the proposed settlement must be rejected. *See, e.g., Ass'n for Disabled Americans, Inc. v. 7-Eleven, Inc.*, No. CIV. 3:01-CV-0230-H, 2002 WL 546478, at *5 n.4 (N.D. Tex. Apr. 10, 2002) (concluding that the Court was not authorized "to release claims by way of a settlement that the plaintiffs would have no standing to raise in any court"). As the Supreme Court has recently emphasized, "[i]n an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). To approve the Tentative Settlement in this litigation would permit the Parties to use releases to circumvent standing requirements that Class Plaintiffs fail to meet and that prevent them from pursuing claims in federal court. *Ass'n For Disabled Americans*, 2002 WL 546478 at *5 n.4 (allowing parties to release claims they have no standing to bring "would essentially allow the parties to adjudicate claims through the release clause of a class settlement

that Article III precludes them from adjudicating before the Court."). *Parens patriae* claims belong only to the sovereign, and only the sovereign can assert and release them. Therefore, the Court should deny preliminary approval of the proposed Settlement in its current form.

CONCLUSION

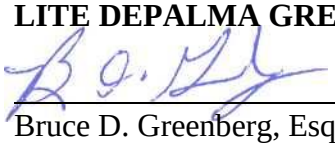
For the foregoing reasons, the Intervenor States request that the Court permit the Intervenor States to intervene, for the limited purposes of objecting to the terms of the Tentative Settlement that interfere with the Intervenor States' pending actions, and to stay consideration of Plaintiffs' Motion for Preliminary Approval of Proposed Settlement until those terms are changed.

Respectfully submitted this the 15th day of August, 2023.

GENOVA BURNS LLC

s/Jennifer Borek
Jennifer Borek, Esq.
494 Broad Street
Newark, New Jersey 07102
Tel: 973-533-0777
Fax: 973-533-1112
jborek@genovaburns.com
Attorneys for State of Arizona
Attorneys for State of Mississippi

LITE DEPALMA GREENBERG, LLC



Bruce D. Greenberg, Esq.
Lite DePalma Greenberg & Afanador, LLC
570 Broad Street, Suite 1201
Newark, NJ 07102
(973) 877-3820
bgreenberg@litedepalma.com
Attorneys for State of Minnesota

STATE OF ARIZONA

KRIS MAYES
Attorney General
State of Arizona

AMANDA SALVIONE
Assistant Attorney General
2005 N. Central Avenue
Phoenix, AZ 85004-1592
(602) 542-8798
Amanda.Salvione@azag.gov

VINCE RABAGO
Section Chief Counsel
2005 North Central Avenue
Phoenix, Arizona 85004-1592
(602) 542-7731
Vince.Rabago@azag.gov

STATE OF MINNESOTA

KEITH ELLISON
Attorney General
State of Minnesota

JAMES W. CANADAY (*pro hac vice*)
Deputy Attorney General

JASON PLEGGENKUHLE (*pro hac vice*)
Assistant Attorney General
445 Minnesota Street, Suite 1200
St. Paul, Minnesota 55101-2134
(651) 757-1147
jason.pleggenkuhle@ag.state.mn.us

ALEX K. BALDWIN (*pro hac vice*)
Assistant Attorney General
445 Minnesota Street, Suite 1200
St. Paul, Minnesota 55101-2134
(651) 757-1020
alex.baldwin@ag.state.mn.us

JUSTIN MOOR (*pro hac vice*)
Assistant Attorney General
445 Minnesota Street, Suite 1400

St. Paul, Minnesota 55101-2134
(651) 757-1060
justin.moor@ag.state.mn.us

NOAH LEWELLEN (*pro hac vice*)
Assistant Attorney General
445 Minnesota Street, Suite 1200
St. Paul, Minnesota 55101-2134
(651) 757-1420
noah.lewellen@ag.state.mn.us

Attorneys for State of Minnesota

STATE OF MISSISSIPPI

LYNN FITCH
Attorney General
State of Mississippi

HART MARTIN (*pro hac vice pending*)
Deputy Director, Consumer Protection Division
550 High Street
P.O. Box 220
Jackson, MS 39205
(601) 359-4223
Hart.martin@ago.ms.gov

Attorney for State of Mississippi