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

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

ORDER

In this putative class action, Direct Purchasers of Doryx, the branded version of doxycycline hyclate, allege that Defendant brand name pharmaceutical companies illegally thwarted generic competition. The Parties now ask me to certify a Rule 23(b)(3) Settlement Class, grant final approval of their proposed Settlement, and approve an award of attorneys' fees and incentive awards. (Doc. Nos. 571, 572.) Because I conclude that: (1) the proposed Settlement Classes meet the requirements of Rule 23(a) and 23(b)(3); (2) the Notice to Class Members was sufficient; (3) the terms of the Settlement are fair, reasonable and adequate; and (4) the requested fees and awards are reasonable, I will grant their Motions.

BACKGROUND

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

state laws that would otherwise have allowed pharmacists to fill prescriptions doctors had written for Doryx with generics.

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

I provisionally certified the Settlement Class on February 18, 2014 after a preliminary approval hearing. (Doc. No. 484.) Plaintiffs filed the instant unopposed Motion on April 24, 2014, asking me to: (1) grant final certification for settlement purposes; (2) approve the proposed Settlement; (3) approve the proposed distribution plan; (4) approve the proof of claim and release; and (5) dismiss all Direct Purchaser Plaintiff's claims against Defendants. (Doc. No. 571-72.) I held a final fairness hearing on June 9, 2014. (Doc. No. 653); see Gates v. Rohm and Haas Co., 248 F.R.D. 434, 439 (E.D. Pa. 2008) ("Judicial review of a proposed class settlement generally requires two hearings: one preliminary approval hearing and one final 'fairness' hearing.").

LEGAL STANDARDS

Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). "While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the

court has an obligation to ensure that any settlement reached protects the interests of the class members." In re Aetna Inc. Sec. Litig., MDL No. 1219, 2001 WL 20928, at *4 (E.D. Pa. Jan 4, 2001) (citing In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995)).

Consequently, before approving the Settlement, I must determine whether the Notice provided to Class Members was adequate. Id. I must also "scrutinize the terms of the settlement to ensure that it is 'fair, adequate and reasonable.'" Id. "[C]ases such as this, where the parties simultaneously seek certification and settlement approval, require 'courts to be even more scrupulous than usual' when they examine the fairness of the proposed settlement." In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 316 (3d Cir. 1998) (citations omitted).

Where, as here, the Class has not already been finally certified, I must also independently determine that the proposed Settlement Class satisfies the requirements of Rule 23. See Amchem v. Windsor, 521 U.S. 591, 620 (1997); In re Prudential Ins., 148 F.3d at 308 ("[A] district court must . . . find [that] a class satisfies the requirements of Rule 23, regardless of whether it certifies the class for trial or settlement.").

DISCUSSION

I. Rule 23(a) & (b)(3)

In my February 18, 2014 Order granting Plaintiffs' Motion for Preliminary Approval (Doc. No. 484), I preliminarily certified and ordered that Notice of the Settlement be directed by Rust Consulting Inc., to the following Class:

> All persons and entities in the United States who purchased Doryx directly from one or more of the Defendants at any time from July 18, 2008 through December

> 31, 2013 (the "Class Period"). Excluded from the Class are Defendants, their parents, employees, subsidiaries and affiliates, and federal government entities (the "Class").

Rule 23(a)(1) requires that joinder of the parties be impracticable. Fed. R. Civ. P. 23(a)(1). The Class I preliminarily certified has 23 Members across the United States, which is sufficient to satisfy the impracticality of joinder requirement. "[W]hen the court finds that the class members are widely dispersed geographically, then their joinder may be deemed impracticable." 7A Charles A. Wright, et al., Federal Practice and Procedure § 1762. Courts have repeatedly deemed joinder impracticable when class members' dispersion was similar to that presented here. Am. Sales Co. v. SmithKline Beecham Corp., 274 F.R.D. 127, 132-33 (E.D. Pa. 2010) (class members spread across 14 states rendered joinder impracticable); In re Wellbutrin, XL Antitrust Litig., No. 08-2431, 2011 WL 3563385, at *3 (E.D. Pa. Aug. 11, 2011) (class members across 15 states rendered joinder impracticable).

Rule 23(a)(2) requires that the Class share common questions of law or fact. To satisfy the commonality requirement, the purported class's claims must depend upon a common contention susceptible to class-wide resolution. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550-51 (2011). Here, the following issues present common, class-wide questions under Rule 23(a)(2):

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

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

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

Rule 23(a)(3) requires me to evaluate whether the Named Plaintiffs' claims are typical of the Class. See Beck v. Maximus, Inc., 457 F.3d 291, 295-96 (3d Cir. 2006). The named Plaintiffs—Meijer Inc., Meijer Distribution, Inc., Rochester Drug Co-operative, Inc., and American Sales Company, LLC—allege on behalf of the Class and themselves the same manner of injury from the same course of conduct and assert on their own behalf the same legal theory that they assert for the Class. Any probable factual differences relate to damages not liability. Gates, 248 F.R.D. at 441. Accordingly, I conclude that the Named Plaintiffs' claims meet Rule 23(a)(3)'s typicality requirement.

Finally, Rule 23(a)(4) requires me to decide whether the Named Plaintiffs will fairly and adequately protect the interests of the Class. Fed. R. Civ. P. 23(a)(4). I find that they will. All Class Members sought to prove Defendants' alleged anticompetitive conduct, and to recover overcharge damages. Moreover, all Class Members were given an opportunity to opt out. Furthermore, the Named Plaintiffs are well-qualified to represent the Class, given their experience in prior cases, and the vigor with which they have acted thus far. (Doc. No. 452.)

Turning to the requirements of Rule 23(b)(3), I conclude, for settlement purposes, that common questions of law and fact predominate over questions affecting only individual Members. Fed. R. Civ. P. 23(b)(3). "[T]he task for plaintiffs at class certification is to demonstrate that [each] element . . . is capable of proof at trial through evidence that is common

to the class rather than individual to its members." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310-12 (3d Cir. 2008). Here, the elements of Plaintiffs' claims are (1) violation of antitrust laws, (2) antitrust impact, and (3) measurable damages. Because these issues are subject to generalized proof, they apply class-wide and predominate over issues that require individualized proof. Id.

Finally, I must consider whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This requires me to determine whether a class action is fairer and more efficient than alternative methods of adjudication. In re Prudential Ins., 148 F.3d at 316. Plainly, it would be fairer and more efficient to resolve the claims of the Class in a single action. There are few manageability problems presented by a case such as this, particularly in light of the Settlement approved in this Order.

II. Notice

As required in my Preliminary Approval Order, timely Notice of the proposed Settlement was mailed by first-class mail to the last known address of all Class Members found in Warner Chilcott's sales database and verified by Rust. The Notice was also posted, along with relevant litigation and Settlement documents, on Faruqi & Faruqi, LLPs website—www.faruqilaw.com—to further advise Members of the Class of the Settlement. I find that this Notice complies with the requirements of Fed. R. Civ. P. 23(e) and due process. Moreover, it is the best notice practicable in the circumstances. Accordingly, all Class Members are bound by this Order and Final Judgment.

III. Reasonableness of the Proposed Settlement

In determining whether the Settlement is fair, adequate, and reasonable, I must consider the Girsh factors: (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 in light of all the attendant risks of litigation. In re Cendant Corp. Litig., 264 F.3d 201, 231–32 (3d Cir. 2001) (citing Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975)).

Additionally, "[i]n more recent decisions, the Third Circuit has suggested an expansion of the nine-prong test when appropriate to include what are now referred to as the Prudential considerations." In re Flonase Antitrust Litig., 951 F. Supp. 2d 739, 742 (E.D. Pa. 2013). These include: (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 facts 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; (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. Id. (quoting In re Prudential Ins., 148 F.3d at 323).

The Third Circuit has determined that a court should accord a presumption of fairness to settlements if the court finds that: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the Settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." In re Cendant Corp. Litig., 264 F.3d at 233 n.18. Here, the Settlement is entitled to a presumption of fairness because: (1) it is the result of intense, *bona fide*, arm's length negotiations, (2) the Parties engaged in exhaustive discovery, (3) the attorneys are extremely experienced in similar litigation, and (4) there were no objections from the Class. Id.

The Girsh Factors

These weigh heavily in favor of approving the Settlement. This was a complex and expensive case with 23 experts and dozens of fact witnesses. Lengthy dispositive motions and a protracted trial and appeal were nearly certain (first factor). The time and resources saved by the avoidance of these costs benefits all Parties. Fleisher v. Fiber Composites, LLC, No. 12-1326, 2014 WL 866441, at *11 (E.D. Pa. Mar. 5, 2014).

There have been no opt-outs or objections from the Class (second factor). At the time the Parties settled, they had concluded fact discovery and were midway through expert discovery. A reasonable amount of discovery has thus been completed—enough to give both sides an accurate view of the risks of continued litigation (third factor).

The risks of litigation and establishing damages (fourth and fifth factors) weigh heavily in favor of approving the Settlement. Plaintiffs faced the risk that I would rule that: (1) product hopping was not anticompetitive; (2) Defendants had legitimate business justifications for the product changes; or (3) Plaintiffs suffered no damages. Defendants faced a potential treble damages award.

The Settlement amount—$15 million—is reasonable in light of the damages estimates, which were between $23 million and $1 billion, the risks of litigation that I have described, and was recommended by the mediator. (Id. at 6-7) (eighth and ninth factors). The remaining factors—the risks of maintaining the Class through trial and Defendants' abilities to withstand a greater verdict—are neutral.

The Prudential Factors

These also weigh in favor of approving the Settlement. First, as I have discussed, the case was well developed, and extensive discovery had already been taken. Second, Indirect Purchaser and opt-out Retailers have both also settled. Only a single Plaintiff—Mylan—remains; the outcome of that case is unclear. Third, no Plaintiff has chosen to opt out. Fourth, the attorney fee provisions are reasonable, as discussed below. Fifth, the claim handling mechanism (to which no Party has objected) is fair and reasonable, allowing for the distribution of funds based on the nature and extent of the injuries. Similar mechanisms have been approved and implemented successfully and efficiently in other cases. (Doc. No. 571, at 23.) Accordingly, applying the Prudential and Girsch factors, I conclude that the Settlement is fair, adequate, and reasonable.

IV. Approval of Proposed Settlement Plan

I also approve the Plan of Distribution of the Settlement Proceeds, net of attorneys' fees, reimbursed expenses and incentive awards proposed by Plaintiffs. "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." In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 179 (E.D. Pa. 2000). Generally, a distribution plan is reasonable if it reimburses the class members based on

the type and extent of their injuries. Id. Here, the Plan will authorize Rust to make fair and efficient distribution of the Net Settlement Fund proceeds *pro rata*, with the assistance of Class Counsel's expert economist, based on Class Members' purchases of Doryx during the Class Period. (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.)

V. Approval of the Proposed Claim Form

I also approve the proposed Doryx Direct Purchaser Proof of Claim and Release Form, (Doc. No. 452-5), Rust will use to notify each Class Member of the Class Member's estimated purchases of Doryx during the Class Period. Each estimate will be formulated with the assistance of Class Counsel's expert economist, based on data produced by Warner Chilcott and Retailer Plaintiffs, as well as Rust's estimate of the Class Member's *pro rata* share of the Net Settlement Fund.

VI. Release of Claims

All Direct Purchaser Plaintiffs' claims in the above-captioned action against Defendants will be dismissed with prejudice and without costs. In accordance with Paragraph 11 the Settlement Agreement, upon the Settlement becoming final, I will find that:

> Plaintiffs and all Class Members, on behalf of themselves and their respective past and present parents, subsidiaries, affiliates, officers, directors, employees, agents, attorneys, servants, representatives (and the parents' subsidiaries' and affiliates' past and present officers, directors, employees, agents, attorneys servants, and representatives), and their predecessors, successors, heirs, executors, administrators, and representatives (the "Releasors"), hereby release and forever discharge, and covenant not to sue Defendants and their past and present parents, subsidiaries, affiliates, officers, directors, employees, agents, attorneys, servants, representatives (and the parents', subsidiaries', and affiliates' past and present officers, directors, employees, agents, attorneys,

> servants, and representatives), and the predecessors, successors, heirs, executors, administrators and representatives of each of the foregoing (the "Releasees"), with respect to, in connection with, or relating to any and all past, present, or future liabilities, claims, demands, obligations, suits, injuries, damages, levies, executions, judgments, debts, charges, actions, or causes of action, at law or in equity, whether class, individual, or otherwise in nature, and whether known or unknown, foreseen or unforeseen, suspected or unsuspected, contingent or non-contingent, arising out of or relating to purchases of Doryx at any time prior to the Effective Date and arising under the Sherman Act, 15 U.S.C. §§ 1 & 2, *et seq.*, or any other federal or state statute or common law relating to antitrust or unfair competition (the "Released Claims"). The Released Claims include, but are not limited to, any and all claims relating to or arising out of the facts, occurrences, transactions, or other matters alleged or asserted in this Action, or that could have been alleged or asserted in this Action. However, this Settlement Agreement is not intended to release anyone other than the Releasees, is not on behalf of anyone other than the Releasors, and does not affect the claims of the proposed end-payor Class, the claims of the Retailer Plaintiffs who filed their own complaints in this matter, or the claims of Mylan Pharmaceuticals, Inc. or its affiliates, nor is it intended to release any actual or potential claims described in Paragraph 13 of the Settlement Agreement.

In addition, in accordance with Paragraph 12 of the Settlement Agreement, upon the Settlement becoming final, I will find that each Class Member has expressly waived and released any and all provisions, rights, and/or benefits conferred by § 1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor; or by any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Each Releasor may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the claims that are the subject matter of Paragraph 10. Nonetheless, upon the Settlement becoming final each Releasor hereby expressly waives and fully, finally and forever settles and releases any known or unknown, foreseen or unforeseen, suspected or unsuspected, contingent or non-contingent claim that is the subject matter of Paragraph 10 of the Settlement Agreement, whether or not concealed or hidden, without

regard to the subsequent discovery or existence of such different or additional facts.

VII. Attorney's Fees & Incentive Awards

Finally, Class Counsel have moved for an award of attorneys' fees of $5,000,000; reimbursement of expenses totaling $1,111,284.11; and incentive awards of $50,000 to each Class Representative. Under Fed. R. Civ. P. 23(h)(3) and 54(d), and the factors for assessing the reasonableness of a class action fee request set forth in Gunter and In re Prudential, I find that Counsel is entitled to the requested fees and costs. Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000); In re Prudential, 148 F.3d at 340.

Here, the proposed fees represent approximately one-third of the Settlement Fund. This Settlement confers a monetary benefit on the Class that is substantial both in absolute terms and when assessed in light of the risks of establishing liability and damages. The Fund will benefit all Class Members. There were no objections by Class Members to the requested fee award of one-third of the Settlement Fund. Class Counsel have efficiently prosecuted this difficult and complex action on behalf of the Members of the Class for over two years, with no guarantee they would be compensated, undertaking numerous and significant risks of nonpayment. Further, Class Counsel have reasonably expended thousands of hours, and incurred over a million dollars in out-of-pocket expenses, in prosecuting this action, with no guarantee of recovery. Fee awards similar to the fee requested by Class Counsel here have been awarded in similar cases, including numerous Hatch-Waxman antitrust class actions similarly alleging impaired generic competition. Gunter, 223 F.3d 195 n.1; (Doc. No. 572-12, at 20 (collecting cases).)

The Third Circuit has advised that a court should also consider the Prudential factors in approving the fee award. In re Prudential, 148 F.3d at 340. Here, the Settlement achieved for

the benefit of the Class was obtained as a direct and exclusive result of Class Counsel's skillful advocacy. Moreover, the Settlement was reached following negotiations conducted by an experienced mediator and after good-faith discussions.

The "percentage-of-the-fund" method is an appropriate method for calculating attorneys' fees in complex, common-fund class actions. See, e.g., In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005). In the notice of Proposed Settlement, Class Members were advised that Class Counsel intended to move for up to 33⅓% of the gross Settlement Fund in attorney's fees, in addition to reimbursement of reasonable costs and expenses. Class Counsel then moved for an award in that amount, plus reimbursement. This Motion has been publicly available since March 19, 2014 on this docket and on Faruqi & Faruqi's website. (Doc. No. 566.)

A lodestar cross-check, which confirms the reasonableness of the fee request, ensures that application of the percentage method results in a recovery that is "sensible." Rite Aid, 396 F.3d at 305-06. Class Counsel's lodestar is in excess of $11,296,550. The requested fee is thus 44 percent less than the lodestar and below the range normally approved in comparable cases. See, e.g., Meijer, Inc. v. 3M, No. 04-5871, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (approving a percentage fee award that translated to a 4.77 multiplier in case that settled after one year); In re Remeron Direct Purchaser Antitrust Litig., No. 03-85, 2005 WL 3008808, at *47-48 (D.N.J. Nov. 9, 2005) (multiplier of 1.8 is on the "low end of the spectrum").

Class Counsel substantially developed this case through their investigation and efforts. Although other Plaintiffs pursued claims against Defendants, Class Counsel took a primary role in leading the joint litigation efforts, including serving as lead questioner during most of Defendants' employee depositions; taking the lead in third party discovery; overseeing the work of numerous experts in dermatology, gastroenterology, pharmaceutics, pharmaceutical

manufacturing and supply, pharmacoeconomics, and economics. Further, a one-third contingency is standard in individual litigation; in antitrust litigation, a higher contingency would be reasonable, given the complexities and risks involved. In these circumstances, the requested 33⅓% fee award is fair and reasonable. Accordingly, Class Counsel will be awarded attorneys' fees in the amount of $5,000,000 from the Settlement Fund plus interest, if any. Co-Lead Counsel shall allocate the fees among Class Counsel.

Class Counsel also will be awarded $1,111,284.11 for reimbursement of out of pocket expenses that were fairly and reasonably incurred. The awarded fees and expenses shall be paid to Class Counsel from the Settlement Fund in accordance with the terms of the Settlement Agreement. Co-Lead Counsel shall allocate the expenses among Class Counsel.

Without affecting the finality of this judgment, I will retain exclusive jurisdiction over the Settlement Agreement to oversee its administration, distribution to the Class, and issues relating to attorneys' fees. In addition, Defendants and each Class Member irrevocably submit to the exclusive jurisdiction of this Court for any suit, action, proceeding or dispute arising out of or relating to the Settlement Agreement.

RDC, American Sales and Meijer each will be awarded $50,000 from the Settlement Fund. These payments are in recognition of the work these Plaintiffs undertook in representing the Class. This amount is in addition to whatever monies these Plaintiffs will receive from the Settlement Fund pursuant to the Plan. These awards are fair and reasonable.

VIII. Claims

Finally, I find that under Rule 54(b), there is no just reason to delay the entry of dismissal with prejudice as to Defendants. Accordingly, I will direct the Clerk to enter final judgment.

The entry of final judgment is appropriate because this Order fully and finally adjudicates the Class's claims against all Defendants, allows execution of the Settlement, and will expedite the distribution of the Settlement proceeds to Class Members.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

September 15, 2014 Paul S. Diamond, J.