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**

DIRECT PURCHASER PLAINTIFFS' UNOPPOSED MOTION FOR CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT, PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, APPOINTMENT OF CLASS COUNSEL, APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE CLASS AND SETTING THE FINAL SETTLEMENT SCHEDULE AND DATE FOR A FAIRNESS HEARING

Direct Purchaser Plaintiffs Rochester Drug Co-Operative, Inc., American Sales Company, LLC, and Meijer, Inc. and Meijer Distribution, Inc. ("Plaintiffs"), by their counsel ("Class Counsel"), move for an order pursuant to Fed. R. Civ. P. 23:

1. Certifying for purposes of settlement the direct purchaser class as proposed in the Settlement Agreement annexed as Exhibit "A" to Direct Purchaser Plaintiffs' Memorandum of Law In Support of Unopposed Motion for Class Certification for Purposes of Settlement, Preliminary Approval of Proposed Settlement, Appointment of Class Counsel, Approval of the Form and Manner of Notice to The Class and Setting the Final Settlement Schedule and Date for Fairness Hearing (Memorandum of Law In Support of Preliminary Approval Motion");

2. Appointing previously appointed (ECF No. 58) interim class counsel Faruqi & Faruqi, LLP, Berger & Montague, PC, Hagens Berman Sobol Shapiro LLP, and Grant & Eisenhofer, PA as Class Counsel;

3. Granting preliminary approval of a settlement of this action between Plaintiffs and Warner Chilcott Public Limited Company, Warner Chilcott (US) LLC, Warner Chilcott Company LLC, Warner Chilcott Holdings Company III, Ltd., and Warner Chilcott Laboratories Ireland Limited (collectively, "Warner Chilcott"), and Mayne Pharma Group Limited and Mayne Pharma International Pty, Ltd. (collectively, "Mayne") (collectively "Defendants");

4. Approving the proposed form and manner of notice to the class, plan of distribution, and claim form;

5. Appointing Rust Consulting, Inc. ("Rust") as settlement administrator;

6. Appointing Huntington National Bank ("HNB") as escrow agent; and

7. Authorizing a proposed schedule for completing the approval process.

In support of this motion, Plaintiffs submit, as more fully described in their accompanying Memorandum of Law In Support of Preliminary Approval Motion and exhibits thereto, that the settlement represents a beneficial result to the class in that it provides a cash payment to the class of $15 million in exchange for certain releases to Defendants, and an agreement to dismiss this action with prejudice against Defendants, as set forth in detail in the Settlement Agreement. By this motion, Plaintiffs also:

1. Submit for approval a proposed form of notice including procedures for objecting to the settlement, and plan for the notice to be sent by first class mail to all class members (annexed as Exhibit "C" to Memorandum of Law In Support of Preliminary Approval Motion). This manner of notice is well recognized to be in compliance with Fed. R. Civ. P. 23.

2. Submit for approval a proposed plan of distribution calling for the distribution of the settlement amount, net of attorneys' fees and expenses, incentive awards to the class representatives, and other costs as shall be allowed by the Court, to all class members *pro rata* based on their direct purchases of Doryx during the class period (annexed as Exhibit "B" to Memorandum of Law In Support of Preliminary Approval Motion).

3. Propose that Rust be appointed settlement administrator. Rust is a highly experienced settlement administrator with special proficiency in the administration of claims involving purchases of pharmaceutical products. *See* Declaration of Robin Niemiec In Support of Unopposed Motion for Class Certification for Purposes of Settlement, Preliminary Approval of Proposed Settlement, Appointment of Class Counsel, Approval of the Form and Manner of Notice to the Class and Setting the Final Settlement Schedule and Date for a Fairness Hearing (annexed as Exhibit "F" to Memorandum of Law In Support of Preliminary Approval Motion).

4. Propose that HNB be appointed escrow agent for the settlement funds. HNB holds over $57 billion in assets and includes 700 offices nationwide. HNB National Settlement Team has handled more than 1000 settlements for law firms, claims administrators and regulatory agencies. (Escrow Agreement annexed as Exhibit "G" to Memorandum of Law In Support of Preliminary Approval Motion.)

5. Propose the following schedule for the provision of notice to class members of the settlement, class counsel's application for attorneys' fees, costs, incentive awards for the class representatives, class members' deadline to request exclusion from or object to the settlement, and the holding of the hearing on final approval:

Within 15 days from entry of preliminary approval order	Settlement administrator disseminates notice to the class via first class mail.
Within 30 days from entry of preliminary approval order	Class counsel submits motion for attorneys' fees and expenses and incentive awards for class representatives.
Within 30 days from the date of the notice disseminated to the class	Class members' deadline to request exclusion from the class or object to the settlement.
Within 51 days from the date of the notice disseminated to the class[1]	Class counsel submits motion for final approval of the settlement.
On a date to be set by the Court no less than 100 days following the filing of this motion[2]	Court holds fairness hearing.

WHEREFORE, based on the foregoing, and for the reasons set forth in the accompanying memorandum of law and exhibits, Plaintiffs' motion should be granted.

A proposed form of order granting the relief sought by this motion is annexed as Exhibit "E" to the Memorandum of Law In Support of Preliminary Approval Motion.

[1] Under ¶ 4 of the Settlement Agreement, Plaintiffs are to file their motion for final approval of the settlement within twenty one (21) days after the Court-ordered deadline by which class members may exclude themselves from the class or object to the settlement.

[2] Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), Defendants are required to serve proposed settlement documents (*i.e.*, a copy of the settlement agreement, the complaint, notice of scheduled hearings, and any proposed or final orders or judgments) on appropriate state and federal officials, including the U.S. Attorney General; state attorneys general for each state in which class members reside; and licensing or regulatory bodies, within 10 days of filing a proposed settlement with the Court. An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the date on which the officials are served. *See* 28 U.S.C. §1715.

Dated: January 10, 2014

Respectfully submitted,

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Proposed Class Counsel for the Proposed Direct Purchaser Class

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed and served through the Court's ECF system a true and correct copy of the foregoing.

/s/ Neill W. Clark

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

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

CERTIFICATE OF UNCONTESTED MOTION

Pursuant to Local Rule 7.1(b), the undersigned certifies that the attached Unopposed Motion for Class Certification for Purposes of Settlement, Preliminary Approval of Proposed Settlement, Appointment of Class Counsel, Approval of the Form and Manner of Notice to the Class and Setting the Final Settlement Schedule and Date for a Fairness Hearing is uncontested.

Dated: January 10, 2014

Respectfully submitted,

FARUQI & FARUQI, LLP

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Proposed Class Counsel for the Proposed
Direct Purchaser Class

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

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

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT, PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, APPOINTMENT OF CLASS COUNSEL, APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE CLASS AND SETTING THE FINAL SETTLEMENT SCHEDULE AND DATE FOR A FAIRNESS HEARING

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Direct purchaser plaintiffs Rochester Drug Co-Operative, Inc., American Sales Company, LLC, and Meijer, Inc. and Meijer Distribution, Inc. ("Plaintiffs" or "Direct Purchasers") respectfully submit this memorandum of law in support of their motion for preliminary approval of their settlement with defendants Warner Chilcott Public Limited Company, Warner Chilcott (US) LLC, Warner Chilcott Company LLC, Warner Chilcott Holdings Company III, Ltd., and Warner Chilcott Laboratories Ireland Limited (collectively, "Warner Chilcott"), and Mayne Pharma Group Limited and Mayne Pharma International Pty, Ltd. (collectively, "Mayne") (collectively "Defendants").

I. INTRODUCTION

After extensive litigation and private mediation, Plaintiffs and Defendants reached a settlement agreement that provides, among other things, for the payment of $15 million in cash to Plaintiffs and members of the Direct Purchasers Class (the "Class") in exchange for dismissal of this litigation with prejudice and certain releases from Plaintiffs and the proposed Class to Defendants (the "Settlement"). Defendants have stipulated to certification of the Direct Purchaser Class under Fed. R. Civ. P. 23 for purposes of the Settlement. All the terms of the Settlement are set forth in the Settlement Agreement dated December 24, 2013 ("Settlement Agreement"), annexed as Exhibit "A".

Preliminary approval of the Settlement is appropriate. Plaintiffs agreed to the Settlement after intense, fully developed litigation and detailed negotiations moderated by nationally recognized mediator Jonathan B. Marks (the "Mediator"). All counsel are experienced in class actions generally and pharmaceutical antitrust litigation particularly and, given the work they have put into the case, are well-informed and well-positioned to assess the risks and merits of the case. The Settlement assures that the Class will receive a substantial cash settlement payment now, while avoiding the uncertainties and delays of continued litigation and potential appeals.

Accordingly, Plaintiffs respectfully request that the Court enter the order proposed (annexed as Exhibit "E") which accomplishes the following:

1. Preliminarily approves the Settlement Agreement, annexed as Exhibit A, and the documents filed herewith necessary to effectuate the settlement, including:

   - Exhibit B – proposed plan of distribution
   - Exhibit C – proposed form of notice to the Class, including procedures for opting-out of the Class and objecting to the Settlement
   - Exhibit D – proposed claim form to be mailed to each Class member;

2. Certifies the Direct Purchaser Class as proposed in the Settlement Agreement;

3. Appoints previously appointed (ECF No. 58) interim class counsel Faruqi & Faruqi, LLP, Berger & Montague, PC, Hagens Berman Sobol Shapiro LLP, and Grant & Eisenhofer, PA as Counsel for the Direct Purchaser Class ("Class Counsel");

4. Enters a preliminary approval order substantially in the form annexed as Exhibit "E" hereto;

5. Appoints Rust Consulting Inc. ("Rust") as settlement administrator, *see* Declaration of Robin Niemiec In Support of Unopposed Motion for Class Certification for Purposes of Settlement, Preliminary Approval of Proposed Settlement, Appointment of Class Counsel, Approval of the Form and Manner of Notice to the Class and Setting the Final Settlement Schedule and Date for a Fairness Hearing annexed as Exhibit "F";

6. Appoints The Huntington National Bank ("HNB") as escrow agent for the settlement funds, *see* Escrow Agreement annexed as Exhibit "G"; and

7. Adopts the proposed settlement schedule set forth in the proposed preliminary approval order (annexed as Exhibit "E"), including scheduling a fairness hearing during which the Court will consider:

   - Direct Purchasers' request for final approval of the settlement and entry of a proposed order and final judgment;
   - Class Counsel's application for an award of attorneys' fees and reimbursement of expenses, payment of administrative costs, and incentive awards to named class plaintiffs; and
   - Direct Purchasers' request for dismissal of this action.

II. BACKGROUND

A. DIRECT PURCHASERS' CLAIMS AND PROCEDURAL BACKGROUND

This is an antitrust class action brought on behalf of direct purchasers of the prescription drug Doryx, an antibiotic primarily prescribed to treat moderate to severe acne. Direct Purchasers alleged that Defendants repeatedly reformulated and switched to different versions of Doryx merely to obstruct and delay generic competition to Doryx. Defendants filed motions to dismiss. On June 12, 2013 the Court denied Defendants' motion (ECF No. 280), but characterized Defendants' arguments as "compelling," expressed skepticism that the "'product hopping' alleged here constitutes anticompetitive conduct," and invited Defendants to renew their arguments at summary judgment after discovery was completed.

Plaintiffs also moved for class certification. Plaintiffs' motion remains under advisement by the Court.

The case also involved intensive discovery, including production of over six million pages of electronic and paper documents, nearly 100 non-party subpoenas, 78 depositions of fact witnesses, third parties, and experts, and discovery motion practice.

At the time the Settlement was reached, expert reports had been exchanged and expert depositions were underway. Plaintiffs had submitted 6 merits expert reports and Defendants had submitted 16 merits expert reports.

B. SETTLEMENT NEGOTIATIONS AND THE PROPOSED SETTLEMENT

The lengthy settlement negotiations between Class Counsel and attorneys for Defendants were hard fought, at arm's length, and guided by an experienced and independent mediator. The parties agreed to private mediation with Jonathan B. Marks, a nationally recognized mediator experienced with large antitrust class actions including those involving direct purchasers of

pharmaceutical products. Preparations for the mediation were extensive, and prior to negotiations both sides made presentations concerning the strengths and weaknesses of Plaintiffs' case and Defendants' case. An initial full day of mediation proved unsuccessful. Subsequently, the Mediator recommended a settlement payment by Defendants of $15 million in cash in exchange for releases and dismissal of claims by the Direct Purchasers. After a period for conferring with clients, the parties accepted the Mediator's recommendation and negotiated the Settlement Agreement, which is dated on December 24, 2013.

III. THE DIRECT PURCHASER SETTLEMENT CLASS SATISFIES THE REQUIREMENTS FOR CERTIFICATION OF A SETTLEMENT CLASS

The parties have stipulated, subject to the Court's review and approval, to a Class for settlement purposes defined as follows:

> 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").[1]

Plaintiffs set forth the requirements for certifying a class of direct purchasers of Doryx under Rule 23 for litigation purposes in their motion for class certification.[2] These requirements obtain for settlement purposes, except that "a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prods., Inc v. Windsor*, 521 U.S. 591, 620 (1997); *see also O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 291 (E.D. Pa. 2003) ("[M]anageability issues are irrelevant for certifying a settlement class.").

[1] Settlement Agreement at ¶ 1.

[2] For further detail, Plaintiffs respectfully refer the Court to their motion for class certification. Memorandum of Law In Support of Motion to Certify Class of Direct Purchaser Plaintiffs (ECF No. 153) ("Pls.' Class Cert. Mem.") and Reply In Support of Direct Purchaser Plaintiffs' Motion for Class Certification (ECF No. 384) ("Pls.' Class Cert. Reply").

In their motion for class certification, Plaintiffs cited 18 cases in which direct purchasers alleged overcharges resulting from suppressed generic competition, including four that were certified only for purposes of settlement.[3] While Defendants do not concede those decisions supported certification of a litigation class in this matter, Plaintiffs submit that this case, like those previously certified, involves similar plaintiffs, similar proposed classes, and similar theories of liability, and harm relating to overcharges arising from wrongfully suppressed generic competition. The proposed settlement Class satisfies the requirements of 23(a) (numerosity, commonality, typicality, and adequacy of representation), and 23(b)(3) (predominance).

A. THIS CLASS SATISFIES THE PREREQUISITES OF RULE 23(A)

1. Numerosity and the Impracticability of Joinder[4]

Rule 23(a)(1) permits class certification if the class is so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1). "No magic number exists satisfying the numerosity requirement[.]" *Jackson v. SEPTA*, 260 F.R.D. 168, 185-86 (E.D. Pa. 2009) (citation omitted). *See also id*. at 186 ("the Third Circuit has declined to set forth any hard and fast number required to satisfy this element"); *Lanning v. SEPTA*, 176 F.R.D. 132, 147 (E.D. Pa. 1997) ("[C]ourts have recognized the absurdity of setting numerical cut-offs below which a class will not be certified"). Thus, there is "[n]o minimum" on class size." *Stewart v. Abraham*, 275 F.3d 220, 226 (3d Cir. 2001); *see In re K-Dur Antitrust Litig*., No. 01-1652, 2008 U.S. Dist. LEXIS, 118396, (D. N.J. Apr. 14, 2008), *aff'd*, 686 F.3d 197 (3d Cir. 2011) ("*K-Dur*") (discussing certified classes with as few as 10 members); *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 294, 305-06 & n.14 (D.D.C. 2007) ("*Ovcon*") (30 members sufficient); *see also Lanning*, 176 F.R.D. at 147 (22 members sufficient); *Manning v. Princeton*

[3] *See* Pls.' Class Cert. Mem. at 1-2 nn.1-5.

[4] *See* Pls.' Class Cert. Mem. at 18-22 and Pls.' Class Cert. Reply at 74-78.

Consumer Disc. Co., 390 F. Supp. 320, 324 (E. D. Pa.1975) (14 members sufficient); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co*., 43 F.R.D. 452, 463 (E.D. Pa. 1968) (25 members sufficient).

The class is not only sufficiently numerous but also geographically dispersed, thereby making joinder of the Class impracticable. *See McMahon Books, Inc. v. Willow Grove Assoc.*, 108 F.R.D. 32, 35 (E.D. Pa. 1985) ("[s]hould a substantial proportion of the potential class members seek joinder upon motion, however, the procedure would be inefficient, costly, time-consuming, and probably confusing . . . therefore, [] joinder of all members is impracticable."); *Lanning*, 176 F.R.D. at 147 ("The district court can make a common sense determination whether it would be difficult or inconvenient to join all class members as named parties under the particular circumstances of a case."). Geographic dispersion weighs in favor of impracticability because coordination among geographically remote parties and lawyers imposes needless burden. *See Ovcon*, 246 F.R.D. at 306-07; *Vinson v. Seven Seventeen HB Philadelphia Corp*., No. 00-6334, 2001 U.S. Dist. LEXIS 25295, *56-57 (E.D. Pa. Oct. 31, 2001).

As Dr. Letizinger explained in his April 1, 2013 Declaration, there are 23 Class members in this case dispersed throughout 14 different states across the country, from east coast to west coast, and including Puerto Rico and the Deep South. Declaration of Jeffrey Letizinger, Ph.D. dated April 1, 2013 ("Leitzinger Decl.") at ¶ 50 n.96 & Ex. 3 (ECF No. 154). This nationwide dispersion clearly makes joinder difficult, inconvenient, and costly. *See, e.g., Teva Pharms. USA, Inc. v. Abbott Labs.*, 252 F.R.D. 213, 225 n.26 (D. Del. 2008) ("*Tricor*") ("[w]here, as here, potential class members are from disparate geographical areas, this also weighs towards class certification."); *Am. Sales Co., Inc. v. SmithKline Beecham Corp.*, No. 08-CV-03149, 2010 U.S. Dist. LEXIS 120177, *13 (E.D. Pa. Nov. 10, 2010) ("*Flonase*") (joinder of 33 direct

purchasers dispersed across 14 states is impracticable); *Calhoun v. Horn*, No. 96-350, 1997 U.S. Dist. LEXIS 15719, *6 (E.D. Pa. Oct. 8, 1997) ("[a] court will certify a class when the members are spread over a large geographical area.").

Though Class members are geographically dispersed they are easily ascertainable from Warner Chilcott's electronic transactional sales data. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 260 (E.D. Pa. 2012) ("*Processed Egg Prods*.") ("[T]he Court determines that the Class Members are ascertainable from objective criteria, such as various electronic data files that contained names and addresses of customers."). Here, Warner Chilcott's electronic transactional sales data identifies the direct purchasers of Doryx by name and address, thereby enabling easy identification and individual first class mail notification to the Class.

Given the number of Class members, their straightforward ascertainability, their geographic dispersion, and the complexity of this action, judicial economy is served by certifying the Class. *See, e.g.*, *Ovcon*, 246 F.R.D. at 306 ("Moreover, the Court notes that judicial economy may be considered by courts in evaluating numerosity, and that the interest of judicial economy is clearly served by resolving the complex common issues raised by the instant action in a single action, rather than thirty individual actions.") (internal citation omitted); *In re Cardizem Antirust Litig.*, 200 F.R.D. 326, 351 (E.D. Mich. 2001) ("*Cardizem*") ("As to the third-party payer class members and Defendants' assertion that their large size renders their claims inappropriate for class treatment, the Sixth Circuit has observed that '[t]he procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather to achieve the economies of time, effort, and expense.'") (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196 (6th Cir. 1988)). Certification for

purposes of settlement avoids the very manageability concerns class actions are intended to address.

2. Commonality[5]

Common questions of law and fact are routinely found in antitrust cases alleging anticompetitive conduct because class members necessarily use the same evidence to prove their monopolization allegations. "In an antitrust action on behalf of purchasers who have bought defendants' products at prices . . . above competitive levels by unlawful conduct, the courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy the Rule 23(a)(2) prerequisite." 1 Wm. B. Rubinstein, NEWBERG ON CLASS ACTIONS § 3:10 (4th ed. 2011). *See, e.g.*, *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 205-06 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145 (3d Cir. 2002). Commonality is met so long as plaintiffs' claims depend upon a "common contention . . . [that] must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

In Direct Purchasers' Consolidated Amended Class Action Complaint (ECF No. 62) ("Complaint"), Plaintiffs listed 11 common issues[6] in this case including:

- whether the Defendants conspired to suppress generic competition for Doryx;
- whether the Defendants' challenged conduct suppressed generic competition to Doryx;
- whether, and to what extent, the Defendants' conduct caused antitrust injury to the business or property of Plaintiffs and the members of the Class in the nature of overcharges; and
- the quantum of overcharges paid by the Class in the aggregate.

[5]*See* Pls.' Class Cert. Mem. at 22-23.

[6]Complaint at ¶ 28.

These issues are more than sufficient to satisfy the commonality requirement. *See In re Wellbutrin SR Antitrust Litig.*, No. 04-5525, 2008 U.S. Dist. LEXIS 36719, *10 (E.D. Pa. May 2, 2008) ("*Wellbutrin SR*") (commonality satisfied by class-wide questions including " [1] whether this conduct delayed entry of a generic version of Wellbutrin SR . . . and [2] whether this conduct resulted in artificially high prices for the drug"); *In re Wellbutrin XL Antitrust Litig.*, No. 08-2431, 2011 U.S. Dist. LEXIS 90075, **13-14 (E.D. Pa. Aug. 11, 2011) ("*Wellbutrin XL*") (commonality satisfied because "[e]ach class member's claims depend on whether or not the defendants unlawfully engaged in anticompetitive behavior to limit the entry of generic competitors in violation of federal antitrust law. Numerous courts have held that similar allegations satisfy the commonality requirement of Rule 23.").[7]

3. Typicality[8]

Rule 23(a)(3) requires that " the claims . . . of the representative parties [be] typical of the claims . . . of the class." "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Processed Egg Prods.*, 284 F.R.D. at 290 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001)). "The Third Circuit Court of Appeals has recognized that the jurisprudence assures that a claim framed as a violative practice can support a class action embracing a variety of injuries so long as those injuries can all be linked to the practice." *Id.* (internal quotations and citations omitted). The typicality requirement is satisfied even if some class members have larger damage claims than others or are proceeding under assignment because "typicality refers to the nature of the claims of the

[7]*See also K-Dur*, 2008 U.S. Dist. LEXIS 118396, at **23-24; *Tricor*, 252 FRD at 225; *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 368-69 (D.D.C. 2007) ("*Nifedipine*"); *Ovcon*, 246 F.R.D. at 300; *In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 342 (D.Mass. 2003) ("*Relafen*").

[8]Pls.' Class Cert. Mem. at 23-24 and Pls.' Class Cert. Reply at 78-81.

representative, not the individual characteristics of the plaintiff." *Ovcon*, 246 F.R.D. at 301-02 (rejecting Defendants', including Warner Chilcott's, arguments that plaintiffs' claims were atypical because the class representatives' claims were smaller than the three largest wholesalers and/or were proceeding by assignment).

The Plaintiffs' claims here rely on legal theories identical to those of the Class. The Plaintiffs' and the Class's claims arise out of the same "core pattern" of alleged anticompetitive conduct that has similarly injured the Plaintiffs and members of the Class by suppressing generic competition and causing Plaintiffs and each Class member to incur overcharges on their delayed release doxycycline hyclate purchases. The typicality element is therefore satisfied.

4. Adequacy of Representation[9]

The requirements of both prongs of Rule 23(a)(4) are also satisfied here: (1) the class representatives' interests do not conflict with the class members' interests; and (2) the class representatives and their attorneys are able to prosecute the action vigorously. *See New Directions Treatment Servs. v.City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007). "Essentially, the inquiry into the adequacy of the representative parties examines whether the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." *Processed Egg Prods.*, 284 F.R.D at 261 (internal quotations and citations omitted).

(a) Absence of Conflict

There are no conflicts between Plaintiffs and other members of the Class. All Class members are seeking damages in the form of overcharges and thus all have the same financial incentive to prove they were overcharged and recover damages on the basis of that overcharge.

[9] Pls.' Class Cert. Mem. at 25-27; Pls.' Class Cert. Reply at 82-88.

K-Dur, 686 F.3d at 223 ("[B]ecause *Hanover Shoe* sets the amount of overcharge as plaintiffs' damages, all of the class members have the same financial incentive for purposes of the litigation –i.e., proving that they were overcharged and recovering damages based on that overcharge."); *Wellbutrin SR*, 2008 U.S. Dist. LEXIS 36719, at *27 ("Because all class members have the right to pursue overcharge damages, they have the same incentive to do so, and there is no conflict among class members allegedly harmed by the same antitrust violation."). That some class members are proceeding by assignment, have claims that are larger than those of the class representatives, or may have been "bypassed" by their customers once generic entry occurs does not establish a conflict under Rule 23(a)(4). *See id.* (citing cases finding no conflict between Plaintiffs, small direct purchaser wholesaler and retailers proceeding by assignment, and class of direct purchasers of pharmaceuticals and finding that "[t]hese cases recognize that because all class members have the right to pursue overcharge damages, they have the same incentive to do so, and there is no conflict among class members allegedly harmed by the same antitrust violation."); *see also K-Dur*, 2008 U.S. Dist. LEXIS 118396, at *38 ("Because all members of the putative class in this case will be entitled to the same measure of damages if successful — the amount of the overcharge — there can be no conflict within the class on the issue of damages.") (internal quotations and citation omitted); *Ovcon*, 246 F.R.D. at 304 ("Plaintiffs seek damages in the amount of alleged overcharges resulting from [defendants' violation] and because all direct purchasers are entitled to recover such overcharges, Plaintiffs and the absent class members have exactly the same interests in maximizing recovery of overcharge damages on each qualifying direct purchase or assigned claim.") (internal quotations omitted); *Wellbutrin XL*, 2011 U.S. Dist. LEXIS 90075, at *17 ("The named plaintiff has the same incentive as any other class member to recover damages from any illegal overcharges for conduct that has already taken place.").

(b) Qualifications of Counsel[10]

As discussed further in the sections regarding appointing class counsel and preliminarily approving the Settlement, Class Counsel here are highly qualified to represent the Class.[11] Class Counsel are experienced in antitrust, class action, complex litigation involving pharmaceutical products. The Court has previously entered an order pursuant to Rule 23(g) appointing Hagens Berman Sobol Shapiro LLP as interim co-lead and liaison counsel, and Berger & Montague, P.C., Faruqi & Faruqi, LLP, and Grant & Eisenhofer, P.A. as interim co-lead counsel.[12] From first chairing most of the depositions to overseeing the dermatology, esophageal, pharmaceutics, regulatory, and pharmaceutical manufacturing experts shared with other plaintiff groups (as well as their individually retained economic expert), Class Counsel have capably represented the Class and will continue to do so.

B. PLAINTIFFS SATISFY ALL REQUIREMENTS OF RULE 23(B)(3)[13]

Plaintiffs satisfy the requirements of Rule 23(b)(3), which provides that a class may be certified if the requirements of Rule 23(a) are met and the "court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." For the reasons set forth below, common issues predominate in this case, and a class action is the superior means of adjudicating this case.

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[10] Pls.' Class Cert. Mem.at 26-27.

[11] *See infra* at 16-17 & 20-22.

[12] *See* Order, August 7, 2012 (ECF No. 58), at 1-2.

[13] Pls.' Class Cert. Mem. at 27-39.

1. Common Questions of Law and Fact Predominate Over Individual Questions

"Third Circuit precedent 'provides that the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct.'" *In re Imprelis Herbicide Mktg.*, MDL No. 2284, 2013 U.S. Dist. LEXIS 149323, **17-18 (E.D. Pa. Oct. 17, 2013) (quoting *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 240, 266 (3d Cir. 2009)). Each element of plaintiffs' claim need not be susceptible to common proof in order satisfy the predominance requirement of Rule 23(b)(3). *See Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, No. 11-1085, 133 S. Ct. 1184, 1197 (2013); *K-Dur*, 686 F.3d at 222 ("for certification plaintiff need not prove antitrust injury actually occurred."). Moreover, predominance is a test readily met in antitrust cases. *See Amchem*, 521 U.S. at 625; *In re Buspirone Patent & Antitrust Litig.*, 210 F.R.D. 43, 58 (S.D.N.Y. 2002) ("*Buspirone*") (predominance is a test readily met in cases alleging violations of antitrust laws). Common evidence exists to prove each element of Direct Purchasers' claims because antitrust violation and injury and damages can all be proven with classwide evidence.[14]

Here, Plaintiffs allege that Defendants engaged in a common course of conduct of implementing an overarching anticompetitive scheme to suppress generic price competition by making a series of medically insignificant product changes to their Doryx product and impairing the market for generic versions of Doryx thereby significantly inhibiting the efficient and cost effective means of distributing low priced generic pharmaceuticals to the delayed release doxycycline hyclate market. Plaintiffs here are seeking their overcharges—the difference between the price that was actually charged and the price that would have been charged had the anticompetitive conduct not occurred. This is "the standard method of measuring damages in

[14] Pls.' Class Cert. Mem. at 29-37.

price enhancement cases[.]" *Howard Hess Dental Labs., Inc. v. Dentsply*, 424 F.3d 363, 374-75 (3d Cir. 2005). As a result of the alleged impairment of generic competition, each Plaintiff and member of the Class suffered overcharges and that "is the only theory of antitrust impact" that Plaintiffs advance in this case, so there is a perfect fit between Plaintiffs' allegations of anticompetitive conduct and their theory of antitrust impact. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433-1434 (2013). The Declaration of Jeffrey Leitzinger, which Plaintiffs proffered in support of their class certification papers, demonstrates that antitrust impact can be demonstrated on a class wide basis.[15]

The common evidence that Plaintiffs propose to use to prove antitrust impact, namely: (1) economic literature relating to the price relationship between branded and generic drugs; (2) Defendants' and generic manufacturers' internal forecasting documents; and (3) empirical data demonstrating that generics did enter the market at lower prices and were substituted for the brand, is the same type of evidence courts routinely accept as common evidence to prove antitrust impact.[16] Furthermore, the methodology Plaintiffs propose to utilize to calculate antitrust injury and damages[17] does not vary between each Class member, so this is not the case where "questions of individual damages calculations will inevitability overwhelm questions common to the class." *Comcast*, 133 S. Ct. at 1433. Because antitrust impact can be proven with evidence that is predominantly common to the Class, rather than individual to its members,

[15] Leitzinger Decl. at ¶¶ 27-52. *See Linerboard*, 305 F.3d 145, 155 (3d Cir. 2002) ("[W]e conclude that the district court did not err in determining that plaintiffs' showed that they could establish injury on a class-wide basis. Plaintiffs produced affidavits of expert witnesses, Dr. Beyer and Dr. Cantor, who effectively utilized supporting data, including charts and exhibits, to authenticate their professional opinions that all class members would incur such damages. We decide that this was not the case where plaintiffs relied solely on presumed impact and damages.").

[16] *See* Pls.' Class Cert. Mem. at 35 n.102.

[17] *See* Leitzinger Decl. at ¶57-63, 65.

and because a common methodology is available to establish each Class member's damages, the predominance standard is met here.

Here, identical evidence would be utilized to prove each of the elements of Plaintiffs' and absent Class members' antitrust claims, including proof of Defendants' alleged antitrust violations, proof of antitrust impact, and proof of damages. *See* Pls.' Class Cert. Mem. at 27-37. Courts that have dealt with monopolization claims alleging the suppression of generic competition have uniformly found that common issues predominate over individual ones. *See, e.g.*, *Wellbutrin SR*, 2008 U.S. Dist. LEXIS 36719, at *38 n.21 ("This finding of predominance is consistent with the findings of other courts in which plaintiffs have alleged antitrust injuries resulting from the delayed entry of generic drug competitors."); *Nifedipine*, 246 F.R.D. at 369-71; *Ovcon*, 246 F.R.D. at 307-12; *Relafen*, 218 F.R.D. at 343-46; *Buspirone*, 210 F.R.D. at 58; *Cardizem CD Antitrust Litig*, 200 F.R.D. 297, 307-25 (E.D.Mich. 2001).

2. A Class Action Is Superior to Other Methods of Adjudication[18]

Federal Rule 23(b)(3) provides that the court may assess the superiority of the class action mechanism by weighing class members interest in pursuing separate actions, the extent of any independent litigation already commenced by class members, the desirability of concentrating the litigation in this forum, and the difficulties likely to be encountered in the management of the class action." Fed. R. Civ. 23(b)(3). *See also Amchem*,521 U.S. at 615 (observing that the requirement of superiority ensures that resolution by class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bring about other undesirable results."). Here class certification is plainly more efficient than separate litigation of numerous separate claims. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,*

[18] Pls.' Class Cert. Mem. at 37-39.

148 F.3d 283, 315-16 (3d Cir. 1998); *Wellbutrin SR*, 2008 U.S. Dist. LEXIS 36719, at *38 ("In the instant case, denying certification would require each direct purchaser to file suit individually at the expense of judicial economy and litigation costs for each party."); *see also Processed Egg Prods.*, 284 F.R.D. at 294 ("[A] class action device enables individual direct purchasers to pursue their claims in an economically feasible manner, with greater efficacy in achieving enforcement and deterrence goals, and with greater bargaining power for settlement purposes."). Furthermore, the fact that this case does not implicate management issues also supports a finding of superiority. Class certification also limits the likelihood of inconsistent rulings. *See Relafen*, 218 F.R.D. at 347 ("Resolution by class action would instead promote uniform treatment of class members-similarly situated direct purchasers who allege similar injuries resulting from the same conduct."). Certification of the Class is plainly the superior method by which Class members can obtain compensation for their injuries.

3. Proposed Class Counsel Meet the Requirements for Appointment Under Rule 23(g)[19]

Under Rule 23(g), a court that certifies a class must appoint class counsel. Class counsel is charged with fairly and adequately representing the interests of the class. *See* Fed. R. Civ. P. 23(g)(1)(B). In appointing class counsel, the Court must consider: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions, other complex litigation, and similar claims; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. *See* Fed. R. Civ. P. 23(g)(1)(A)(i-iv); *see also In re Imprelis Herbicide Mktg.*, 2013 U.S. Dist. LEXIS 149323, at **15-16.

[19] The adequacy of class counsel is also discussed *supra* at 12 and *infr*a at 20-22 and in Pls.' Class Cert. Mem. at 26-27.

Harnessing the experience garnered by litigating antitrust cases resulting from unlawful generic suppression for more than 15 years, Class Counsel have vigorously pursued this litigation on behalf of the proposed Class since this case was first filed. Class Counsel have filed and opposed motions, spearheaded discovery of both parties and non-parties, taken dozens of depositions, overseen the preparation of expert reports shared with other plaintiff groups prepared by experts in pharmaceutics, dermatology, the esophagus, pharmaceutical regulation and pharmaceutical manufacturing, conducted settlement negotiations, and otherwise managed and prosecuted all aspects of this litigation. In addition, Class Counsel have already expended more than a million dollars in litigating this case and will commit further and necessary resources to assure that plaintiffs and members of the Class are well represented in this litigation.

IV. THE PROPOSED SETTLEMENT MEETS THE STANDARD FOR PRELIMINARY APPROVAL

Preliminary approval of a proposed class settlement is warranted if the court determines it has no grounds to doubt the settlement's fairness, the settlement has no obvious deficiencies, and the settlement appears to fall within the range of possible approval. *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007); *Thomas v. NCO Fin. Sys., Inc.*, No. 00-5118, 2002 WL 1773035, *5 (E.D. Pa. July 31, 2002); *Greer v. Shapiro & Kreisman*, No. 004647, 2001 WL 1632135, *3 (E.D. Pa. Dec. 18, 2001). "The preliminary approval decision is not a commitment to approve the final settlement; rather, it is a determination that there are no obvious deficiencies and the settlement falls within the range of reason." *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438 (E.D. Pa. 2008) (internal quotations and citation omitted). Accordingly, preliminary approval does not require a court to reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute. *See Thomas*, 2002 WL 1773035, at *5 (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)). Instead, "[t]his analysis

often focuses on whether the settlement is the product of arm's-length negotiations." *Curiale v. Lenox Grp. Inc*., No. 07-1432, 2008 WL 4899474, *4 (E.D. Pa. Nov. 14, 2008). *See also In re Auto Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, *2 (E.D. Pa. May 10, 2004) (approving settlement reached "after extensive arms-length negotiation between very experienced and competent counsel.").

In a court's evaluation of a proposed settlement, the "professional judgment of counsel involved in the litigation is entitled to great weight." *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985). *See also Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."). Other factors to consider are whether there was sufficient discovery and information concerning the reaction of the class. *See Curiale*, 2008 WL 4899474, at *10 (citing *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003)).

A hearing is neither necessary nor required under Fed. R. Civ. P. 23(e) at the preliminary approval stage. As explained in the MANUAL FOR COMPLEX LITIGATION, § 21.632 at 382 (4th ed. 2005) (the "Manual"), "[i]n some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties." *See also Curiale*, 2008 WL 4899474 (court granting preliminary approval without hearing).

A. THE PROPOSED SETTLEMENT IS THE PRODUCT OF SERIOUS, INFORMED, ARM'S-LENGTH NEGOTIATIONS

Whether a settlement arises from arm's-length negotiations is a key factor in deciding whether to grant preliminary approval. If a court finds that a settlement is the result of good-faith, serious, arm's-length negotiations the settlement is entitled to a presumption of fairness because such negotiations guard against any "obvious deficiencies" in a settlement. *Hughes v.*

InMotion Entm't., No. 07-CV-1299, 2008 WL 3889725, *3 (W.D. Pa. Aug. 18, 2008). *See also Mehling*, 246 F.R.D. at 472 ("A common inquiry is whether the proposed settlement is the result of 'arm's-length negotiations.'"); *Curiale*, 2008 WL 4899474, at *4 (the preliminary approval analysis "often focuses on whether the settlement is the product of arm's-length negotiations."); *Gates*, 248 F.R.D. at 444 (granting preliminary approval where there was "nothing to indicate that the proposed settlement . . . [was] not the result of good faith, arm's-length negotiations between adversaries.").

As Direct Purchasers and Defendants will readily attest, settlement discussions in this case lasted for weeks and were based upon a voluminous record. The parties were unable to reach a settlement during the face-to-face mediation and continued to negotiate over the details of the Settlement Agreement for weeks after accepting the Mediator's settlement proposal. The negotiations, conducted with the assistance of an experienced mediator, were detailed, time-consuming, and hard-fought.

B. THE ADVANCED STAGE OF THIS CASE SUPPORTS PRELIMINARY APPROVAL

This case is well advanced. Fact discovery is with few exceptions concluded, motions to dismiss have been fully briefed and denied by the Court, more than seventy (70) depositions have been taken, class certification has been fully briefed, opening and responsive merits expert reports have been exchanged, and summary judgment motions are due in only a few months. Expert reports have been exchanged on every facet of this case and it has been exhaustively discovered from the economic issues of market power, antitrust injury and damages, to the medical issues involving esophageal erosion and dosing flexibility, to pharmaceutics and pharmacokinetic issues relating to product stability and pill coating, to pharmaceutical manufacturing issues involving product validation and ANDA approvals, to pharmaceutical marketing efforts by brand and generic companies. As to be expected in a case with a myriad of

complex issues, a massive amount of discovery involving a variety of issues was produced and reviewed in this case. Defendants produced millions of paper documents and thousands of files containing Electronically Stored Information. Third party discovery was almost as vast and varied as party discovery: Plaintiffs issued thirty two (32) subpoenas for documents and defendants issued sixty two (62) subpoenas. Among the targets of these subpoenas were brand and generic pharmaceutical manufacturers of doxycycline products, health insurance payors, marketing firms that assisted Warner Chilcott with Doryx, Pharmacy Benefit Managers, research institutes that performed studies related to Warner Chilcott's New Drug Applications and vendors that assisted competitor plaintiff Mylan with the marketing and manufacturing of its delayed release doxycycline hyclate product. The Parties have taken a "leave no stone unturned" approach to litigating this case. Class Counsel is now well-positioned to make a fully-informed assessment of the value of the case and the probability of a successful outcome for the Plaintiffs and the Class.

C. THE PROPONENTS OF THE SETTLEMENT ARE HIGHLY EXPERIENCED IN ANTITRUST LITIGATION ALLEGING DELAYED GENERIC DRUG COMPETITION

Class Counsel believe this is a fair settlement and in the best interests of the Class. In approving class action settlements, courts have repeatedly and explicitly deferred to the judgment of experienced counsel who have engaged in arm's-length negotiations. *See Collier v. Montgomery Cnty. Housing Auth.*, 192 F.R.D. 176, 186 (E.D. Pa. 2000) ("the court will give due regard to the advice of the experienced counsel in this case who recommend the settlement who have negotiated this settlement at arm's-length and in good faith"); *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) (stating that significant weight should be attributed "to the belief of experienced counsel that settlement is in the best interest of the class"). The

presumption in favor of such settlements reflects the understanding that vigorous, skilled negotiation protects against collusion and advances the fairness interests of Rule 23(e).

Class Counsel have substantial experience in delayed generic entry cases specifically and this experience should be given weight in making a determination of preliminary approval. Class Counsel are well versed in the both the prosecution and settlement of this type of antitrust litigation having been involved in many such cases for over fifteen years.[20] Significantly, the proposed Class is composed primarily of many of the same wholesalers and retail entities that composed the classes in those prior cases, and no member of the proposed Class has objected to the adequacy of class counsel in obtaining those prior settlements. Class Counsel have demonstrated throughout this litigation that they understand this particular area of antitrust law and have prosecuted this case with vigor and commitment. As described above, Class Counsel took the lead on most of the depositions of Defendants, and also oversaw the preparation not only of their own economic expert but also the preparation of the dermatology, esophageal, pharmaceutics, regulatory, pharmaceutical manufacturing and pharmaceutical economics expert

[20] Some or all of the attorneys in this case have been in the following pharmaceutical antitrust direct purchaser class actions that have previously settled: *In re Cardizem CD Antitrust Litig*., No. 99-md-1278, (E.D. Mich. Edmunds, J.) (final settlement approval on November 25, 2002); *In re Buspirone Antitrust Litig*., MDL Docket No. 1413 (S.D.N.Y. Koeltl, J.) (final settlement approval on April 7, 2003); *In re Relafen Antitrust Litig*., No. 01-12239, (D. Mass. Young, J.) (final settlement approval on April 9, 2004); *North Shore Hematology-Oncology Assoc., P.C. v. Bristol Myers Squibb Co*., No. 1:04-cv-248, (D.D.C. Sullivan, J.) (final settlement approval on Nov. 30, 2004); *In re Terazosin Hydrochloride Antitrust Litig*., No. 99-mdl-1317, (S.D. Fla. Seitz, J.) (final settlement approval on April 19, 2005); *In re Remeron Antitrust Litig*, No. 03-CV-0085, (D.N.J. Hochberg, J.) (final settlement approval on Nov. 9, 2005); *In re Children's Ibuprofen Oral Suspension Antitrust Litig*., No. 1:04 CV-01620, (D.D.C. Huvelle, J.) (final settlement approval on April 24, 2006); *Meijer, Inc. et al. v. Warner Chilcott, & Barr Pharma. Inc. et al*., No.05-2195, (D.D.C. Kollar-Kotelly J.) (final settlement approval on April 20, 2009); *In re Tricor Antitrust Litig*., No. 05-340, (D. Del. Robinson, J.) (final settlement approval on April 24, 2009); *In re Nifedipine Antitrust Litig*., MDL No. 1515, (D.D.C. Leon, J.) (final settlement approval on Jan. 31, 2011); *In re OxyContin Antitrust Litig.*, No. 04 md 1603, (S.D.N.Y. Stein, J.) (final settlement approval on Jan. 25, 2011); *In re Wellbutrin SR Antitrust Litig*., No.04-5525 (E.D.Pa.) (Stengl, J.) (final settlement approval on Nov. 21, 2011); *In re D.D.A.V.P. Antitrust Litig*., No. 05 Civ. 2237, (S.D.N.Y. Seibel, J.) (final settlement approval on Nov. 28, 2011*); In re Metoprolol Succinate Antitrust Litig*., No. 06-52-MPT, (D. Del. Thynge, J.) (final settlement approval on Feb. 21, 2012); *Rochester Drug Co-Operative et al. v. Braintree Labs. Inc*., No-07-142, (D. Del. Robinson, J.) (final settlement approval on May 31, 2012); *In re Flonase Antitrust Litig*,. No. 08-cv-3149, (E.D. Pa. Brody, J.) (final settlement approval on June 14, 2013) .

reports that were shared with the other Plaintiff groups (i.e., Mylan, Retailers and Indirect Purchaser Plaintiffs).

D. THE PROPOSED SETTLEMENT IS WITHIN THE RANGE OF POSSIBLE APPROVAL

The settlement falls within the range of settlements that could possibly be worthy of final approval as fair, reasonable, and adequate. *See, e.g., Samuel v. Equicredit Corp.*, No. 00-6196, 2002 WL 970396, *1 n.1 (E.D. Pa. May 6, 2002). Whether a settlement is granted *final* approval is ultimately determined at the final fairness stage using the factors set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), which enumerates nine factors to be considered by courts assessing the fairness of a settlement under Rule 23(e).[21] At the *preliminary* approval stage, by contrast, courts simply determine if the settlement as proposed could possibly be approved using the *Girsh* factors. *See Curiale*, 2008 WL 4899474, at *8 n.4 ("[a]t the preliminary approval stage, however, we need not address all of these factors, as 'the standard for preliminary approval is far less demanding.'") (quoting *Gates*, 248 F.R.D. at 444 n.7).

The proposed Settlement is in the best interest of the Class. In its rulings on Defendants' Motion to Dismiss, multiple discovery disputes, and other matters, the Court has provided the parties with guidance useful to their evaluation of the likelihood of success in this litigation, which is informative of the range of potential recoveries. *See, e.g., In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 334 (E.D.N.Y. 2010) (where "critical evidentiary rulings on the parties' motions in limine in the weeks before trial in this action served to clarify the parties' relative likelihood of success," settlement discussions were well-informed and

[21] These factors are: (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 the trial; (7) the ability of the 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. *See Kaplan v. Chertoff*, No. 06-5304, 2008 WL 200108, *2 n.1 (E.D. Pa. Jan. 24, 2008).

approval was granted). The Settlement, if finally approved, will afford Class members cash compensation of $15 million, and free them from the uncertainties and delay of continued litigation. Compared to the significant and enduring risk of litigation to final resolution, the certain immediate receipt of the proceeds of the Settlement establishes an initial presumption that the settlement is "fair, adequate, and reasonable." *Samuel*, 2002 WL 970396, at *1 n.1.

E. THE PLAN OF DISTRIBUTION IS FAIR, REASONABLE, AND ADEQUATE

Approval of a plan of distribution of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate. *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 174 (E.D. Pa. 2000). Generally, an allocation plan is reasonable if it reimburses class members based on the type and extent of their injuries. *Id.*

The proposed plan of distribution meets this standard. As set forth in the plan of distribution, annexed as Exhibit "B", direct purchasers propose to distribute the proceeds of the proposed Settlement in this case, net of Court-approved attorneys' fees, plaintiffs' contribution awards, and costs of litigation ("Net Settlement Fund"), by paying the Net Settlement Fund to members of the Class who submit claims *pro rata* based on each Class member's aggregate share of the total Class' purchases of Doryx during the class period. The proposed plan of distribution is similar to plans that have previously been approved by courts in analogous cases and implemented with a high degree of success and efficiency.[22] The plan reimburses class members based on the type and extent of their injuries, and should be preliminarily approved.

[22] *See, e.g., Meijer, Inc. et al v. Biovail Corp. et al.* No. 2:08-cv-02431 (E.D.Pa. Nov. 7, 2012) (ECF No. 485) (granting final approval to Plan of Distribution); *In re Flonase Antitrust Litig*., No. 08-cv-3149 (E.D. Pa. June 14, 2013) (ECF. No. 496) (same) .

F. THE PROPOSED FORM AND MANNER OF NOTICE ARE APPROPRIATE

1. Form of Notice.

Under Rule 23(e), class members are entitled to reasonable notice of a proposed settlement before it is finally approved by the Court and notice of the final fairness hearing. *See* Manual §§ 21.312, 21.633. "[T]o satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Ikon Office Solutions*, 194 F.R.D. at 184. There are two components of "notice": the form of the notice and the manner in which notice is sent to Class members.

The proposed form of notice is appropriate. The proposed notice, annexed as Exhibit "C" is designed to alert Class members to the proposed Settlement by using a bold headline. This headline will enable Class members to quickly determine if they are potentially affected by the proposed Settlement. Plain language text provides important information regarding the terms of the Settlement, the schedule for future events, the class definition, and the legal rights available to Class members, including instructions on how a Class member may exclude themselves from or object to the Settlement. In addition, the proposed notice prominently features Class Counsel's contact information, directions to the firm website for one of Class Counsel where the Settlement documents and supplemental information will be provided, as well as Rust's contact information so that Class members can obtain other information, exclude themselves from the Settlement or submit objections, if desired.

Class Counsel here have used virtually the same form and the exact same method of notice in prior, similar cases.

The notice fairly, clearly and concisely describes in plain, easily understood language the following:

- the nature of the action (*see* Exhibit C at §§ 2-4);
- the definition of the Class certified (*see id*. at § 6);
- the Class claims, issues and defenses (*see id*. at § 2);
- that a Class member may exclude themselves from the Class and the process for doing so (*see id*. at § 11);
- that a Class member may object to the Settlement Agreement and enter an appearance through an attorney if the member so desires (*see id*. at § 17);
- the binding effect of a Class judgment on members of the Class (*see id*. at §§ 11-12);
- the significant terms of the Settlement and the total amount Defendants have agreed to pay to the class (*see id.* at § 7);
- the process for obtaining a portion of the Settlement proceeds (*see id*. at § 13);
- the Court approval process for the proposed Settlement and Class Counsel's request for attorneys' fees of up to one-third of the Settlement and reimbursement of all litigation expenses (*see id.* at §§ 16- 20); and
- the schedule for completing the settlement approval process, including deadlines for objecting to the Settlement, and the submission of motions for final approval of the settlement, and for attorneys' fees, expenses, and contribution awards to the named plaintiffs (*see id.* at §§ 16-20).

2. Manner of Notice.

The proposed manner of notice is also appropriate. Direct purchasers propose to send notice by first class United States mail to each of the 23 Class members, all of which are business entities that have received and followed similar settlement notices. The list of Class members was taken from Warner Chilcott's electronic transactional sales data. In circumstances in which all class members can be identified and reached with certainty, the best method of notice is individual notice. Manual, § 21.311 at 488 ("Rule 23(c)(2)(B) requires that individual notice in 23(b)(3) actions be given to class members who can be identified through reasonable effort."). Individual notice by first class mail has been recognized by the courts as an appropriate

manner of delivery of notice. *See, e.g., In re Janney Montgomery Scott LLC Fin. Consultant. Litig.*, No. 06-3202, 2009 WL 2137224, *7 (E.D. Pa. July 16, 2009) (notice by first-class mail); *see also Smith v. Prof'l Billing & Mgmt. Servs., Inc.*, No. 06-4453, 2007 WL 4191749, *5 (D.N.J. Nov. 21, 2007) ("first-class mail . . . is unquestionably the best notice practicable under the circumstances"); *Wilson v. United Intern. Investigative Servs. 401(k) Sav. Plan*, No. 01-6126, 2002 WL 734339, *8 (E.D. Pa. Apr. 23, 2002) (notice by first-class mail); *Comer v. Life Ins. Co.*, No. 08-CV-228, 2011 U.S. Dist. LEXIS 36042, *4 (D.S.C. Mar. 31, 2011) (notice by first class mail alone found sufficient, where identity of 84 class members was readily ascertainable from defendant's records).

G. THE COURT SHOULD APPOINT RUST AS SETTLEMENT ADMINISTRATOR

Direct Purchasers also ask that Rust be appointed as the Settlement administrator to oversee the administration of the Settlement, including disseminating notice to the class, calculating each Class member's *pro rata* share of the Settlement fund, and distributing the Settlement. *See* Declaration of Robin Niemiec In Support of Unopposed Motion for Class Certification for Purposes of Settlement, Preliminary Approval of Proposed Settlement, Appointment of Class Counsel, Approval of the Form and Manner of Notice to the Class and Setting the Final Settlement Schedule and Date for a Fairness Hearing annexed as Exhibit "F".

Rust is in the business of carrying out large public notice of payment projects on behalf of businesses and governmental agencies. Rust has been in operation for over 35 years. Rust has been appointed as settlement administrator in many pharmaceutical class actions, including two pharmaceutical antitrust cases recently before this Court. *Id*. at ¶ 3. Through these and other matters, Rust has developed and demonstrated the expertise to effectively administer settlements in pharmaceutical products antitrust class actions.

H. THE COURT SHOULD APPOINT THE HUNTINGTON NATIONAL BANK AS ESCROW AGENT

Plaintiffs propose HNB as escrow agent. Defendants have approved this selection and the Escrow Agreement annexed as Exhibit "G". HNB is qualified to serve as escrow agent. HNB, established in 1866, is among the largest 1% of banks in the United States based on size. It holds over $57 billion in assets and includes 700 offices nationwide. HNB's National Settlement Team has handled more than 1000 settlements for law firms, claims administrators, and regulatory agencies. Class Counsel have utilized the services of HNB as escrow agent in many class action settlements previously to great success.

I. THE PROPOSED SCHEDULE IS FAIR AND SHOULD BE APPROVED

As set forth in the proposed preliminary approval order, Plaintiffs propose the following schedule for completing the Settlement approval process:

- Within 10 days from the date of filing for preliminary approval, Defendants shall serve notices pursuant to the Class Action Fairness Act of 2005;
- Within 15 days from the date of preliminary approval, notice is mailed to each member of the Class;
- Within 30 days from the date of preliminary approval, Class Counsel will submit its motion for attorneys' fees, expenses, and incentive awards to the named class representatives;
- Within 30 days from the date of the notice Class members may request exclusion from the Class or object to the Settlement;
- Within 51 days from the date of notice, Class Counsel will submit a motion and memorandum in support of final approval of the Settlement;[23] and

[23] Under ¶ 4 of the Settlement Agreement, Plaintiffs are to file their motion for final approval of the settlement within twenty one (21) days after the Court-ordered deadline by which Class members may exclude themselves from the Class or object to the Settlement.

- On a date to be set by the Court no less than 100 days following the filing of this motion, the Court will hold a final fairness hearing.

This schedule is fair to Class members. It gives ample time to review the preliminary approval papers, Settlement Agreement, and fee petition before the opt-out deadline or any objections are due. The Class members will have the notice for approximately 30 days before the deadline to request exclusion from the Class or object to the Settlement. The Class members will have access to Plaintiffs' fee petition for approximately two weeks before the deadline to request exclusion from the Class or object to the Settlement. In addition, the schedule allows the full statutory period for Defendants to serve its Class Action Fairness Act notice, pursuant to 28 U.S.C. § 1715, and for regulators to review the Settlement and, if they choose, advise the Court of their view. Given the sophistication of the members of the Class, and their familiarity with this kind of litigation, the schedule is fair.

V. CONCLUSION

For the foregoing reasons, Direct Purchasers respectfully request that the Court enter an order: (1) certifying the Class for purposes of Settlement; (2) appointing Class Counsel; (3) granting preliminary approval of the proposed Settlement; (4) approving the proposed form and manner of notice to the Class; (5) directing that the notice to the Class be disseminated in the manners described herein; (6) establishing a deadline for Class members to request exclusion from the Class or file objections to the Settlement; (7) appointing Rust as Settlement administrator; (8) appointing HNB as the Escrow Agent for the Settlement funds and approving the Escrow Agreement; and (9) setting the proposed schedule for completion of further Settlement proceedings, including scheduling a fairness hearing.

Dated: January 10, 2014 Respectfully submitted,

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