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

MYLAN PHARMACEUTICALS, INC., et al. **Plaintiff,** **v.** **WARNER CHILCOTT PUBLIC LIMITED COMPANY, et al.,** **Defendants.**	:	**Civ. No. 12-3824** **CONSOLIDATED**

ORDER

In this putative class action, direct purchasers of Doryx, the branded version of doxycycline hyclate, allege that Defendant brand name pharmaceutical companies for illegally thwarted generic competition. The Parties now ask me to certify conditionally a Rule 23(b)(3) settlement class and approve preliminarily their proposed Settlement. Because I conclude preliminarily that the proposed settlement classes meet the requirements of Rule 23, the proposed settlement is within the range of reasonableness, and the notice provisions are consistent with the requirements of due process and Rule 23, I will grant their Motion.

BACKGROUND

Plaintiffs are generic drug manufacturers, pharmaceutical wholesalers, and retail pharmacies. Defendants are pharmaceutical companies that produce and sell Doryx, the branded version of an antibiotic prescription drug (doxycycline hyclate) used primarily to treat severe acne. Plaintiffs allege that Defendants conspired to protect their monopoly by implementing a series of product changes that—while providing no real benefit to patients—exempted Doryx

from state laws that would otherwise have allowed pharmacists to substitute generic drugs for prescriptions for Doryx.

Plaintiffs filed the instant action on July 6, 2012. (Doc. No. 1.) Defendants moved to dismiss the Complaint. (Doc. Nos. 82, 83, 101, 102, 135, 138, 172, 174.) In denying Defendants' Motion, I deferred until summary judgment ruling on the dispositive question of whether product hopping is anticompetitive. (Doc. No. 280.) Direct Purchaser Plaintiffs filed a Motion for Class Certification on April 1, 2013. (Doc. No. 151.) Defendants opposed Certification. (Doc. Nos. 228, 247.) While the certification motion was pending, the Parties began settlement discussions and, after lengthy negotiations, reached a proposed settlement on December 24, 2013. (Doc. No. 452.)

Plaintiffs filed the instant unopposed Motion on January 14, 2014, asking me to: (1) certify conditionally a Rule 23(b)(3) class for settlement purposes; (2) approve preliminarily the Settlement; (3) direct notice of the Settlement to the Class; and (4) schedule a Final Approval Hearing. (Doc. No. 452.) I held a hearing on the Parties' Motion on February 6, 2014. Doc. No. 452; see Gates v. Rohm and Haas Co., 248 F.R.D. 434, 439 (E.D. Pa. 2008) ("Judicial review of a proposed class settlement generally requires two hearings: one preliminary approval hearing and one final 'fairness' hearing.").

LEGAL STANDARDS

Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). At the preliminary approval stage, I must determine whether there are any obvious deficiencies and the "settlement falls within the range of reason." Gates v. Rohm and Haas Co., 248 F.R.D. 434, 438 (E.D. Pa. 2008) (quotations omitted); see also Manual for Complex Litigation, § 21.632 (4th ed. 2009).

Where, as here, a class has not already been certified, I must also independently determine that the proposed settlement class satisfies the requirements of Rule 23. See Amchem v. Windsor, 521 U.S. 591, 620 (1997); In re Prudential Ins. Co. of Amer. Sales Practices Litig., 148 F.3d 283, 308 (3d Cir. 1998) ("[A] district court must . . . find [that] a class satisfies the requirements of Rule 23, regardless of whether it certifies the class for trial or settlement."); Manual for Complex Litigation, § 21.632 (4th ed. 2009) (same).

Preliminary approval is not binding; it is granted unless a proposed settlement is obviously deficient. Gates, 248 F.R.D. at 438. I must consider: (1) whether the negotiations were at arm's length, (2) whether there was adequate discovery, (3) whether the litigants are experienced in similar litigation, and (4) the proportion of the class objected. In re General Motors Corp. Pick-Up Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785-86 (3d Cir. 1995).

DISCUSSION

I. Rule 23

Here, the Parties ask me to certify the following settlement class:

> All persons and entities in the United States who purchased Doryx directly from one or more of the Defendants at any time from July 18, 2008 through December 31, 2013 (the "Class Period"). Excluded from the class are Defendants, their parents, employees, subsidiaries and affiliates, and federal government entities (the "Class").

The Class has at least 23 members spread throughout the United States. This is sufficient to satisfy the impracticality of joinder requirement of Rule 23(a)(l). "[W]hen the court finds that the class members are widely dispersed geographically, then their joinder may be deemed impracticable." 7A Charles A. Wright, et al., Federal Practice and Procedure § 1762. Courts have repeatedly deemed joinder impracticable when class members' dispersion was similar to

that presented here. Am. Sales Co. v. SmithKline Beecham Corp., 274 F.R.D. 127, 132-33 (E.D. Pa. 2010) (class members spread across 14 states rendered joinder impracticable); In re Wellbutrin, XL Antitrust Litig., No. 08-2431, 2011 WL 3563385, at *3 (E.D. Pa. Aug. 11, 2011) (class members across 15 states rendered joinder impracticable).

Rule 23(a) requires that there be questions of law or fact common to the class. To satisfy the commonality requirement, the purported class's claims must depend upon a common contention. Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2550 (2011). The common contention must be capable of classwide resolution. Id. at 2551. Here, the following issues relating to claims or defenses present common, class-wide questions under Rule 23(a)(2):

a. Whether the conduct challenged by the Class as anticompetitive in the Consolidated Amended Class Action Complaint filed August 13, 2012 (the "Complaint") (ECF No. 62) constitutes a restraint of trade in violation of Section 1 of the Sherman Act 15 U.S.C. § 1 or constitutes monopolization or attempted monopolization in violation Section 2 of the Sherman Act, 15 U.S.C. § 2;

b. Whether Defendants' challenged conduct substantially affected interstate commerce and caused antitrust injury-in-fact to the Class through overcharges paid as a result of the higher prices direct purchasers paid for Doryx; and

c. The amount of overcharge damages, if any, owed to the Class in the aggregate under Section 4 of the Clayton Act, 15 U.S.C. § 4.

Rule 23 also requires me to evaluate whether the Named Plaintiffs' claims are typical of the class. See Beck v. Maximus, Inc., 457, F.3d 291, 295-96 (3d Cir. 2006) (citations omitted). The named Plaintiffs—Meijer Inc., Meijer Distribution, Inc., Rochester Drug Co-operative, Inc., and American Sales Company, LLC—are hereby appointed as Class representatives. They

allege on behalf of the Class and themselves the same manner of injury from the same course of conduct and assert on their own behalf the same legal theory that they assert for the Class. Any probable factual differences relate to damages rather than to liability. Gates, 248 F.R.D. at 441. Accordingly, I conclude that the Named Plaintiffs' claims meet Rule 23(a)(3)'s typicality requirement.

Finally, the Named Plaintiffs will fairly and adequately protect the interests of the Class; their interests do not conflict with the interests of absent members of the Class. Fed. R. Civ. P. 23(a)(4). All Class Members seek to prove Defendants' alleged anticompetitive conduct, and to recover overcharge damages. Moreover, all Class Members will be given an opportunity to opt out. Furthermore, the Named Plaintiffs are well-qualified to represent the Class, given their experience in prior cases, and the vigor with which they have acted thus far. (Doc. No. 452.)

For settlement purposes, I conclude that common questions of law and fact predominate over questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). "[T]he task for plaintiffs at class certification is to demonstrate that [each] element . . . is capable of proof at trial through evidence that is common to the class rather than individual to its members." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310-312 (3d Cir. 2008). Here, the three elements of Plaintiffs' claims are (1) violation of antitrust laws, (2) antitrust impact, and (3) measurable damages. Because these issues are subject to generalized proof, they apply Classwide and predominate over issues that require individualized proof. Id.

Finally, I must consider whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This requirement requires me to determine whether a class action is fairer and more efficient than alternative methods of adjudication. In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148

F.3d 283, 316 (3d Cir. 1998). Plainly, it would be fairer and more efficient to resolve the claims of the Class in a single action. There are few manageability problems presented by a case such as this, particularly in light of the Settlement approved in this Order.

II. Class Counsel

Pursuant to Fed. R. Civ. P. 23(c)(l)(B) and 23(g), having considered the factors provided in Rule 23(g)(1)(A), I hereby appoint the following counsel as Co-Lead Counsel for the Class, and direct them to ensure that any remaining work in this litigation that is performed by any counsel listed on the Complaint is performed efficiently and without duplication of effort:

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III. Reasonableness of the Proposed Settlement

The final approval of a class action settlement requires a finding that the settlement is fair, adequate, and reasonable. Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 965 (3d Cir. 1983). In evaluating a proposed settlement for preliminary approval, however, I am required to determine only whether "the proposed settlement disclose grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range

of possible approval." Mehling v. New York Life Ins. Co., 246 F.R.D. 467, 472 (E.D. Pa. 2007) (internal quotation marks omitted). The proposed Settlement satisfies this standard.

Upon review of the record and the Settlement Documents, I find that the proposed settlement—which includes a cash payment of $15 million by Defendants into an escrow account for the benefit of the Class in exchange for, *inter alia,* dismissal of the litigation with prejudice and certain releases of claims by Plaintiffs and the Class as set forth in the Settlement Agreement is the product of arm's-length negotiations by highly experienced counsel after years of litigation, falls within the range of possibly approvable settlements, and so is preliminarily approved, subject to further consideration at the Fairness Hearing provided for below.

IV. Approval of the Plan of Notice to the Class

The proposed form of Notice to Class Members of the pendency of this Class Action and the proposed Settlement (annexed as Exhibit "C" to the Settlement Documents) and the proposed method of notice satisfy the requirements of Rule 23(e) and due process, are otherwise fair and reasonable, and so are approved. Class Counsel shall cause the Notice substantially in the form attached to the Settlement Agreement to be disseminated by no later than March 4, 2014, or 15 days following the entry of this Order, by first-class mail to the last known address of each entity that purchased Doryx directly from one or more Defendants during the Class Period.

Potential Class members may request exclusion from the Class or object to the Settlement no later than 30 days from the date on the Notice. Class Counsel or their designee shall monitor and record any and all opt-out requests that are received.

Pursuant to the Class Action Fairness Act of 2005 ("CAFA") Defendants shall serve notices as required under CAFA within ten (10) days from the date Plaintiffs filed the Settlement Documents.

I appoint Rust Consulting, Inc. to serve as Claims Administrator and to assist Class Counsel in disseminating the Notice. Robin Niemiec of Rust has submitted a declaration setting forth Rust's qualifications (Exhibit "F" to the Settlement Documents). All expenses incurred by the Claims Administrator must be reasonable, are subject to Court approval, and shall be payable solely from the Settlement Fund.

I appoint The Huntington National Bank to serve as Escrow Agent to administer the escrow account holding the settlement sum. All expenses incurred by the Escrow Agent must be reasonable, are subject to Court approval, and shall be payable from the settlement fund. A copy of the Escrow Agreement executed by the Huntington National Bank and Counsel for the parties is annexed as Exhibit "G" to the Settlement Documents.

V. <u>Final Fairness Hearing</u>

A hearing on final approval shall be held before me on June 9, 2014, at 10:00 a.m. in Courtoom 6B at the United States District Court for the Eastern District of Pennsylvania, James A. Byrne United States Courthouse, 601 Market Street, Philadelphia PA 19106. At the Fairness Hearing, I will consider, *inter alia:* (a) the fairness, reasonableness and adequacy of the Settlement and whether the Settlement should be finally approved; (b) whether the Court should approve the proposed plan of distribution of the Settlement Fund among Class members; (c) whether the Court should approve awards of attorneys' fees and reimbursement of expenses to Class Counsel; (d) whether and in what amount incentive awards should be awarded to the Named Plaintiffs; and (e) whether entry of a final judgment terminating this litigation should be

entered. If the Fairness Hearing is rescheduled or continued, I will notify all counsel. Class Counsel shall be responsible for communicating any such notice promptly to the Class by posting conspicuous notice on the following website of Class Counsel: www.faruqilaw.com.

All briefs and materials in support of the application for an award of attorneys' fees and reimbursement of expenses and incentive awards for the named Plaintiffs shall be filed with the Court no later than thirty (30) days from the date of this Order, March 19, 2014.

Class Members who wish to (a) object with respect to the proposed Settlement or (b) otherwise wish to appear in person at the Fairness Hearing must first send an Objection and, if intending to appear, a Notice of Intention to Appear, along with a Summary Statement outlining the position(s) to be asserted and the supporting grounds together with copies of any papers or briefs, via first class mail, postage prepaid, to the Clerk of the United States District Court for the Eastern District of Pennsylvania, James A. Byrne United States Courthouse, 601 Market Street, Philadelphia PA 19106, with copies to the following counsel:

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To be valid, any such Objection or Notice of Intention to Appear and Summary statement must be postmarked no later than thirty (30) days from the date of the Notice. Except as provided here, no person or entity shall be entitled to contest the terms of the proposed Settlement. All persons and entities who fail to file an Objection or Notice of Intention to Appear as well as a Summary Statement as provided above shall be deemed to have waived any such objections by appeal, collateral attack or otherwise and will not be heard at the Fairness Hearing.

All briefs and materials in support of the final approval of the settlement and the entry of final judgment proposed by the parties to the Settlement Agreement shall be filed with the Court within fifty one (51) days from the date of the Notice.

All proceedings in the direct purchaser class action are hereby stayed until such time as the Court renders a final decision regarding the approval of the Settlement and, if it approves the Settlement, enters final judgment and dismisses these actions with prejudice.

In the event that the Settlement does not become final, litigation of the direct purchaser Class Action will resume in a reasonable manner to be approved by the Court.

In the event the Settlement Agreement and the Settlement are terminated or rescinded in accordance with the applicable provisions of the Settlement Agreement, the Settlement

Agreement, the Settlement, and all related proceedings shall, except as expressly provided to the contrary in the Settlement Agreement, become null and void, shall have no further force and effect, and Plaintiffs shall retain full rights to assert any and all causes of action against Defendant(s) and any other released party, and Defendant(s) and any other released parties shall retain any and all defenses and counterclaims. These actions shall revert forthwith to their procedural and substantive status before the date of execution of the Settlement Agreement and shall proceed as if the Settlement Agreement and all other related orders and papers had not been executed by Plaintiffs and Defendant(s).

Neither this Order nor the Settlement Agreement nor any other Settlement-related document, nor any proceedings undertaken in accordance with the terms set forth in the Settlement Agreement or in any other Settlement-related document, shall constitute, be construed as or be deemed to be evidence of or an admission or concession by Defendants as to the validity of any claim that has been or could have been asserted against Defendants or as to any liability by Defendants as to any matter set forth in this Order, or to whether any class may certified for purposes of litigation and trial.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

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Paul S. Diamond, J.

February 18, 2014