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 FINAL APPROVAL OF SETTLEMENT

Direct purchaser plaintiffs Rochester Drug Co-Operative, Inc., American Sales Company, LLC, and Meijer, Inc. and Meijer Distribution, Inc. (collectively "Plaintiffs"), by their counsel, respectfully move for an order and judgment pursuant to Fed. R. Civ. P. 23 and 54:

1. Finally approving the proposed settlement of this action for $15 million on the terms set forth in the December 24, 2013 Settlement Agreement[1] ("Settlement") between the preliminarily certified class of direct purchasers of Doryx[2] and Defendants Warner Chilcott (US) LLC, Warner Chilcott Public Limited Company, Warner Chilcott Company LLC, Warner Chilcott Holdings Company III, Ltd., and Warner Chilcott Laboratories Ireland Limited (collectively, "Warner

[1] A copy of the December 24, 2013 Settlement Agreement ("Settlement Agreement") was filed as Exhibit A to 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 ("Motion for Preliminary Approval") (ECF No. 452-2).

[2] The Court previously preliminarily certified a class of direct purchasers of Doryx defined as:

> 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").

Order, February 18, 2014 (ECF No. 484), at 3. Following dissemination of Court-approved notice, no Class members requested exclusion from the Class.

Chilcott"), and Mayne Pharma Group Limited and Mayne Pharma International Pty. Ltd. (collectively, "Mayne") (together, "Defendants").

2. Approving the proposed Plan of Distribution of the Settlement proceeds ("Plan"),[3] net of any awards of attorneys' fees, expenses, and incentive awards ("Net Settlement Fund");

3. Approving the proposed Doryx Direct Purchaser Proof of Claim and Release ("Claim Form")[4] to be sent to each Class member upon final approval of the Settlement setting forth each Class member's *pro rata* share of the Net Settlement Fund; and

4. Dismissing all claims against Defendants, and releasing on behalf of Plaintiffs and the Class all claims relating to Doryx and/or its generic versions that were or could have been asserted in this action, as specified in Paragraphs 11 & 12 of the Settlement Agreement.

The Declaration of Co-Lead Counsel Peter Kohn is attached hereto as **Exhibit 1**.

A proposed order is attached as **Exhibit 2**, granting the relief Plaintiffs seek both by this motion, and by the contemporaneously-filed motion entitled "Direct Purchaser Class Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Incentive Awards to the Class Representatives."

A Certificate of Uncontested Motion is attached hereto.

WHEREFORE, for the foregoing reasons, and for the reasons set forth in the accompanying memorandum of law, and in the attached exhibits, Plaintiffs respectfully request that their motion be granted.

[3] The Plan was submitted with Plaintiffs Motion for Preliminary Approval at ECF No. 452-3, Ex. B.

[4] The Claim Form was submitted with Plaintiffs' Motion for Preliminary Approval at ECF No. 452-5, Ex. D.

Dated: April 24, 2014

Respectfully submitted,

/s/ Peter Kohn

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Co-Lead Counsel for the 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
Neill W. Clark

Dated: April 24, 2014

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 Direct Purchaser Plaintiffs' Unopposed Motion for Final Approval of Settlement is uncontested.

Dated: April 24, 2014

Respectfully submitted,

/s/ Peter Kohn

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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' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT

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I. INTRODUCTION

Direct purchaser plaintiffs Rochester Drug Co-Operative, Inc., American Sales Company, LLC, and Meijer, Inc., and Meijer Distribution, Inc. (collectively "Plaintiffs," "Direct Purchasers," or "Class Representatives") respectfully submit this memorandum of law in support of their unopposed motion for final 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").

The proposed settlement between Defendants and Plaintiffs (the "Settlement") in all respects is fair, reasonable, and adequate and satisfies the class action settlement standards set forth by the Third Circuit in both *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) and *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) ("*Prudential*"). The Settlement should be approved.[1]

After nearly two years of hard fought litigation, extensive fact discovery and motion practice, after the Court's denial of Defendants' motion to dismiss (ECF No. 280), extensive class certification briefing (ECF Nos. 153, 233, 384), submission of opening and responsive merits expert reports, and initial expert deposition discovery, Plaintiffs, on behalf of a class of direct purchasers of Doryx, reached a settlement agreement with Defendants.[2] The Settlement

[1] A copy of the December 24, 2013 Settlement Agreement ("Settlement Agreement") was filed as Exhibit A to 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 ("Motion for Preliminary Approval") (ECF No. 452-2).

[2] The Class is defined as:

> "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').

assures that Class members will receive substantial cash payments now while avoiding the uncertainties and delays of continued litigation and potential appeals.

Following the Court's Preliminary Approval Order, on March 4, 2014, the Court-appointed settlement administrator Rust Consulting, Inc. ("Rust") mailed to all members of the Class a notice of the proposed Settlement describing the precise terms of the Settlement, including Class Counsel's[3] intent to seek an award of attorneys' fees and reimbursement of expenses ("Class Notice"), and directed Class members to the website of Faruqi & Faruqi LLP, (www.faruqilaw.com), one of Co-Lead Counsel, for copies of filings related to the Settlement.[4] In addition, as ordered, on March 19, 2014, 15 days before the April 3, 2014 deadline for Class members to request exclusion from the Class or object to the Settlement, Plaintiffs filed the Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Incentive Awards to the Class Representatives and supporting brief, declaration, and exhibits ("Motion for Fees and Expenses") (ECF No. 562).[5] These filings were also placed on the Settlement website.

The postmark deadline for Class members' objections to the Settlement was 30 days from the date of the Class Notice, April 3, 2014. That date has passed and no Class member has

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> Excluded from the Class are Defendants, their parents, employees, subsidiaries and affiliates, and federal government entities (the 'Class')."

Order, February 18, 2014, ECF No. 484 ("Preliminary Approval Order").

[3] Class Counsel refers to Co-Lead Counsel for the Class ("Co-Lead Counsel") that the Court appointed in its Preliminary Approval Order and other Plaintiffs' counsel that assisted Co-Lead Counsel in the prosecution of this action.

[4] The Class Notice mailed to Class members is attached as Exhibit 1 to the Declaration of Dan Coggeshall of Rust Consulting, Inc. Regarding Notice of Pendency of Class Action and Settlement, dated April 24, 2014 ("Coggeshall Decl."). The Coggeshall Decl. is attached as Exhibit A to Declaration of Co-Lead Counsel Peter Kohn In Support of Direct Purchaser Plaintiffs' Unopposed Motion for Final Approval of Settlement ("Co-Lead Decl."). The Co-Lead Decl. is attached as Exhibit 1 to the motion in whose support this memorandum is filed.

[5] On March 26, 2014 the Court denied without prejudice the Motion for Fees and Expenses and instructed Plaintiffs to resubmit it before the final fairness hearing. Order, Mar. 26, 2014, ECF No. 566. Accordingly, today, Plaintiffs refile their Motion for Fees and Expenses.

objected or excluded itself from the Class. *See* Co-Lead Decl.¶ 20; Coggeshall Decl. ¶ 4.[6] The favorable reaction of the Class confirms that the Settlement is fair, reasonable, and adequate.

II. BACKGROUND

This is an antitrust class action brought on behalf of direct purchasers of the prescription drug Doryx.

A. Plaintiffs' Claims and Procedural Background.[7]

Plaintiffs alleged that Defendants repeatedly reformulated and switched to different versions of Doryx and undertook other efforts to impair the process by which AB-rated generic pharmaceutical drugs are automatically substituted for their brand name counterparts. Plaintiffs thus alleged that Defendants: (a) unlawfully maintained monopoly power in the market for delayed-release doxycycline hyclate in the United States; (b) maintained the price of Doryx at supra-competitive levels; and (c) overcharged Plaintiffs and members of the Class millions of dollars by depriving them of the benefits of unimpaired competition and access to less expensive generic Doryx. This litigation was factually and legally complex, involving voluminous discovery of Defendants and multiple third parties, and requiring analysis of the science behind the Doryx reformulations and generic ANDAs, pharmacoeconomics, pharmaceutics, pharmaceutical innovation, FDA regulations and drug manufacturing, dermatology, gastroenterology, and the complex economics issues surrounding antitrust injury and damages.

[6] Some customers of Class members requested exclusion from the Class based upon assignments they previously received from Class members. Customers of some of the Class members ("Assignees") thus requested exclusions on behalf of themselves and the Class member/Assignor with respect to Doryx sold from the Class member/Assignor to the Customer/Assignee. Each of these entities had already been pursuing their own individual actions against Defendants pursuant to these assignments. *See* Coggeshall Decl. ¶ 5. This was anticipated by the parties, and does not disrupt the Settlement.

[7] The Court is familiar with the progress of this action from its supervision of the case and review of the parties' monthly status reports. In addition, a detailed description of Plaintiffs' efforts to advance the case is described in Plaintiffs' Motion for Fees and Expenses at 3-6 (refiled contemporaneously herewith).

Defendants raised numerous defenses to Plaintiffs' claims, including that each Doryx reformulation benefitted patients and did not impair generic competition, and that the statute of limitations had expired before Plaintiffs filed their claims. The Court also expressed skepticism that Plaintiffs' "'product hopping' claim constitutes anticompetitive conduct," characterizing Plaintiffs' theory as "novel" and Defendants' arguments as "compelling," and invited Defendants to renew the arguments made on their motion to dismiss at summary judgment.[8]

Discovery was extensive, including the production of millions of documents by Plaintiffs, Defendants, and Mylan Pharmaceuticals, Inc. ("Mylan"). There was also substantial third-party discovery involving nearly 100 subpoenas to brand and generic manufacturers of acne medications, health insurance payors, marketing firms for Warner Chilcott, pharmacy benefit managers, research companies, and vendors that assisted Mylan with its generic products. By the time the parties settled, over 75 depositions had been taken, including depositions of Defendants' and Mylan's personnel involved in the development, sale and marketing of Doryx or generic Doryx, as well as third parties, the Class Representatives, Retailer and End Payor Plaintiffs, and experts in dermatology, drug manufacturing and supply, and antitrust injury and damages.

B. Settlement Negotiations and the Proposed Settlement.

In October 2013, following unproductive early discussions, and after fact discovery closed and the exchange of opening and responsive expert reports, the parties agreed to a private mediation with nationally-recognized mediator Jonathan B. Marks (the "Mediator"). The mediation and settlement discussions that followed were conducted at arm's length and were highly substantive, informed by: (a) the substantial discovery; (b) the legal, factual, and expert

[8] Order, June 12, 2013, ECF No. 280 at 3-4. Plaintiffs respectfully disagree with the Court's expressed view. The Court's assessment, however, underscores the benefits to the class of the Settlement.

analyses compiled in prosecuting the case; and (c) Class Counsel's and defense counsel's substantial experience litigating pharmaceutical antitrust cases. After the parties submitted materials to the Mediator, they participated in a day-long face-to-face mediation. On November 8, 2013, 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 of conferring with clients, the parties accepted the Mediator's recommendation and negotiated the Settlement Agreement.

The parties executed the Settlement Agreement on December 24, 2013. As part of the Settlement, Class Counsel drafted a notice to be mailed to all Class members to inform them of the Settlement, and an Escrow Agreement to govern the handling of Settlement funds (ECF Nos. 452-2, 452-8). On February 18, 2014, following Plaintiffs' Motion for Preliminary Approval (ECF No. 452), the Court entered an order preliminarily certifying a class of direct purchasers of Doryx and approving the proposed Settlement. (ECF No. 484). In the Preliminary Approval Order, the Court adopted Plaintiffs' proposed form and manner of notice to the Class and directed notice to be mailed to all Class members.

C. Notification to and Reaction of the Class to the Settlement.

The Class was notified of the Settlement through first class mail using addresses obtained from Warner Chilcott's sales database and cross-referenced with addresses that Rust had on file based on settlement notices it had disseminated to Class members in previous pharmaceutical antitrust cases. *See* Coggeshall Decl. ¶ 2. As directed by the Court's Preliminary Approval Order, on March 4, 2014 (*i.e.*, 15 days from the Court's Preliminary Approval Order), Rust mailed the notice to all members of the Class by first class mail. *See* Preliminary Approval Order at 7; Co-Lead Decl. ¶ 17; Coggeshall Decl.¶ 3. The Class Notice informed the Class of the Settlement and Class Counsel's request for attorneys' fees and reimbursement of expenses

and described all aspects of the proposed Settlement. Documents related to the Settlement, including Plaintiffs' complete filing related to the Motion for Preliminary Approval, Motion for Fees & Expenses, Class Notice, Settlement Agreement, and the Preliminary Approval Order, were also posted on Co-Lead Counsel Faruqi & Faruqi's website as stated in the Class Notice. Co-Lead Decl. ¶¶ 17-19.

To date, the response from the Class has been uniformly positive. Objections were required to have been postmarked no later than April 3, 2014. Coggeshall Decl. ¶4. To date, no objections have been received. Co-Lead Decl. ¶ 20; Coggeshall Decl. ¶ 4. Other than from the Retailer Plaintiffs, who had already been proceeding with individual complaints by assignments from members of the Class and whose exclusion requests were anticipated in the Settlement, no requests for exclusions were received. Co-Lead Decl. ¶ 20; Coggeshall Decl. ¶¶ 4-5.

III. ARGUMENT

A. Certification of the Proposed Class is Appropriate.

Although the Court has preliminarily certified the Class,[9] before determining whether to grant final approval to the Settlement, the Court must finally certify the Class.[10] For the reasons set forth in the Preliminary Approval Order and Plaintiffs' submissions related to class certification and Motion for Preliminary Approval (ECF Nos. 153, 384 & 452-1), which are incorporated by reference, Plaintiffs continue to satisfy the requirements of Rule 23(a) and 23(b)(3).

[9] Preliminary Approval Order, at 3-6.

[10] *See, e.g., In re CertainTeed Fiber Cement Siding Litig.*, MDL Docket No. 2270, 2014 U.S. Dist. LEXIS 36532, at *45 (E.D. Pa. March 20, 2014) ("*CertainTeed*") ("Having determined that the proposed class may properly be certified and that notice to the proposed class was appropriate, I must determine whether the proposed settlement should be approved."); *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 306 (E.D. Pa. 2012) ("In accordance with the standard of review, the Court must determine (1) that certification of the proposed class is appropriate and (2) that the settlement 'is fair, reasonable, and adequate.'"); *Reed v. Wash. Mut. Inc.*, No. 07-4426, 2012 U.S. Dist. LEXIS 171606, at *8 (E.D. Pa. Dec. 4, 2012) ("'When presented with an unopposed motion for class certification and settlement approval, a court must separate its analysis of the class certification issue from its evaluation of the settlement's fairness.'").

B. Adequate Notice was Provided to the Class Consistent with the Court's Preliminarily Approval Order.

Similarly, "[a] court must determine that notice was appropriate before evaluating the merits of the settlement."[11] The due process requirements of the Fifth Amendment and Fed. R. Civ. P. 23 require that adequate notice of a proposed settlement be given to class members.[12] The Fifth Amendment's due process requirements are satisfied by the "combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class."[13] Rule 23(e) notice is "designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation."[14]

Notice of the Settlement was provided by first-class mail to each Class member on March 4, 2014 and the Class Notice (along with other information) was made (and remains) available on the Faruqi & Faruqi website, all consistent with the Court's February 18, 2014 Preliminary Approval Order. Co-Lead Decl. ¶¶ 17-19. This method of notice is sufficient to satisfy Rule 23 requirements and due process concerns.[15]

As more fully explained in Plaintiffs' Motion for Preliminary Approval, the content of the Class Notice is also sufficiently clear, detailed, and instructive to satisfy due process.[16] The Class Notice is in plain language and informs Class members of the claims asserted in this case,

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[11] *Reed*, 2012 U.S. Dist. LEXIS 171606, at *17 (internal quotation marks omitted).

[12] *Nichols v. SmithKline Beecham Corp.*, C.A. No. 00-6222, 2005 U.S. Dist. LEXIS 7061, at *28 (E.D. Pa. Apr. 22, 2005); *Grunewald v. Kasperbauer*, 235 F.R.D. 599, 609 (E.D. Pa. 2006); Fed. R. Civ. P. 23(e).

[13] *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions* , 148 F.3d 283, 306 (3d Cir. 1998) ("*Prudential*").

[14] *CertainTeed*, 2014 U.S. Dist. LEXIS 36532, at *42 (internal quotation marks omitted).

[15] *See Chakejian v. Equifax Info. Servs*., 275 F.R.D. 201, 207 (E.D. Pa. 2011); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 329 (E.D. Pa. 2007).

[16] *See* Motion for Preliminary Approval at 24-25.

the definition of the Class and Class Period, the role of Class Counsel, the terms of the Settlement, the attorneys' fee and expenses request, the incentive award request for class representatives, the date and location of the final approval hearing, the procedures necessary to opt-out, object, or appear and be heard at the final approval hearing, how to file a claim, and how to obtain additional information.[17]

C. The Proposed Settlement Should Be Approved as Fair, Reasonable, and Adequate.

1. Settlements of antitrust class actions are encouraged.

"[T]here is an overriding public interest in settling class action cases that warrants an especially strong presumption in favor of voluntary settlements in class actions."[18] Courts particularly encourage settlements in complex litigation because settlements conserve judicial resources.[19]

2. Standards for Court approval of a settlement.

A class action settlement warrants final approval if it is "fair, reasonable, and adequate."[20] The Third Circuit has held that an initial presumption of fairness applies when a district court finds that the factors have been met to support a settlement's preliminary

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[17] *See In re Imprelis Herbicide Mktg., Sales Pract. & Prods. Liab. Litig.*, No. 11-md-02284, 2013 U.S. Dist. LEXIS 149323, at *21-22 (E.D. Pa. Oct. 17, 2013) ("*Imprelis*") ("The notices themselves explained in plain language the settlement and the procedures necessary to file a claim, opt-out, or object to the settlement. Thus, the Court finds that the parties' comprehensive notice program, which the Court also reviewed in advance, satisfies Rules 23(c)(2)(B) and (e)."); *see also Prudential*, 148 F.3d at 328; *Nichols*, 2005 U.S. Dist. LEXIS 7061, at *29.

[18] *In re Budeprion XL Mktg & Sales Litig*. No. 09-md-2107, 2012 U.S. Dist. LEXIS 91176, at *31 (E.D. Pa. July 2, 2012); *see Alves v. Main*, Nos. 13-1071, 13-1072, 2014 U.S. App. LEXIS 5234, at *6 (3d Cir. Mar. 20, 2014) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004)).

[19] *In re Gen. Mot. Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig*., 55 F.3d 768, 784 (3d Cir. 1995) ("[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"); *see also Alderfer v. Clemens Mkts. Inc*., No. 10-4423, 2012 U.S. Dist. LEXIS 54650, at *12-13 (E.D. Pa. Apr. 18, 2012) ("The law favors class action settlements because they conserve judicial resources").

[20] Fed. R. Civ. P. 23(e)(2); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 295 (3d Cir. 2011) (internal quotation marks omitted).

approval.[21] The Court has made such a determination here, having preliminarily approved the Settlement.[22]

To further guide courts in assessing whether a settlement warrants final approval, the Third Circuit has identified nine factors (often called the *Girsh* factors) to consider:

(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.[23]

No one factor is dispositive.[24]

The Third Circuit has more recently held that district courts should consider an additional set of factors, known as the *Prudential* factors:

(1) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;

(2) the existence and probable outcome of claims by other classes and subclasses;

(3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants;

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[21] *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 n.18 (3d Cir. 2001).

[22] Preliminary Approval Order, February 18, 2014, ECF No. 484.

[23] *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 258 (3d Cir. 2009) (quoting *Girsh*, 521 F.2d at 157).

[24] *Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154, 169 (E.D. Pa. 2011).

(4) whether class or subclass members are accorded the right to opt-out of the settlement;

(5) whether any provisions for attorneys' fees are reasonable; and

(6) whether the procedure for processing individual claims under the settlement is fair and reasonable.[25]

Only the *Prudential* factors relevant to the litigation in question need be addressed.[26]

District courts must make findings on each of the *Girsh* factors and, where appropriate, consider but not necessarily make findings on the *Prudential* factors.[27] The Court can determine that a settlement is fair, reasonable, and adequate without finding that each *Girsh* factor favors settlement.[28] The Court may not simply substitute assurances from or conclusions by the parties for independent analysis of the settlement.[29] However, the court can give "considerable weight to the views of experienced counsel as to the merits of a settlement" because "a settlement represents the result of a process by which opposing parties attempt to weigh and balance the factual and legal issues that neither side chooses to risk taking to final resolution."[30]

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[25] *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010) ("*Pet Food*") (quoting *Prudential*, 148 F.3d at 323).

[26] *Prudential*, 148 F.3d at 323-24. At least one court has suggested that where the *Girsh* factors clearly establish the fairness, reasonableness, and adequacy of a settlement, consideration of additional factors is not necessary. *Pichler v. UNITE*, 775 F. Supp. 2d 754, 758 (E.D. Pa. 2011). However, Plaintiffs here also address the relevant *Prudential* factors.

[27] *See, e.g., In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 268 (E.D. Pa. 2012) ("*Processed Eggs*") ("While the court must make findings as to the *Girsh* factors to approve a settlement as fair reasonable, and adequate, the *Prudential* factors are illustrative of additional factors that may be useful even though they are not essential or inexorable depending upon the specific circumstance.").

[28] *See, e.g. Processed Eggs*, 284 F.R.D. at 277 ("However, all of the factors considered in determining the fairness of a settlement 'are a guide; an unfavorable conclusion regarding one or more factors does not automatically render the settlement unfair.'") (quoting 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 6:8 (6th ed. 2010)*; Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 317 (E.D. Pa. 2012) (granting final approval of settlement despite finding that four out of five *Girsh* factors were neutral and other factors only slightly favored the settlement.)

[29] *Pet Food*, 629 F.3d at 350.

[30] *Imprelis*, 296 F.R.D. at 364.

In cases such as this where class certification and settlement approval are sought simultaneously, the Court should apply "an even more rigorous, heightened standard."[31] "This heightened standard is designed to ensure that class counsel has demonstrated 'sustained advocacy' throughout the course of the proceedings and has protected the interests of all class members."[32] "The professional judgment of counsel involved in the litigation" is, however, "entitled to significant weight."[33] Counsel should not be held to "an impossible standard, as a settlement is virtually always a compromise, a yielding of the highest hopes in exchange for certainty and resolution."[34]

The Settlement meets each of the factors for final approval.

3. Evaluation of the settlement under the *Girsh* factors.

a. The complexity, expense, and likely duration of the litigation.

This action involved complex legal issues concerning antitrust law, pharmaceutical product regulation, and class action procedure, as well as complex scientific and medical issues concerning pharmaceutical manufacturing and composition, dermatology, and gastroenterology, that were investigated and litigated intensely for nearly two years. "[A]ntitrust class actions are perhaps the most complex cases to litigate."[35] This is particularly so in a "product hopping" case such as this one where the case law is not well-developed and dependent upon a fact intensive

[31] *Processed Eggs*, 284 F.R.D at 268 (internal quotation marks omitted).

[32] *Prudential*, 148 F.3d at 317.

[33] *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985).

[34] *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) (internal quotation marks omitted).

[35] *Bradburn Parent Teacher Store*, 513 F. Supp. 2d at 338-39; *accord In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) ("*Linerboard I*").

inquiry.[36] Class Counsel's efforts thus far are commensurate with and illustrative of the complexity and expense of this litigation. Among other things, Class Counsel:

- Investigated the Class's claims of antitrust violation and injury (and did so months before the *Mylan* complaint was filed);
- Conducted extensive research and analysis concerning antitrust liability for product hopping, conspiracy, statute of limitations, relevant market, and the *Noerr-Pennington* doctrine as it relates to filings with the FDA;
- Opposed Defendants' motion to dismiss which included briefing and exhibits totaling hundreds of pages;
- Filed and briefed class certification, including taking and defending four expert depositions and replying to Defendants' response in opposition to class certification that included three separate expert reports and 117 exhibits;
- Prepared for and defended the depositions of Class Representatives;
- Assisted Class Representatives and absent class members with discovery, including opposing Defendants' motion to compel absent class member discovery,[37] and providing the Court with additional class member data;[38]
- Litigated other discovery motions and negotiated stipulations concerning Defendants' extensive document and data demands;
- Pursued discovery from and conducted substantial negotiations with 32 subpoenaed third parties;
- Reviewed and analyzed millions of pages of documents and data produced by Defendants and third parties;
- Conducted or appeared at dozens of depositions of current and former employees of Defendants, other plaintiffs, and third parties;

[36] *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 422 (D. Del. 2006) ("*Tricor*") ("If plaintiffs show anticompetitive harm from the formulation changes, that harm will be weighed against any benefits presented by Defendants").

[37] *See Letter Br. Regarding Discovery*, May 2, 2013, ECF No. 186; Opp'n to Letter Br., May 6, 2013, ECF No. 193. Class Counsel also worked with counsel for absent class members in response to Defendants' motion to compel the Retailer Plaintiffs to produce documents related to assignments from some of the wholesaler members of the Class. *See Letter Br. Motion to Compel the Four Retailers*, Apr. 30, 2013, ECF No. 184.

[38] Order, Aug. 16, 2013, ECF No. 404; ECF No. 408.

- Oversaw the preparation of 10 expert reports;[39]
- Conducted depositions of five of Defendants' experts;[40]
- Submitted a mediation statement and participated in mediation that yielded a $15 million settlement for the Class; and
- Developed and drafted the Settlement and Class Notice documents and will assist in overseeing the notice and claims process to ensure swift and accurate distribution of Settlement proceeds to the Class.

While fact discovery was complete when the parties agreed to the Settlement, much work still remained to try the Class's claims against Defendants including completing expert discovery, submitting rebuttal expert reports, briefing and arguing summary judgment, and finally conducting a trial. This Settlement saves the substantial additional expense of a multi-week trial likely involving complex scientific and regulatory testimony from experts and fact witnesses as well as hundreds of trial exhibits – and the expense associated with a lengthy appeal that would likely follow a jury verdict.[41] After receiving the Class Notice, no Class member has objected to the Settlement, and there will be no appeal of a final approval of the Settlement. This factor overwhelmingly supports approval.

[39] Plaintiffs' economic expert Jeffrey Leitzinger, Ph.D. submitted three expert reports, two related to class certification and one opening merits report; Plaintiffs' pharmaceutical economics expert, Aaron S. Kesselheim, M.D., J.D., M.P.H. submitted two expert reports; the five other opening merits reports were submitted by Plaintiffs' dermatology, pharmaceutics, pharmaceutical manufacturing and supply, gastroenterology and FDA regulatory experts.

[40] In addition, Class Counsel worked with Plaintiffs' experts in connection with their reports and depositions relating to class certification and merits. At the time the parties accepted the Mediator's settlement proposal, Class Counsel was assisting the experts in preparation for their upcoming rebuttal reports and depositions.

[41] *See Warfarin*, 391 F.3d at 536 (approving settlement because, in part, "the time and expense leading up to trial would have been significant"); *In re Flonase Antitrust Litig*. 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013) ("The settlement avoided the need for a difficult and expensive multi-week trial involving complex scientific and regulatory testimony, and the time and expense associated with the appeal that would likely have followed a verdict."); *PDC, Inc. v. 3M*, C.A. No. 04-5871, 2006 WL 2382718, at *13 (E.D. Pa. Aug. 14, 2006) (approving settlement where "in the absence of settlement, significant costs in terms of both time and money likely would result from the continued litigation of this case.")

b. The reaction of the class to the settlement.

Each member of the Class received actual notice, via first-class mail, of the Settlement, and there has not been a single objection. "'Courts have generally assumed that silence constitutes tacit consent to the agreement.'"[42] The members of the Class in this case are largely sophisticated businesses that have received notices of settlement in previous pharmaceutical antitrust class actions.[43] Some members of the Class even have separate counsel who entered their appearances or made filings and submissions in this case.[44] That there have been no objections from sophisticated class members who are familiar with settlements in pharmaceutical antitrust cases is "particularly telling" and overwhelmingly supports approval.[45]

c. The stage of the proceedings and the amount of discovery completed.

Courts consider the procedural stage of a case at the time of settlement in assessing whether counsel adequately appreciated the merits of the case before negotiating that settlement.[46] "[C]ourts generally recognize that a proposed class action settlement is presumptively valid where . . . the parties engaged in arm's length negotiations after meaningful

[42] *Reed*, 2012 U.S. Dist. LEXIS 171606, at *22 (quoting *Chakejian*, 275 F.R.D. at 212).

[43] Coggeshall Decl. ¶ 2.

[44] *See*, *e.g.*, Notice of Appearances by Donald Myers and David A. Schumacher on behalf of Amerisourcebergen Drug Corp., ECF Nos. 194, 195 respectively; Third Party McKesson Corp.'s Opp'n to Warner Chilcott's Mot. to Compel, ECF No. 197; Letter in Resp. to Mot. to Compel by Cardinal Health, Inc., ECF No. 198; Letter from Steven Winick, May 3, 2013, ECF No. 200; Letter from Donald W. Myers, May 3, 2013, ECF No. 202.

[45] *Warfarin*, 391 F.3d at 536; *see In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 629 (E.D. Pa. 2004) ("*Linerboard II*").

[46] *Warfarin*, 391 F.3d at 537 (citations omitted).

discovery."[47] Settlements reached after discovery "'are more likely to reflect the true value of the claim . . . .'"[48]

This case is well-advanced. By the time the parties completed settlement negotiations in December 2013, fact discovery had concluded; over 75 depositions had been taken including of Defendants' personnel responsible for the development, sale, and marketing of Doryx and some of Defendants' experts in dermatology, pharmaceutical manufacturing and supply, pharmaceutical economics, and drug delivery, and over six million pages of documents had been produced by Defendants and third parties. In addition, the Court had denied Defendants' motion to dismiss, class certification was fully briefed, and the parties had exchanged opening and responsive merits expert reports. That record allowed Class Counsel and Defendants to engage in a productive full-day mediation session and subsequent settlement discussions resulting in a settlement just a few months before summary judgment briefing was to begin.[49] This factor, too, overwhelmingly supports final approval of the Settlement.

d. The risks of establishing liability.

This factor weighs the likelihood of ultimate success against the benefits of an immediate settlement. The existence of obstacles to a plaintiff's success at trial weighs in favor of settlement.[50] "In examining this factor, the court may 'give credence to the estimation of the

[47] *Cullen v. Whitman Med Corp.*, 197 F.R.D. 136, 144-45 (E.D. Pa. 2000); *see also Linerboard II*, 321 F. Supp. 2d at 630.

[48] *Alderfer*, 2012 U.S. Dist. LEXIS 54650, at *15 ("Moreover, 'post discovery settlements are more likely to reflect the true value of the claim and be fair'") (quoting *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 (3d Cir. 1993)); *Boone v. City of Phila.*, 668 F. Supp. 2d 693, 712 (E.D. Pa. 2009) (same).

[49] *See Prudential*, 148 F.3d at 319 (type and amount of discovery ensures that a proposed settlement is the product of "informed negotiations").

[50] *Warfarin*, 391 F.3d at 537; *Prudential*, 148 F.3d at 319.

probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'"[51]

This case challenged an alleged anticompetitive scheme, known as "product hopping," which, while effective in blocking generic competition, has undergone relatively little prior judicial review. Defendants had asserted substantial factual and legal defenses, including that: (1) the Doryx reformulations did not cause any anticompetitive harm, and even if they did, harm was outweighed by procompetitive benefits including, *inter alia,* reduced incidence of esophageal erosion, improved patient compliance, flexibility in titration of dosing, reduced co-pays and improved shelf-life; (2) Mylan and other generic manufacturers' own conduct, not Defendants' conduct, impaired generic competition for Doryx; (3) Plaintiffs' claims were barred by the statute of limitations because Plaintiffs' main theory of liability involved the capsule-to-tablet switch that occurred more than four years before Plaintiffs had filed their claims; and (4) Defendants did not have market power in the relevant product market because of the availability of numerous anti-acne medications to treat the same or similar conditions as Doryx. In its ruling on the motions to dismiss, the Court characterized Defendants' defenses as "compelling," expressed skepticism that the "'product hopping' scheme alleged here constitutes anticompetitive conduct," and invited Defendants to renew their arguments at summary judgment.[52]

While Plaintiffs were confident in their factual and legal position with respect to each of these issues, the risk remained that the Court or the jury would disagree with Plaintiffs on one or more of these issues. And even if Plaintiffs prevailed at trial, they would have faced the challenge of sustaining every favorable outcome on appeal. The paucity of clear precedent in

[51] *Esslinger v. HSBC Bank Nev., N.A.*, No. 10-3212, 2012 U.S. Dist. LEXIS 165773, at *29 (E.D. Pa. Nov. 20, 2012.

[52] Order, June 12, 2013, ECF No. 280, at 3-4.

pharmaceutical product hopping cases[53] overwhelmingly supports final approval of the Settlement.

e. The risks of maintaining the class action through trial.

The Court previously assured itself that the requirements of Rule 23 were met and certified this case as a class action for purposes of preliminary approval.[54] Numerous courts, including the Third Circuit, have certified nearly identical classes of direct purchasers bringing antitrust claims against manufacturers allegedly seeking to delay generic competition in the pharmaceutical industry.[55] Nonetheless, "the Third Circuit Court of Appeals has recognized that there will always be a risk of possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement."[56] While the risk of decertification is extremely slight, this factor can be considered neutral in this case.[57]

f. The ability of defendant to withstand a greater judgment.

The ability of a defendant to withstand a greater judgment is most relevant in cases where the amount of the settlement is less than might ordinarily be agreed upon by the plaintiff, but

[53] Courts are divided on treatment of product-hopping claims. *Compare Tricor*, No. 05-340-SLR, [Proposed] Order and Final J. Approving Settlement, Awarding Att'ys' Fees and Expenses, Awarding Representative Pl. Incentive Awards, Approving Plan of Allocation, and Ordering Dismissal as to All Defs. 9-10, ECF No. 543 (D. Del. Apr. 23, 2009) (awarding 33⅓% fee after parties litigated for three and half years and trial had begun) *with Walgreen Co. v. AstraZeneca*, 534 F. Supp. 2d 146 (D.D.C. 2008) (granting motion to dismiss) and *AstraZeneca AB v. Mylan Labs. Inc*., No. 00 Civ. 6749, 2010 WL 2079722 (S.D.N.Y. May 19, 2010) (granting motion to dismiss counterclaims).

[54] Preliminary Approval Order, ECF No. 484.

[55] *See, e.g., In re K-Dur Antitrust Litig*., 686 F.3d 197 (3d Cir. 2012); *In re Wellbutrin SR Direct Purchaser Antitrust Litig*., C.A. No. 04-5525, 2008 WL 1946848 (E.D. Pa. May 2, 2008) ("*Wellbutrin SR*"); *Teva Pharms. USA, Inc. v. Abbott Labs.*, 252 F.R.D. 213 (D. Del. 2008).

[56] *Imprelis*, 2013 U.S. Dist. LEXIS 149323, at *42 (internal quotations marks omitted) (quoting *Prudential*, 148 F.3d. at 321).

[57] *See Cendant*, 264 F.3d at 239 (holding that this factor was neutral where the risk of decertification appeared to be extremely slight).

greater than defendant's financial circumstances might be able to accommodate.[58] These circumstances do not exist here.

Of course, courts have recognized that a defendant's ability to pay more must be balanced against other considerations of whether the settlement is fair in light of the legal issues and circumstances involved in the case.[59] Courts have granted final approval to settlements even when this factor is neutral or disfavors settlement.[60] This case involved difficult legal issues, deployed theories the Court considered "novel," presented significant risks that Plaintiffs would either not prevail, and was hard-fought. The amount that Plaintiffs obtained in the Settlement is a positive benefit to class members on its face, and an even better result when these considerations are taken into account. The theoretical ability of Defendants to pay more is a neutral factor in this context.

g. The range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation.

In combination, the final two *Girsh* factors "'test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the

[58] *Alderfer*, 2012 U.S. Dist. LEXIS 54650, at *17 ("'This factor is most clearly relevant where a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement.'") (quoting *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011)); *Chakejian,* 275 F.R.D. at 214 (same).

[59] *See CertainTeed*, 2014 U.S. Dist. LEXIS 36532, at *54 ("Even if CertainTeed could pay more, it does not mean that it is obligated to pay any more than it has agreed to pay into the settlement fund based on the theories of liability that existed when the parties reached their agreement on the size of the settlement fund."); *Esslinger*, 2012 U.S. Dist. LEXIS 165773, at *31-32 ("However, the mere possibility that HSBC could withstand a greater judgment does not prevent the Court from approving the settlement."); *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, No., 06-3202, 2009 U.S. Dist. LEXIS 60790, at *31 (E.D. Pa. July 16, 2009) ([T]his factor's importance is lessened by the obstacles the class would face in establishing liability and damages.").

[60] *E.g.*, *Fleisher v. Fiber Composites*, LLC. No. 12-1326, 2014 U.S. Dist. LEXIS 29151, at *36, 45 (E.D. Pa. Mar. 5, 2014) (granting final approval despite finding that this factor "slightly" disfavored settlement); *Alderfer*, 2012 U.S. Dist. LEXIS 54650, at *17, 28 (finding this factor neutral but granting final approval to settlement); *Processed Eggs*, 284 F.R.D. at 274, 278 (granting final approval despite finding that this factor did not weigh in favor of approval).

parties would face if the case went to trial.'"[61] In conducting this analysis, courts consider "'the opinions of experienced attorneys in deciding the fairness of a settlement compared to the likely recovery at trial.'"[62] In addition, Courts find this factor met when both parties have demonstrated a willingness to litigate the action and engaged in mediation.[63]

Assessment of a settlement, however, need not be tied to an exact formula.[64] A settlement may still be within a reasonable range, even though it represents only a portion of the potential recovery.[65] In addition, courts have approved settlements where the plaintiffs have not set forth an exact estimation of damages.[66]

Here, the Settlement falls within the range of settlements that are worthy of final approval as fair, reasonable, and adequate. The proposed Settlement totaling $15 million cash is reasonable both in absolute terms and in light of the circumstances of this litigation, particularly the risks of establishing liability before or at trial. In another antitrust case recently settled on behalf of nearly the same class of direct purchasers alleging similar conduct, the district court noted that the $20.25 million settlement represented "a substantial sum," and, weighing the risks of establishing liability and damages "against the guarantee of this large a sum for a class" found

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[61] *Processed Eggs*, 284 F.R.D. at 274 (quoting *Warfarin*, 391 F.3d at 538).

[62] *Alderferer*, 2012 U.S. Dist. LEXIS 54650, at *18 (quoting *Orloff v. Syndicated Office Sys., Inc.*, Civ A. No. 00-5355, 2004 U.S. Dist. LEXIS 7151, at *7 (E.D. Pa. Apr. 22, 2004)).

[63] *See Fleisher*, 2014 U.S. Dist. LEXIS 29151, at *38 ("Moreover there is no indication that the settlement amount has been reached inappropriately, or should otherwise be considered suspect; both parties have demonstrated willingness and ability to litigate this action, have engaged in mediation with the assistance of the Court."); *see also Esslinger*, 2012 U.S. Dist. LEXIS 165773, at *27-28 (approving settlement and finding that settlement was the result of arms' length negotiations where the parties participated in mediation led by Jonathan B. Marks).

[64] *See Prudential*, 148 F.3d at 322.

[65] *Cullen*, 197 F.R.D. at 144; *Linerboard II*, 321 F. Supp. 2d at 632; *see also Fisher Bros.*, 604 F. Supp. at 451 (settlement must fall within a "'range of reasonableness,'" it need not be the most favorable possible result).

[66] *Esslinge*r, 2012 U.S. Dist. LEXIS 165773, at *33-34 ("Although Plaintiffs do not set forth an exact estimation of the damages they would likely recover if successful . . . Plaintiffs discuss the obstacles that must be surmounted before any damages may be awarded."); *see also Imprelis*, 296 F.R.D. at 369 ("Even estimating the best possible recovery is difficult in this case . . . the Court accepts that the Settlement here is reasonable, in view of the long, winding and contentious road Plaintiffs would have to travel to recover damages at trial.").

the proposed settlement was adequate and reasonable.[67] Another court in this district found that a $17.25 million dollar settlement involving most of the same class members here conferred "an immediate benefit on the Class . . . which benefit is substantial in light of the risks of establishing liability and damages in this case[.]"[68] Further, estimates of damages here ranged from $23 million to $1 billion depending on the timing and number of generic entrants, sales volume, and pricing assumptions. When these damages estimates are discounted by the risks of continued litigation, "[t]he value of the [S]ettlement to each class member represents a reasonable discount from the best possible judgment if they were to prevail after trial."[69] Furthermore, $15 million is the amount recommended by the Mediator after receiving submissions and hearing presentations by both parties. Accordingly, the Settlement is reasonable when considered in light of the possible range of recovery and recent antitrust pharmaceutical settlements involving most of the same class members. This factor also overwhelmingly supports final approval.

4. Evaluation of the settlement under the relevant *Prudential* factors.

a. Factors that bear on the maturity of the underlying substantive issues.

This case was settled after fact discovery, complete briefing on class certification, the denial of motions to dismiss, completed fact discovery, the submission of opening and responsive merits expert reports, a full day of mediation guided by an experienced mediator, and

[67] *See In re DDAVP Direct Purchaser Antitrust Litig*., C.A. No. 05-2237 (S.D.N.Y. Nov. 2, 2011), Tr. 12-13.

[68] *Rochester Drug Co-Operative, Inc. v. Braintree Labs*., No. 07-142, ECF No. 24, at 7 (D. Del. May 31, 2012). *See also In re Metoprolol Succinate Antitrust Litig.* No. 06-52, ECF No. 240-3 (D. Del. Apr. 27, 2012) (finding that $20 million settlement involving most of same class members here was "well within the range of reasonableness in light of the best possible recovery and the risk the parties would have faced if the case had continued to verdicts as to both liability and damages").

[69] *CertainTeed*, 2014 U.S. Dist. LEXIS 36532, at *56 (quoting *In re Am. Bus. Fin. Servs., Inc. Noteholders Litig.*, No. 05-232, 2008 U.S. Dist. LEXIS 95437, at *26 (E.D. Pa. Nov. 21, 2008)).

hard-fought settlement negotiations. That the underlying substantive issues were well-developed further supports approval of this Settlement.[70]

b. Results achieved by settlement for individual class members versus the results achieved – or likely to be achieved – for other claimants.

This factor also supports approval of the Settlement. There are no Class members who have filed a separate lawsuit against Defendants.[71] The Settlement, therefore, obtains the best, and only, result for the Class.

c. Whether class or subclass members are accorded the right to opt-out of the settlement.

The Class Notice that each member of the Class received explained how to opt-out of the Class and provided the deadline for doing so.[72] No Class member requested exclusion from the Class by the April 3, 2014 deadline (or thereafter, as of the date of this motion). Thus, this factor also supports final approval.[73]

d. Whether any provisions for attorneys' fees are reasonable.

Plaintiffs' application for an award of attorney fees and reimbursement of expenses is reasonable.[74]

First, from the beginning, Class Counsel pursued this action vigorously, committing their services and resources, applying their highly specialized expertise in the field of pharmaceutical antitrust litigation, and advancing substantial funds to prosecute the case. To date, these

[70] *See Chakejian*, 275 F.R.D. at 215 (where underlying substantive issues were "mature in light of the experience of the attorneys, extent of discovery, posture of the case, and mediation efforts undertaken," settlement was reasonable).

[71] Some class members have assigned a portion of their claims to the Retailer Plaintiffs, but whatever recovery is obtained by the Retailer Plaintiffs belongs to them as assignee.

[72] *See* Motion for Preliminary Approval, Ex. C, § 11, ECF No. 452-4.

[73] *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 259 n.17.

[74] A detailed discussion about the reasonableness of Plaintiffs' request for attorneys' fees is set forth in the Motion for Fees and Expenses filed on March 19, 2014, and refiled today.

attorneys have neither been paid for their efforts nor reimbursed for their out-of-pocket expenses. Instead, their compensation has been contingent upon obtaining a recovery on behalf of the Class.

Second, in more than a dozen analogous direct purchaser class actions involving similar allegations of impaired generic competition brought on behalf of virtually identical classes of sophisticated institutional drug purchasers, courts have awarded class counsel fees of one third of the Settlement. (*See* Table of prior cases set forth in Motion for Fees and Expenses at 15).

Third, an attorneys' fee equaling one-third of the settlement amount is particularly appropriate here where the multiplier on class counsel's lodestar amount falls well below the range traditionally approved by courts because the requested fee is less than lodestar, i.e., there is a negative multiplier of 44 percent.

Fourth, prior to the deadline for Class members to object to the Settlement, Class members were notified expressly that "Plaintiffs' Counsel will apply to the Court for an award of attorneys' fees (of up to one-third of the Settlement Fund) and expenses,"[75] and have been directed to the Settlement website, where Plaintiffs' fee submission is posted, and no Class member has objected.

e. Whether the procedure for processing individual claims under the settlement is fair and reasonable.[76]

This factor is discussed more in Section D below. The proposed plan of distribution, submitted with Plaintiffs' Preliminary Approval Motion dated January 10, 2014 (ECF No. 452-3, at Ex. B) (the "Plan"), proposes to allocate the Net Settlement Fund to Class members based on the type and extent of their injuries and is similar to plans that have previously been approved by

[75] Class Notice, Coggeshall Dec., Ex. 1, § 7.

[76] Plaintiffs' Motion for Preliminary Approval also explains why the proposed plan of distribution is fair, reasonable, and adequate. Motion for Preliminary Approval at 23.

courts in analogous cases and implemented with a high degree of success and efficiency. If the Court grants final approval of the Settlement, the proposed Doryx Direct Purchaser Proof of Claim and Release attached as Exhibit D to the Motion for Preliminary Approval ("Claim Form")[77] will be mailed to the Class as well as placed on the Settlement website. The Claim Form implements the procedures of the Plan.

As explained in more detail below, the Court has authorized Rust, which is experienced in administering class action settlements, to receive and process Class members' claims, with the supervision of Class Counsel. Class members will be provided with information reflecting their qualifying purchases, as reflected in Warner Chilcott's sales records, and will be advised of their proposed *pro rata* share. Class members will then be given an opportunity to evaluate the information and proposed *pro rata* share based on their own data. A deadline for Class member claim submissions will be set, and after all timely inquiries have been addressed and adjustments made, if any, payments will be distributed to Class members from the Net Settlement Fund.[78] The distributions will be made on a *pro rata* basis, according to class members' purchases of Doryx during the class period. This proposed plan of distribution does not grant preferential treatment to any Class member and is thus fair and reasonable. In further support of this point, Plaintiffs incorporate the discussions of the Class Notice discussed above and plan of distribution and Claim Form discussed below.

Accordingly, under both the *Girsh* and *Prudential* factors, the Settlement is fair, reasonable, and adequate.

[77] ECF No. 452-5.

[78] The "Net Settlement Fund" is the amount remaining after attorneys' fees, reimbursement of litigation expenses, class representative incentive awards, and settlement administration costs approved by the Court are deducted. Class Notice, Coggeshall Dec., Ex. 1, § 7.

D. The Court Should Approve the Plan of Distribution and Proposed Claim Form.

"Approval of a plan of allocation 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."[79] Generally, a distribution plan is reasonable if it reimburses class members based on the type and extent of their injuries.[80] The proposed Plan of Distribution submitted with the Plaintiffs' Motion for Preliminary Approval ("Plan"), meets this standard.[81] It is similar to plans that have previously been approved by courts in analogous cases and implemented with a high degree of success and efficiency.

The proposed Claim Form is attached as Exhibit D to Plaintiffs' Motion for Preliminary Approval.[82] The Claim Form implements the Plan. If the Court gives final approval to the Settlement, Rust will mail a copy of the Claim Form to each Class member by first class United States mail. Part 2A of the Claim Form will include Rust's estimate of the Class members' purchases of Doryx during the Class Period, based on data produced by Defendants in the litigation and provided to Rust by Class Counsel. Part 2A of the Claim Form will also include Rust's estimate of the Class member's *pro rata* share of the net settlement fund. The estimate of each class member's purchases, as well as their *pro rata* share of the Net Settlement Fund, will be calculated by Rust in conjunction with Plaintiffs' economic expert. Co-Lead Decl. ¶ 23.

If the Class member agrees with Rust's calculation of their purchases of Doryx and their *pro rata* share of the Net Settlement Fund, the Class member need only accept the calculation, sign the Claim Form to verify their acceptance of the terms of the release of claims, and return it to Rust.

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[79] *Ikon Office Solutions*, 194 F.R.D. at 184 (internal quotation marks omitted).

[80] *Id*. (citation omitted).

[81] ECF No. 452-3, at Ex. B.

[82] ECF No. 452-5, at Ex. D.

If the Class member disagrees with Rust's calculations, Part 2C of the Claim Form provides instructions for providing Rust with data concerning the Class members' Doryx purchases during the Class Period. Rust, in conjunction with Plaintiffs' economic experts, will review any data provided and, if warranted, make adjustments to each Class member's *pro rata* share of the Net Settlement Fund. *Id.* ¶ 25.

Plaintiffs propose to pay 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. As the Plan sets forth, Plaintiffs propose the following schedule to govern the allocation process:

- 15 days after entry of order finally approving the Settlement: mail the Claim Form to all Class members;[83]
- 45 days after entry of order finally approving the Settlement: deadline for claimants to submit executed Claim Forms to Rust; and[84]
- 90 days after entry of order finally approving the Settlement: Co-Lead Counsel shall submit to the Court a motion for distribution of the Net Settlement Fund, supported by a declaration by Rust.

Rust sent the Class Notice to the Class advising them that the Net Settlement Fund will be divided among class members on a *pro rata* basis and the method of allocation proposed. Again, in response to the Class Notice, no Class member has objected.

Plaintiffs respectfully submit that the Plan and Claim Form are fair, reasonable, and adequate and should be approved. This proposal has the benefit of accuracy, efficiency, and simplicity. Similar proposals and claim forms have been approved for use in administration of a

[83] Each Class member's Claim Form will include estimates of qualifying purchases during the Class Period based on Warner Chilcott's sales data.

[84] Claimants will be required to either accept Rust's estimate or provide individual purchase data supporting an alternative estimate.

number of settlements in cases involving pharmaceutical antitrust claims that the undersigned Co-Lead Counsel has prosecuted.

E. The Notice Requirements of the Class Action Fairness Act Have Been Satisfied.

The Class Action Fairness Act, 28 U.S.C. § 1715 *et seq.* ("CAFA"), requires Defendants to notify appropriate state and federal officials of the proposed Settlement and to allow 90 days to pass before final approval of the proposed Settlement may be entered.[85] Defendants notified the United States Department of Justice and the attorneys general of the 50 states and the District of Columbia of the proposed settlement on January 21, 2014. Co-Lead Decl. ¶ 21, Exhibit B. More than 90 days has passed since the CAFA notice date.

IV. CONCLUSION

For the reasons detailed above, and in other supporting documents, Plaintiffs, on behalf of the Class, and Class Counsel, respectfully request that the Court enter the proposed order and final judgment (attached as Exhibit 2 hereto), which, *inter alia*, grants final approval to the Settlement pursuant to Fed. R. Civ. P. 23(e) and approves the above-described Plan and Claim Form.

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[85] 28 U.S.C. § 1715(d).

Dated: April 24, 2014

Respectfully submitted,

/s/ Peter Kohn

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Co-Lead Counsel for the 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
Neill W. Clark

Dated: April 24, 2014