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 CLASS PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES[1]

Direct purchaser plaintiffs Rochester Drug Co-Operative, Inc. ("RDC"), American Sales Company, Inc. ("American Sales"); Meijer, Inc., and Meijer Distribution, Inc. ("Meijer") (collectively, "plaintiffs") respectfully move for an order:

- awarding attorneys' fees to class counsel of one-third of the settlement fund of $15 million, plus accrued interest thereon;
- reimbursing class counsel for the costs and expenses incurred through November 13, 2014[2] in the amount of $1,111, 284.11; and

[1] Pursuant to the Court's February 18, 2009 Order (ECF No. 484), the Direct Purchaser Class Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards to Class Representatives was filed on March 19, 2014 (ECF No. 452) ("Motion for Fees and Expenses"). On March 26, 2014 the Court denied without prejudice the Motion for Fees and Expenses and instructed Plaintiffs to refile it before the final fairness hearing. Order, Mar. 26, 2014, ECF. No. 566.

[2] Each firm that is seeking reimbursement of its time and expenses is only including time and expense incurred from inception through November 13, 2013, the date the parties accepted the mediator's settlement proposal and a "pens down" provision. However, Co-Lead Class Counsel is seeking reimbursement of some expenses paid from the litigation fund that were incurred after November 13, 2013 and were reasonable and necessary to the administration of the settlement such as the costs of notice and claims administration by the court-appointed claims administrator

- approving incentive awards of $50,000 to each of the Class Representatives.

In support of this motion, plaintiffs submit herewith a memorandum of law and a declaration of Co-Lead Class Counsel, Peter Kohn. A proposed order granting this motion is incorporated into and submitted with Direct Purchaser Plaintiffs' Unopposed Motion for Final Approval of Settlement filed concurrently with this motion.

Dated: April 24, 2014

Respectfully submitted,

/s/ Peter Kohn

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Co-Lead Counsel for the Direct Purchaser Class

Rust Consulting, Inc., economic expert fees incurred in administering the settlement and the document hosting/ management fees incurred in hosting the document production of defendants and third parties in this case.

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

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**

MEMORANDUM IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES

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I. INTRODUCTION[1]

Co-Lead Counsel for the Class of Direct Purchasers ("Co-Lead Counsel")[2] submit this memorandum to support their request for an order (i) awarding attorneys' fees in the amount of one-third of the settlement fund of $15 million (plus accrued interest), (ii) reimbursing Class Counsel for litigation expenses in the amount of $1,111,284.11 incurred through November 13, 2013,[3] and (iii) approving incentive awards to each of the three class representatives in the amount of $50,000.[4]

From the beginning, Class Counsel pursued this action vigorously, committing their services, applying their highly specialized expertise in the field of pharmaceutical antitrust litigation, and advancing substantial funds to prosecute this case. To date, Class Counsel have neither been paid for their efforts nor reimbursed for their payment of litigation expenses. Instead, their compensation and expense reimbursements have been contingent on obtaining a recovery on behalf of the Class. Class Counsel have now achieved a positive cash settlement of

[1] Pursuant to the Court's February 18, 2009 Order (ECF No. 484), the Direct Purchaser Class Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards to Class Representatives was filed on March 19, 2014 (ECF No. 452) ("Motion for Fees and Expenses"). On March 26, 2014 the Court denied without prejudice the Motion for Fees and Expenses and instructed Plaintiffs to refile it before the final fairness hearing. Order, Mar. 26, 2014, ECF. No. 566.

[2] Co-Lead Counsel for the Class are Berger & Montague, P.C., Faruqi & Faruqi, LLP, Grant & Eisenhofer, P.A., and Hagens Berman Sobol Shapiro LLP. Order, February 18, 2014 (ECF No. 484), at 6. The following non-lead firms also contributed to the prosecution of this case and are seeking attorneys' fees and reimbursement of expenses: Cafferty Clobes Meriwether & Sprengel LLP, Hilliard & Shadowen LLP, Radice Law Firm, P.C., Spector Roseman Kodroff & Willis, P.C., Taus, Cebulash & Landau, LLP, and Vanek, Vickers & Masini, P.C. These firms and Co-Lead Counsel are collectively "Class Counsel." *See* Declaration of Co-Lead Counsel Peter Kohn In Support of Direct Purchaser Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Incentive Awards to the Class Representatives ("Co-Lead Decl."), at 1.

[3] On this date Plaintiffs and Defendants agreed to the mediator's settlement proposal and stopped prosecuting the case except for settlement purposes. The only expenses incurred after this date for which Class Counsel currently seek reimbursement are for settlement administration and some additional document hosting expenses. Should the Court grant final approval of the Settlement, Class Counsel will then seek reimbursement of additional settlement administration expenses incurred after the date of this motion when they file their motion for distribution of the Settlement Fund.

[4] The class representatives are Rochester Drug Co-Operative, Inc. ("RDC"), American Sales Company, LLC ("American Sales"), Meijer, Inc. and Meijer Distribution, Inc. ("Meijer") (collectively "Class Representatives" or "Plaintiffs").

$15 million in exchange for release of Plaintiffs' and the Class's claims (the "Settlement" or "Settlement Fund") that will provide immediate, meaningful, and certain benefit to the Class.

Class Counsel's request for a one-third fee is appropriate. In more than a dozen analogous direct purchaser class actions involving similar allegations of suppressed generic competition brought on behalf of virtually identical classes of sophisticated institutional drug purchasers, including from district courts in the Third Circuit, courts have awarded class counsel fees of one-third of the settlement.[5] *See* table of cases at 15, *infra*. The request is particularly appropriate here in that the requested fee is less than Class Counsel's lodestar.

Class Counsel's request for reimbursement of expenses is similarly appropriate. All expenses were necessarily incurred in the prosecution of the case, and minimized through cost-sharing agreements with other plaintiff groups.

Finally, the requested incentive awards of $50,000 for each Class Representative are appropriate. Class Representatives took the risk of filing complaints against prescription drug suppliers, and each participated throughout the litigation by producing documents and discovery, submitting to depositions, providing information to prosecute the case, and overseeing Class Counsel. These amounts are in line with awards in prior cases with similar settlement amounts.[6]

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[5] *E.g.*, *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. 2013) (Brody, J.) ("*Flonase*"); *In re Wellbutrin XL Antitrust Litig.*, No. 2:08-cv-2431 (ECF No. 485) (E.D. Pa. Nov. 7, 2012) (McLaughlin, J.) ("*Wellbutrin XL*"); *In re Wellbutrin SR Antitrust Litig.*, C.A. No. 04-5525 (ECF No. 413) (E.D. Pa. Nov. 21 2011) (Stengel, J.) ("*Wellbutrin SR*"); *Rochester Drug Co-Operative, Inc. v. Braintree Laboratories, Inc.*, C.A. No. 07-142-SLR (ECF No. 243) (D. Del. May 31, 2012) (Robinson, J.) ("*Miralax*"); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52-MPT (ECF No. 193) (D. Del. Feb. 21, 2012) (Thynge, J.) ("*Toprol*"); *In re Tricor Direct Purchaser Antitrust Litig.*, C.A. No. 05-340-SLR (ECF No. 543) (D. Del. April 23, 2009) (Robinson, J.) ("*Tricor*").

[6] *E.g.*, *Flonase*, 951 F. Supp. 2d 739 ($50,000 to one class representative and $40,000 to other class representative); *Wellbutrin XL*, No. 2:08-cv-2431 (ECF No. 485) ($50,000 to class representative); *Wellbutrin SR*, C.A. No. 04-5525 (ECF No. 413) ($25,000 to each of two class representatives); *Miralax*, No. 07-142-SLR (ECF No. 243) ($60,000 to each of the three class representatives); *Toprol*, No. 06-52-MPT (ECF No. 193) ($50,000 to each of the three class representatives); *Tricor*, C.A. No. 05-340-SLR (ECF No. 543) ($50,000 to each of the three class representatives).

II. BACKGROUND

This is an antitrust class action brought on behalf of direct purchasers of Doryx, a delayed-release doxycycline hyclate prescription drug used to treat moderate to severe acne.

A. Direct Purchasers' Claims

Plaintiffs allege 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. As a result of the alleged anticompetitive conduct, it is 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 by depriving them of the benefits of unimpaired competition and access to less expensive generic Doryx.

B. Procedural Background

The Court is familiar with the progress of this action from its supervision of the case and review of the parties' monthly status reports.

Following pre-complaint investigation and the commencement of an antitrust action by generic manufacturer Mylan Pharmaceuticals, Inc., Plaintiffs filed complaints against Defendants beginning July 18, 2012.[7] The Court consolidated the Plaintiffs' complaints with Mylan's on July 24, 2012, amended the case caption on July 25, 2012, and entered a Stipulated Order on July 26, 2012 ordering Defendants to answer, plead, or otherwise move with respect to Mylan and the Plaintiffs' complaints.[8]

[7] Mylan Pharmaceuticals, Inc. ("Mylan") filed its complaint against Defendants on July 6, 2012.

[8] Order, July 24, 2012 (ECF No. 4); Order, July 26, 2012 (ECF No. 12); Order, July 25, 2012 (ECF No. 6-1); [Proposed] Case Management Order, Aug. 24, 2012 (ECF No. 71).

Fact Discovery: Discovery was extensive, including production of millions of documents by Plaintiffs, Defendants, and Mylan. There was also substantial third party document production by 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.

Document discovery began in fall 2012. Class Counsel reviewed and selected documents for use in motions to dismiss and class certification briefing, depositions, and expert reports. Class Counsel spent thousands of hours analyzing the documents. Defendants also pressed Plaintiffs for production, requiring extensive searches and production of Plaintiffs' documents and data.

Plaintiffs began depositions in March 2013 and, as required by the Court's orders, concluded the depositions of Defendants' witnesses by the June 19, 2013 deadline (ECF No. 71 at 3-4).[9] Class Counsel, collaborating with other plaintiffs, was the primary questioner in over half of the Warner Chilcott depositions and three-quarters of the Mayne depositions. Class Counsel also defended Class Representative depositions, and prepared for and appeared at virtually every other deposition, *i.e.,* retailers, absent class members/assignors, Mylan personnel, other generic manufacturers, PBMs, and TPPs. Class Counsel also took or defended the depositions of experts on class certification.[10]

Class Certification: Class certification also was hard-fought. Plaintiffs filed class certification papers on April 1, 2014 (ECF Nos. 153-154). Defendants filed their opposition on

[9] The Parties sought, and were granted, an extension with respect to taking certain third party depositions after this deadline. *See* Order, June 26, 2013 (ECF No. 326). The parties also sought and were granted extensions for the submission of expert reports and completion of expert discovery. *See* Amended Case Management Order, July 16, 2013 (ECF No. 378); Amended Case Management Order, Oct. 28, 2013 (ECF No. 431).

[10] The remainder of Defendants' merits expert depositions had not yet been scheduled as of the date that the parties agreed to the Mediator's Proposal and put pens down.

May 16, 2013 along with a motion to exclude the testimony of Jeffrey Leitzinger, Ph.D. (ECF Nos. 233, 235, 247, 249 & 250). Defendants' voluminous filing included 117 exhibits and three reports from experts in economics, dermatology, and pharmaceutical manufacturing and supply.[11] After taking the depositions of Defendants' experts and preparing for and defending the deposition of Dr. Leitzinger, on July 16, 2013, Plaintiffs filed their reply papers, including a memorandum,[12] an opposition to Defendants' motion to exclude Dr. Leitzinger,[13] and a Rebuttal Declaration of Dr. Leitzinger.[14] Plaintiffs' reply included an 87 page memorandum of law and three volumes of exhibits.[15]

Following briefing on class certification, the Court ordered the parties to produce "[m]arket capitalization, annual profit, annual revenue, and number of employees for each of the 23 members of the proposed Direct Purchaser class . . . [and] direct purchases of Doryx by month for the proposed class period and the percentage of all direct purchases of Doryx made by each class member during the proposed class period."[16] Plaintiffs filed a notice of compliance with that Order on August 20, 2013.[17]

At the time the parties entered into mediation, the class certification motion was pending.

[11] ECF Nos. 247, 247-117, 237-238, 241, 253-254. Plaintiffs also filed a motion to file a Sur-Reply in opposition to Defendants' motion to strike the Declaration of Jeffrey Leitzinger (ECF No. 350), in addition to filing a motion to strike certain portions of Defendants' Memorandum of Law in support of their motion to strike Jeffrey Leitzinger's declaration. (ECF No. 367).

[12] ECF Nos. 336-339.

[13] ECF Nos. 335 & 382.

[14] ECF Nos. 379 & 383.

[15] ECF Nos. 336-339.

[16] ECF No. 404.

[17] ECF No. 408.

On February 18, 2014, the Court certified the Class for purposes of settlement.[18]

Experts: Along with Dr. Leitzinger, Plaintiffs retained six additional experts who collectively served 10 reports on antitrust injury and damages, pharmacoeconomics, pharmaceutics, FDA regulations and drug manufacturing, dermatology, and gastroenterology.[19] In addition to the three reports Defendants had previously served, Defendants served an additional 19 merits reports. At the time the parties agreed to the mediator's settlement proposal, Plaintiffs had already taken depositions of two of Defendants' merits experts, were preparing for depositions of Defendants' other experts, and were working with Plaintiffs' own experts to prepare rebuttal reports.

Settlement Negotiations: The settlement negotiations unfolded in phases. Early discussions were unproductive, but in October 2013, the parties agreed to private mediation with nationally recognized mediator Jonathan Marks (the "Mediator"). Following submission of materials to the Mediator, the parties participated in a day-long face-to-face mediation. On November 8, 2013, the Mediator submitted a settlement recommendation to each side of $15 million. Following consultation with their clients and deliberation among Class Counsel, on November 13, 2013, Co-Lead Counsel notified the Mediator that they accepted the Mediator's settlement proposal. The parties' continued negotiations over other terms, and executed the Settlement Agreement on December 24, 2013.

[18] Order, Feb. 18, 2014 (ECF No. 484), at 3.

[19] In connection with Plaintiffs' motion for class certification, Dr. Leitzinger filed an opening expert report on April 1, 2013 and a rebuttal report on July 16, 2013. (ECF Nos. 154 & 379). His merits expert report was served on August 9, 2013. Aaron S. Kesselheim M.D., J.D., M.P.H., plaintiffs' pharmacoeconomics expert, submitted reports on August 9, 2013 and October 18, 2013. Plaintiffs' five other experts submitted their reports on August 9, 2013.

III. ARGUMENT

The United States Supreme Court has "recognized consistently that a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."[20] A Court determining the reasonableness of an attorney's fee is guided by the factors set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) – the length and complexity of the case, the benefit conferred on the class, the skill and efficiency of counsel, the risk of non-recovery, the amount of time devoted to the litigation, the fees paid in comparable cases, and the presence or absence of substantial objections by class members to the settlement terms and/or fees requested. The Third Circuit urges district courts to perform a lodestar cross-check to ensure that application of the percentage method results in a "sensible" recovery.[21]

Under these standards, Class Counsel's request for a fee of one-third of the $15 million settlement fund for this complex and demanding matter is reasonable. Class Counsel spent over 20,860 hours through November 2013 on the case. If awarded, the requested fee would amount to a negative multiplier of 44 percent of the total loadstar.

Class Counsel's request for reimbursement of expenses, totaling $1,111,284.11, is also reasonable. These costs were incurred by counsel for the benefit of the class, and are reasonable for a complex, deposition- and expert-intensive case such as this. Class Counsel achieved efficiencies on behalf of the class by sharing expert and other expenses with other plaintiffs.

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[20] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also Boone v. City of Phila.*, 668 F. Supp. 2d 693, 713 (E.D. Pa. 2009) (citing *Boeing Co.*, 444 U.S. at 478); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members.").

[21] *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305-06 (3d Cir. 2005).

Class Counsel's request for incentive awards of $50,000 for each Class Representative is also reasonable given the demands of this case and consistent with similar cases.

A. Class Counsel Have Created a Common Fund and the Percentage-Of-Recovery Approach Should Be Used to Compensate Class Counsel.

The Third Circuit favors the percentage-of-recovery method of calculating fee awards in common fund cases. The common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."[22] Unlike in cases in which fees are assessed under a statute, fees in common fund cases "are not assessed against the unsuccessful litigant (fee shifting), but rather are taken from the fund or damage recovery (fee spreading), thereby avoiding the unjust enrichment of those who otherwise would be benefited by the fund without sharing in the expenses incurred by the successful litigant."[23] This allows courts to reward litigation success and penalize failure.[24] Courts in the Third Circuit and elsewhere routinely employ the percentage-of-the-fund method in pharmaceutical antitrust class actions.[25]

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[22] *Boeing Co*., 444 U.S. at 478.

[23] *Fickinger v. C.I. Planning Corp*., 646 F. Supp. 622, 632 (E.D. Pa. 1986).

[24] *See In re OSB Antitrust Litig.*, No. 06-826, (E.D. Pa. 2006) (ECF No. 947 at 3-4) (internal quotations and citations omitted) ("The percentage-of-recovery method is generally preferred in common fund class actions, however, because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure."); *see also In re Rite Aid Corp. Sec. Litig*., 396 F.3d at 300 (distinguishing the alternative lodestar method of determining attorneys' fees, which is more commonly applied in statutory fee-shifting cases)).

[25] *See, e.g.*, *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 746 (E.D. Pa. 2013) ("The latter method [i.e., percentage-of-recovery], is 'generally favored in cases involving a common fund . . . .'") (quoting *In re Rite Aid Corp. Sec. Litig*, 396 F.3d at 300); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 U.S. Dist. LEXIS 27013, at *32 (D.N.J. Nov. 9, 2005) ("*Remeron*") ("the percentage of fund method is the proper method for compensating Plaintiffs' Counsel in this common fund case"); *see also* table of cases at 14-15 *infra* (identifying 16 direct purchaser antitrust pharmaceutical cases in which courts have awarded attorneys' fees based on percentage-of-the-fund method).

B. The Fee Requested by Class Counsel is Fair and Reasonable.

Courts in the Third Circuit historically consider the following seven factors when evaluating the reasonableness of a fee request under the percentage-of-recovery method:

> (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.[26]

More recently, the Third Circuit has suggested additional factors for consideration:

> (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement.[27]

Both the *Gunter* and *Prudential* factors support the fee requested.

1. Application of the *Gunter* factors

a. The complexity and duration of the litigation

Complexity and duration of the litigation is "the first factor that a district court can and should consider in awarding fees."[28] An "antitrust class action [is] perhaps the most complex case[] to litigate."[29] This is particularly so in a "product hopping" case such as this one, where

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[26] *Gunter*, 223 F.3d at 195 n.1. Even if one factor disfavors a requested fee award, other factors often outweigh an outlier. *See, e.g.*, *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *21-22 (E.D. Pa. Aug. 14, 2006) (although time devoted to litigation was relatively low when case settled after one year, other *Gunther* considerations outweighed that fact).

[27] *In re Prudential Ins. Co. of American Sales Practices Litig.*, 148 F.3d 283, 340 (3d Cir. 1998) (*Prudential*); *see also In re AT&T Corp.*, 455 F.3d 160, 165-66 (3d Cir. 2006) ("In reviewing an attorneys' fees award in a class action settlement, a district court should consider the *Gunter* factors, the *Prudential* factors, and any other factors that are useful and relevant") (citations omitted).

[28] *Gunter*, 223 F.3d at 197.

[29] *Bradburn Parent Teacher Store v. 3M*, 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007) ("*Bradburn*"); *see also In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003).

the case law is not well-developed and dependent on a fact-intensive inquiry.[30] Thus, assessing whether the anticompetitive harm from the formulation changes outweighed the benefits presented by Defendants required Class Counsel to master complex legal and scientific matters. Among other things, Class Counsel:

- Investigated the Class's claims of antitrust violation and injury;
- 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[31] and providing the Court with additional class member data;[32]
- 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;

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

[31] *See* Letter Brief Regarding Discovery, May 02, 2013, ECF No. 186; Opp'n to Letter Brief, 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, April 30, 2013, ECF No. 184.

[32] Order, August 16, 2013, ECF No. 404.

- Conducted or appeared at dozens of depositions of current and former employees of Defendants, other plaintiffs, and third parties;
- Oversaw the preparation of 10 expert reports;[33]
- Conducted depositions of 5 Defendants' experts;[34]
- 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.

Co-Lead Decl. ¶¶ 11-12. Without the prospect of further compensation, Class Counsel will continue to devote time to settlement approval (preparation for the final approval hearing and responding to class member inquiries) and administration. *Id*. at ¶ 13. Due to the compressed nature of the schedule and Class Counsel's extensive efforts, this case resolved within 17 months of being filed, half of the time for an average antitrust case.[35] Class Counsel's efficient and effective litigation of this complex case establishes that this factor is met.[36]

[33] Plaintiffs' economic expert Jeffrey Leitzinger, Ph.D. submitted three expert reports, two related to class certification and one opening merits report; Plaintiffs' pharmaceutical economic 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.

[34] Class Counsel worked with 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.

[35] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 Journal of Empirical Legal Studies 811, 820 (Dec. 2010) (finding that the average time for an antitrust case to resolve is 3.1 years).

[36] *Tricor,* No. 05-340-SLR, ECF No. 543, at 9-10 (D. Del. Apr. 23, 2009) (awarding one-third fee where class counsel "effectively and efficiently prosecuted this difficult and complex action on behalf of members of the Class for over three and one-half years"); *In re Am. Investors Life Ins. Co. Marketing and Sales Practices Litig.*, 263 F.R.D. 226, 243 (E.D. Pa. 2009) (fee request supported where case involved complex RICO allegations, and class counsel had conducted extensive discovery, retained experts, and filed and defended several complex motions).

b. The skill and efficiency of counsel

Class Counsel includes some of the preeminent plaintiffs' firms in the country, with decades of experience prosecuting and trying complex pharmaceutical antitrust actions.[37] They applied their knowledge and experience in this specific area to obtain a positive result for the class. Along with Class Counsel's particular experience, the high "quality of opposing counsel" further supports the fee request.[38] Moreover, Class Counsel worked closely with the other plaintiff groups to avoid duplication of effort and reduce expenses.

c. The risk of non-payment

"A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust action[], including the uncertain nature of the fee, the wholly contingent outlay of large out of pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high."[39] The risk of non-payment in this matter was considerable.[40] At the time Plaintiffs filed their complaints, only two courts had ruled in a direct purchaser pharmaceutical product hopping case, one with a favorable outcome,

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[37] The background, experience, and qualifications, including firm resumes of Class Counsel, are included in the Co-Counsel Decl. at Exhibits A-J.

[38] *Am. Investors*, 263 F.R.D. at 244 (where class counsel were skilled in litigating class actions against insurance companies, defendants were represented by a leading law firm, and the case was vigorously litigated by both sides, class counsel's fee request was supported); *In re Corel Corp. Inc. Sec. Litig*. 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003) (where counsel primarily practiced in the field of shareholder securities litigation, had considerable experience, and faced formidable legal opposition, this supported awarding the requested fees).

[39] *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *39.

[40] The history of antitrust litigation is replete with cases in which plaintiffs succeeded at trial on liability but recovered no, or very small, damages at trial or after appeal. *See, e.g.*, *U.S. Football League v. Nat'l Football League,* 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 116-67 (7th Cir. 1983) (antitrust judgment remanded for new trial and damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (after two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the proposed class recovered nothing in an antitrust class case).

and the other failing to survive a motion to dismiss.[41] Indeed, the Court characterized plaintiffs' theory as "novel" and Defendants' arguments as "compelling," expressed skepticism that the "product hopping alleged here constitutes anticompetitive conduct," and invited Defendants to renew their arguments in support of their motion to dismiss at summary judgment.[42] Even if Plaintiffs had brought their case to trial and succeeded, they still would have faced certain and lengthy appeals. As Judge Pratter recently observed, attorneys who undertake the representation of a class are "unable to mitigate any of the risk of nonpayment; instead, they [a]re required to spend or incur obligations to effectively litigate th[e] case."[43] And, as Judge Stengel explained in awarding a one-third fee in *Wellbutrin SR*:

> Class Counsel faced numerous risks in preparing and litigating this case, including the risks associated with the motion to dismiss, class certification, summary judgment, and – had the case continued – ultimately proving liability and damages at trial and potentially surviving any appeals. Underlying all of these risks was the enormous one of handling this case for its entire duration on a contingent basis, doing everything necessary to honor Class Counsel's commitment and obligations to the class. . . . The substantial risk of nonpayment that Class Counsel faced throughout this litigation strongly supports their fee request.[44]

And so it is here. Having now recovered a positive settlement for the Class considering the multiple and significant risks faced, Class Counsel should be compensated for their efforts.

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[41] *Tricor*, ECF No. 543, at 9-10 (D. Del. Apr. 23, 2009) (awarding 33 1/3 % fee after parties litigated for three and half years and trial had begun); *Walgreen v. AstraZeneca*, 534 F. Supp. 2d 146 (D.D.C. 2008) (granting motion to dismiss).

[42] 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.

[43] *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 423 (E.D. Pa. 2010).

[44] *Wellbutrin SR Antitrust Litig.*, at 11-12 (citations omitted).

d. The amount of time devoted to the litigation

Class Counsel expended over 20,860 hours preparing, litigating, and negotiating the settlement of this case.[45] Class Counsel's commitment continues without the prospect of being further compensated because their lodestar calculation does not include any time after the parties agreed to the Mediator's proposal. As a result, the lodestar calculation does not include time related to: (i) negotiations over the December 24, 2013 Settlement Agreement that occurred after November 13, 2013, (ii) preparing and filing the settlement and attorneys' fees and expenses papers, (iii) preparing for and participating in preliminary and final approval hearings, and (iv) handling any claims administration and distribution of the Settlement Fund. That Class Counsel's fee request covers not only work that has been done to date but also any future work supports the reasonableness of Plaintiffs' fee request.[46]

e. The size of the fund and the number of people that benefit

The settlement provides the entire class of Doryx direct purchasers with immediate and certain payment of $15 million, plus accrued interest, less attorneys' fees, expenses, administration costs, and incentive awards to the three Class Representatives, as may be awarded by the Court ("Net Settlement Fund"). Members of the Class will receive their *pro rata* share of the Net Settlement Fund based on their purchases of Doryx during the Class Period.

[45] The time that Class Counsel devoted to this litigation also supports approval of their fee request. *See*, *e.g.*, *Boone*, 668 F. Supp. 2d at 714 (where class counsel spent roughly 2,858 hours of contingent work on the litigation, this justified their fee request); *Bradburn*, 513 F. Supp. 2d at 339 (where class counsel spent more than four years, including more than 9,000 attorney hours and roughly 2,000 paralegal hours, on the case, weighed in favor of awarding the requested fees).

[46] *See Remeron*, 2005 U.S. Dist. LEXIS 27013, at *42 (observing that class counsel would "likely incur hundreds of additional hours in connection with administering the settlement, without prospect for further fees").

f. Consistency with fee awards in comparable cases

The requested fee is consistent with other direct purchaser class actions involving allegations of overcharges arising from impeded generic drug competition. The following table summarizes sixteen cases in which the courts awarded a one-third attorneys' fee:

Date	Case Name	Settlement Amount
06-14-13	*In re Flonase Antitrust Litig.*, E.D. Pa. 08-3149	$150M
11-07-12	*In re Wellbutrin XL Antitrust Litig.*, E.D. Pa. 08-2431	$37.5M
05-31-12	*Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc.*, D. Del. 07-142-SLR	$17.5M
01-12-12	*In re Metoprolol Succinate Antitrust Litig.*, D. Del. 06-52-MPT	$20M
11-28-11	*In re DDAVP Direct Purchaser Antitrust Litig.*, S.D.N.Y. 05-2237	$20.25M
11-21-11	*In re Wellbutrin SR Antitrust Litig.*, E.D. Pa. 04-5525	$49M
08-11-11	*Meijer, Inc. v. Abbott Labs.*, N.D. Cal. 07-05985-CW	$52M
01-31-11	*In re Nifedipine Antitrust Litig.*, D.D.C. 03-mc-223-RJL	$35M
01-25-11	*In re Oxycontin Antitrust Litig.*, S.D.N.Y. 04-md-1603-SHS	$16M
04-23-09	*In re Tricor Direct Purchaser Litig.*, D. Del. 05-340-SLR	$250M
04-20-09	*Meijer, Inc. v. Warner Chilocott and Barr Pharms., Inc.*, D.D.C. 05-2195	$22M
11-09-05	*In re Remeron Direct Purchaser Antitrust Litig.*, D.N.J. 03-0085	$75M
04-19-05	*In re Terazosin Hydrochloride Antitrust Litig.*, S.D. Fla. 99-MDL-1317	$74M
09-28-04	*North Shore Hematology-Oncology Assoc., P.C. v. Bristol-Myers Squibb Co.*, D.D.C. 04-248-EGS	$50M
04-09-04	*In re Relafen Antitrust Litig.*, D. Mass. 01-12239-WHY	$175M
04-11-03	*La. Wholesale Drug Co. v. Bristol-Myers Squibb Co.*, S.D.N.Y. 01-MD-1410-JGK	$220M

As these cases illustrate, a one-third fee award is consistent with and justified by the awards in analogous cases with similar settlement amounts.

g. Presence or absence of objections

The Class Notice approved by the Court and mailed to each Class member described Plaintiffs' intent to seek an award of attorneys' fees and reimbursement of expenses and explained how to opt-out of the Class and object to the Settlement. [47] The postmark deadline for Class members' objections to the Settlement was 30 days from the date of the Class Notice, April 3, 2014. [48] In addition, the Motion for Fees and Expenses filed on March 19, 2014 (ECF No. 562) detailed the amount and type of attorneys' fees and reimbursement of expenses Plaintiffs were seeking.[49] The Class Notice and the Motion for Fees and Expenses were also placed on the website of Co-Lead Counsel, Faruqi & Faruqi LLP. No Class member has objected to the Settlement or requested exclusion from the Class despite ample notice and opportunity to do so.

2. Application of the *Prudential* factors

a. The value of benefits accruing to class members attributable to the efforts of Class Counsel, as opposed to the efforts of others

While Mylan was the first to file, Class Counsel coordinated with counsel for other private plaintiffs in developing and investigating this case. Moreover, once the litigation commenced, Class Counsel led many of the joint litigation efforts. This factor militates in favor of the requested award.

[47] The Class Notice that was mailed to Class members is an exhibit to Direct Purchaser Plaintiffs' Unopposed Motion for Final Approval of Settlement filed on April 24, 2014 ("Motion for Final Approval"). *See* Exhibit 1 to Declaration of Dan Coggeshall of Rust Consulting, Inc. Regarding Notice of Pendency of Class Action and Settlement, dated April 24, 2014 (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 Plaintiffs' Motion for Final Approval.

[48] *See* Order, ECF No. 484, at 7.

[49] The type and amount of the fees and expenses described in the March 19, 2014 Motion for Fees and Expenses is the same as those described here.

b. The percentage fee that would have been privately negotiated

A one-third contingency is standard in individual litigation, and could be more in an antitrust case, given the complexities and risks.[50] As evidenced by the table *supra* at 15, a one-third fee request represents the market rate for fee awards in this type of litigation and thus would likely be the benchmark by which the parties would have privately negotiated a fee.

c. Innovative terms

The terms of the Settlement, while providing a benefit to the class, are otherwise standard. Therefore, this factor neither supports nor detracts from the fee request.[51]

3. A lodestar cross-check confirms the reasonableness of the fee request.

A lodestar cross-check ensures that application of the percentage method results in a recovery that is "sensible."[52] Because the fee sought is less than Class Counsel's collective lodestar, it is less than the range normally approved, and Class Counsel will not receive a risk premium for their efforts in this contingent litigation. Class Counsel's lodestar is $11,296,550.25. Co-Lead Decl. ¶ 18. Thus, the requested fee is less than lodestar, *i.e.,* there is a negative multiplier of 44 percent, and below the range normally approved in comparable cases. The lodestar cross-check confirms the reasonableness of the fee request.

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[50] *See Remeron,* 2005 U.S. Dist. LEXIS 27013, at *46 ("[a]ttorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation," and in a direct purchaser pharmaceutical antitrust class action, the "requested 33⅓% fee reflects the market rate in other litigation of this type").

[51] *Bradburn,* 513 F. Supp. 2d at 340 (counsel's fee request not adversely affected by settlement without innovative terms).

[52] *Rite Aid,* 396 F.3d at 305-06; *see also In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 263 (D. Del. 2002) ("The Third Circuit suggests that the district court cross-check the percentage award against the 'lodestar' award to help ensure the reasonableness of the fee.").

4. Court intervention into distributing the attorneys' fees amongst Class Counsel is unnecessary.

Unlike in *In re OSB Antitrust Litig.*, there is no dispute among the firms comprising Co-Lead Counsel or between Co-Lead Counsel and other Class Counsel over the method and process of dividing the attorneys' fees.[53] Therefore, it is unnecessary for the Court to require Co-Lead Counsel to develop and submit a proposed plan of distribution on attorneys' fees.

C. The Court Should Approve the Request for Reimbursement of Expenses.

Class Counsel incurred $1,111,284.11 for expenses in litigating the case. The largest component was paid to experts who were essential to the prosecution of this case, particularly given the need to respond to Defendants' 22 experts. These expenses, as well as others routinely charged to hourly-fee-paying parties, were reasonable.[54] Given that the expenses here were incurred with no guarantee of recovery, Class Counsel had a strong incentive to incur only reasonable and necessary expenses, and did so.

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of their reasonable litigation expenses.[55] The expenses sought in this case are

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[53] *OSB*, No. 06-826 (ECF No. 947) at 8 ("Prudence suggests that judicial review of that process is warranted, especially in light of the dispute between Co-Lead Counsel").

[54] *See id.* at 9 (approving class counsel's fee request because "[t]his complex lengthy matter involved some eighty depositions, the creation and maintenance of a huge case database, and the preparation and review of expert economic analysis and reports."); *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *49 (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10 postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro-hac vice.")). A breakdown of the litigation expenses incurred, by category is provided. *See* Co-Lead Decl. at ¶ 21.

[55] *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 n.12 (3d Cir. 2001) (quoting the 1985 Task Force Report for the conclusion that the "common-fund doctrine . . . allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred."); *see also AT&T Corp.*, 455 F.3d at 172 n.8 (litigation "[e]xpenses are generally considered and reimbursed separately from attorneys' fees").

roughly comparable to those reimbursed in other antitrust litigation,[56] and should be allowed.

D. The Requested Incentive Award to Each Class Representative is Reasonable.

Plaintiffs request that each Class Representative receive an incentive award of $50,000. In the Third Circuit, incentive awards may be paid to class representatives to reward efforts that benefit the class.[57] In evaluating the appropriateness of an award, courts consider: (i) the financial, reputational and personal risks to the plaintiff; (ii) the degree of plaintiffs' litigation responsibilities; (iii) the length of litigation; and (iv) the degree to which the plaintiffs benefited as class members.[58]

The requested awards are well-deserved. First, the Class Representatives stepped in despite the obvious risk inherent in suing a supplier. By instituting this case, the Class Representatives performed a "public service of contributing to the enforcement of mandatory laws."[59] Without them, the Class would have nothing. Second, the Class Representatives assisted in the prosecution of the case by searching for, collecting, and producing voluminous documents and data, using both electronic and manual means, preparing for and giving depositions, and conferring with Co-Lead Counsel on developments in the case. All of these efforts required the Class Representatives to turn their attention away from their daily business of purchasing and selling pharmaceutical products. Third, the amounts requested are within the

[56] *See, e.g.*, *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *49-50 (awarding reimbursement of $1,925,667.53 in expenses incurred in approximately three years); *In re Relafen Antitrust Litig.*, No. 01-12239-WHY, at 7-8 (ECF No. 297) (D. Mass. Apr. 9, 2004) (awarding $1.799 million in expenses incurred in 28 months).

[57] *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 220 (E.D. Pa. 2011); *Bradburn*, 513 F. Supp. 2d at 342 ("It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class.").

[58] *See Chakejian,* 275 F.R.D. at 220; *see also Bradburn,* 513 F. Supp. 2d at 342.

[59] *Chakejian*, 275 F.R.D. at 220.

acceptable range of payments awarded by courts within the Third Circuit in other direct purchaser antitrust litigation,[60] even in settlements of $20 million or less.[61]

IV. CONCLUSION

Co-Lead Counsel respectfully requests that the Court approve the attorneys' fee and expense application and enter an order awarding counsel fees of $5,000,000 (plus a proportionate share of the interest thereon through the date of the award) and reimbursement of expenses in the amount of $1,111,284.11. Co-Lead Counsel also request that RDC, Meijer, and American Sales each receive an incentive award of $50,000.[62]

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[60] *See* note 6 above.

[61] *See Miralax*, 07-142-SLR (ECF No. 243) ($60,000 to each of the three Class Representatives in $17.5 million settlement); *Toprol*, No. 06-52 GMS-MPT (ECF No. 193) ($50,000 each to three Class Representatives in $20 million settlement).

[62] A proposed order containing these requests, among others, is attached as Exhibit 2 to Direct Purchaser Plaintiffs' Unopposed Motion for Final Approval of Settlement filed concurrently with this motion.

Dated: April 24, 2014

Respectfully submitted,

/s/ Peter Kohn

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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
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