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

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES, AND REGULATIONS

I. SUMMARY OF THE ARGUMENT

Plaintiffs International Brotherhood of Electrical Workers 38, Health and Welfare Fund ("IBEW 38"), International Union of Operating Engineers Local 132, Health and Welfare Fund ("Local 132"), and the Laborers Health and Welfare Trust Fund for Northern California ("Laborers Trust") (collectively "Plaintiffs" or "Named Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement of the above-captioned action (the "Action") in consideration of $8,000,000 in cash (the "Settlement").

The Settlement was reached with the assistance of a well-respected mediator, after more than two years of hard-fought litigation, extensive fact and expert discovery, significant motion practice, extensive pretrial preparation, including the production of witness lists, trial exhibit lists, deposition designations from the over 110 depositions taken in the case, and motions *in limine*, and no Class Member has objected to the Settlement. It is, therefore, entitled to a presumption of reasonableness. Moreover, as set forth below, the Settlement is plainly fair, reasonable and adequate when evaluated under the factors set forth by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), and *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998).

For these reasons, and those set forth in the papers submitted in conjunction herewith, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Declaration of Walter W. Noss in Support of Indirect Purchaser Plaintiffs' Motion for: (1) Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds; and (2) Award of Attorneys' Fees and Expenses ("Noss Decl.") is an integral part of this submission. The Court is respectfully referred to it for a detailed description of the factual and procedural history of the litigation, the claims asserted, the extensive investigation and discovery undertaken, the settlement negotiations, and the numerous risks and uncertainties presented in this litigation.

III. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

The Settlement was reached prior to a decision on Plaintiffs' Motions for Class Certification. Although the Court provisionally certified the Class in its Preliminary Approval Order,[1] the Court must still make a final determination of whether the Class satisfies the requirements of Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure.[2] For the reasons set forth in the Preliminary Approval Order and Plaintiffs' submissions related to class certification and Motion for Preliminary Approval (ECF Nos. 115, 155, 657, and 663), which are incorporated herein by reference, Plaintiffs continue to satisfy the requirements of Rule 23(a) and 23(b)(3).

Rule 23(a) establishes four prerequisites to class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. In addition, the class must meet one of the three requirements of Rule 23(b). Fed. R. Civ. P. 23.

---

[1] The Court certified a Class consisting of: "All persons and entities in the United States who reimbursed for, or indirectly purchased, other than for resale, branded Doryx ("Indirect Purchasers") at any time during the period September 21, 2008 to May 30, 2014. Excluded from the Indirect Purchaser Class are: (1) Defendants and their directors, officers, employees, subsidiaries or affiliates; (2) fully insured health plans, *i.e.*, plans that purchased 100% of the Plan's reimbursement obligations to its members; (3) all federal, state and municipal government entities, except for government funded employee benefit plans; (4) insured individuals covered by plans imposing a flat dollar co-pay that was the same dollar amount for generic as for brand drug purchases; and (5) insured or uninsured individuals who purchased branded Doryx with a coupon and never purchased branded Doryx without a coupon. Also excluded are purchases made through Prisons, Federal Facilities, Clinics (as defined by IMS), and/or Medicaid programs." Preliminary Approval Order at 1 (ECF No. 663).

[2] *See, e.g.*, *In re CertainTeed Fiber Cement Siding Litig.*, MDL No. 2270, 2014 WL 1096030, at *15 (E.D. Pa. March 20, 2014) ("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.'"); *Alexander v. Washington Mut., Inc.*, No. 07-4426, 2012 WL 6021098, at *2 (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.").

A. **Rule 23(a)(1) – Numerosity**

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001).

Here, Plaintiffs have previously submitted to the Court: (1) the Supplemental Declaration of Gordon Rausser, Ph.D. in Support of Indirect Purchaser Plaintiffs' Amended Motion for Class Certification (ECF No. 449); and (2) the Second Supplemental Declaration of Gordon Rausser, Ph.D. in Support of Indirect Purchaser Plaintiffs' Amended Motion for Class Certification and Damages (ECF No. 611) (collectively, the "Rausser Declarations"). As demonstrated by the Rausser Declarations, the Class consists of hundreds of thousands of class members geographically dispersed throughout the United States. The numerosity requirement is, therefore, easily satisfied.

B. **Rule 23(a)(2) – Commonality**

Rule 23(a)(2) requires that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Due to the "conspiratorial nature of allegations" in an antitrust context, "such cases often present common questions of law and fact and are frequently certified as class actions." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 106 (D.N.J. 2012) (citing *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 478 (W.D. Pa. 1999)) (noting that "allegations concerning the existence, scope and efficacy of an alleged conspiracy present questions adequately common to class members to satisfy the commonality requirement"). Similarly, class certification is frequently deemed appropriate in "[a]ntitrust actions involving common questions of liability for monopolization." *See In re Remeron End-Payor Antitrust Litig.*, No. 02-2007 FSH, 2005 WL 2230314, at *11 (D.N.J. Sept. 13, 2005) (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29 (D.D.C. 2001)). Allegations for a violation of Section 2 of the Sherman Act, "naturally raise several questions of law and fact common to the entire class."

Teva Pharms. USA, Inc. v. Abbott Labs., 252 F.R.D. 213, 225 (D. Del. 2008) *(*citing *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151-52 (3d Cir. 2002)). All class members may use "the same evidence to prove the alleged conspiracy and improper maintenance of monopoly power." *Teva Pharms.*, 252 F.R.D. at 225.

Here, the following issues relating to claims or defenses present common, class-wide questions under Rule 23(a)(2):

(1) whether Defendants suppressed generic competition for Doryx;

(2) whether Defendants maintained monopoly power over Doryx;

(3) whether Defendants' conduct violates Section 1 and/or Section 2 of the Sherman Act;

(4) whether Defendants' conduct caused injury-in-fact to Plaintiffs and the putative Class;

(5) whether the injury is an antitrust injury, *i.e.*, the type of injury the antitrust laws were intended to prevent; and

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

Commonality is therefore satisfied. *See In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 137 (E.D. Pa. 2011) (finding commonality requirement met where "[e]ach class member's claims depend on whether or not the defendants unlawfully engaged in anticompetitive behavior to limit the entry of generic competitors in violation of each state's respective antitrust and/or consumer protection laws."); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004) (certifying settlement class).

C. **Rule 23(a)(3) – Typicality**

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. Fed. R. Civ. P. 23(a)(3). "'If the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established.'" *Inmates of Northumberland Cnty. Prison v. Reish*, No. 08-CV-345, 2009 WL 8670860, at *19 (M.D. Pa. Mar. 17, 2009) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

Here, Plaintiffs' claims and the claims of the proposed Class are functionally identical: all claims arise out of Defendants' allegedly anticompetitive actions in launching new versions of Doryx. Accordingly, the typicality requirement is satisfied. *See In re Sys. Software Assocs., Inc. Sec. Litig.*, No. 97 C 177, 2000 WL 1810085, at *2 (N.D. Ill. Dec. 8, 2000) (granting class certification where plaintiffs' claims arose from the same "course of action that g[ave] rise to the claims of other class members and . . . [we]re based on the same legal theory"); *Ins. Brokerage*, 282 F.R.D. at 107 ("[i]f the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established").

D. **Rule 23(a)(4) – Adequacy of Representation**

The final condition of Rule 23(a) is that "the representative part[y] will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy requirement entails two inquiries: (1) whether the attorneys retained by the named Plaintiffs are qualified, experienced, and generally able to conduct the litigation; and (2) whether the named Plaintiffs themselves have interests that are antagonistic to or in conflict with those they seek to represent." *Reish*, 2009 WL 8670860, at *20 (citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 (3d Cir. 1998)).

In this case, there is simply no question that the Court-appointed Named Plaintiffs and Class Counsel, Scott+Scott, Attorneys at Law, LLP ("Scott+Scott"), have and will continue to adequately represent the Class. With respect to Counsel, Scott+Scott has extensive experience prosecuting antitrust class actions and has a proven record of success pursuing complex cases in state and federal courts throughout the United States. *See* Declaration of Daryl F. Scott in Support of Application of Scott+Scott, Attorneys at Law, LLP for Award of Attorneys' Fees and Reimbursement of Expenses, Ex. A (firm résumé of Scott+Scott). Moreover, the Court has personally witnessed Class Counsel's litigation abilities, as well as their commitment to vigorously prosecuting the claims of the Class.

The second inquiry is likewise satisfied because the interests of the Named Plaintiffs and the Class are aligned. Named Plaintiffs and each of the proposed Class members have a strong

identical interest in establishing Defendants' liability since they each allegedly paid supra-competitive prices for Doryx during the Class Period, and thereby suffered the same type of injury. *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 218 (E.D. Pa. 2012) ("Each class member purchased and/or reimbursed for FP at some point during the Class Period at a supracompetitive price. Each class member holds a strong common interest in establishing [Defendants'] liability for these alleged overcharges."). Furthermore, Named Plaintiffs have demonstrated their commitment to prosecuting this Action on behalf of the Class by, among other things, retaining experienced counsel, producing documents in response to Defendants' document requests, responding to interrogatories, and being deposed. Under such circumstances, the adequacy requirement has clearly been met. *See In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 211 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145 (3d Cir. 2002) (the named plaintiffs "do not have interests antagonistic to each other or to the proposed classes; rather, as they must offer common proof to establish the conspiracy, their interests are aligned.").

E. Rule 23(b)(3) – Common Questions of Law and Fact Predominate over Individual Questions

In addition to satisfying all of the criteria of Rule 23(a), a party seeking class certification must also satisfy one of the requirements of Rule 23(b). Certification of a class under Rule 23(b)(3) requires that: (i) common issues predominate over individual issues; and (ii) the class action mechanism be superior to other methods of adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

"Third Circuit precedent 'provides that the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct.'" *In re Imprelis Herbicide Mktg., Sales Practices & Products Liab. Litig.*, 296 F.R.D. 351, 362 (E.D. Pa. 2013) (quoting *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 240, 266 (3d Cir. 2009)). Predominance does not require plaintiffs to prove the elements of each claim. *See Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1191 (2013) ("Rule 23(b)(3) requires a showing that ***questions*** common

to the class predominate, not that those questions will be answered, on the merits, in favor of the class.") (emphasis in original). Moreover, each element of plaintiffs' claim need not be susceptible to common proof in order satisfy the predominance requirement of Rule 23(b)(3). *See Amgen*, 133 S. Ct. at 1197. "Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

Here, Plaintiffs' claims and the claims of each of the proposed Class members they seek to represent arise out of Defendants' common course of conduct allegedly designed to keep generic versions of Doryx off the market. Generic entry not only makes a cheaper alternative drug available, but also can lead to a reduction in the price of the brand name drug. Conversely, anticompetitive conduct that delays generic entry prolongs the monopoly of the brand name manufacturer and causes end payors to pay more for the branded drug. Since all members of the Class, including Plaintiffs, allegedly suffered the same type of injury as a result of Defendants' common course of allegedly anticompetitive conduct, common issues predominate. *See Imprelis*, 296 F.R.D. at 362.

The second prong of Rule 23(b)(3) – that a class action be superior to other available methods for the fair and efficient adjudication of the controversy – is also met. Fed. R. Civ. P. 23(b)(3). Certification of a settlement class provides class members with the ability to obtain prompt, predictable, and certain relief, and the Settlement contains well-defined administrative procedures to assure due process. This includes the right of any Class Members who are dissatisfied with the Settlement to object to it or to exclude themselves. Class certification also eliminates the substantial judicial burdens that would be caused by repeated adjudication of the same issues in thousands of individualized trials against Defendants if this case was to proceed on an individualized basis. Finally, because the parties seek to resolve this case through a settlement, the Court "need not examine issues of manageability." *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 306 (3d Cir. 2005) (citing *Amchem*, 521 U.S. at 620); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 302-03 (3d Cir. 2011).

In sum, the Class meets all of the requirements of Rule 23(a) and 23(b)(3) and should be certified in conjunction with approval of the Settlement.

IV. THE SETTLEMENT SHOULD BE APPROVED

A. The Standards for Approval of a Class Action Settlement

Final approval of a settlement pursuant to Rule 23(e) turns on whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001). In making this determination, "a 'presumption of fairness' applies if the Court finds that settlement negotiations were conducted at arm's length by experienced counsel, that there was sufficient discovery, and that only a small percentage of class members object." *Craig v. Rite Aid Corp.*, No. 4:08-CV-2317, 2013 WL 84928, at *8 (M.D. Pa. Jan. 7, 2013) (quoting *Warfarin*, 391 F.3d at 535).

Furthermore, to further guide courts in assessing whether a settlement warrants final approval, the Third Circuit has identified nine factors to consider, often referred to as 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 to a possible recovery in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 157. No one factor is dispositive. *See Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154, 169 (E.D. Pa. 2011). The Third Circuit has more recently determined that district courts should consider an additional set of factors, known as the *Prudential* factors:

> [1] [T]he 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; [4] whether class or subclass members are accorded the right to optout 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.

In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 350 (3d Cir. 2010) (quoting *Prudential*, 148 F.3d at 323). Only the *Prudential* factors relevant to the litigation in question need be addressed. *Id.* at 323-24.[3]

District courts must make findings on each of the *Girsch* factors and, where appropriate, consider, but not necessarily make findings on *Prudential* factors. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 268 (E.D. Pa. 2012) ("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 on specific circumstances."). Additionally, while the Court may not simply substitute assurances from or conclusions by the parties for independent analysis, 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." *Imprelis*, 296 F.R.D. at 364; *see also Pet Food*, 629 F.3d at 350.

As set forth below, the Settlement is presumptively fair, and clearly satisfies the *Girsh* and *Prudential* factors.

B. **The Settlement Is Entitled to a Presumption of Fairness**

The presumption of fairness applies to this Settlement because: (1) settlement negotiations were conducted at arm's-length on numerous occasions with the assistance of a well-respected mediator, Jonathan B. Marks, Esq. of Marks ADR, LLC (Noss Decl., ¶3); (2) the parties engaged in extensive discovery prior to settlement (*id.*, ¶4); and (3) to date, no class

---

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

members have objected (*id*., ¶36). *See* Preliminary Approval Order at 8 ("I find that the Settlement was arrived at by arm's-length negotiations by highly experienced counsel after years of litigation"); *see also Craig*, 2013 WL 84928, at *8.

A. **Evaluation of the *Girsh* Factors**

1. The Complexity, Expense, and Duration of the Litigation

"This ***factor*** captures 'the probable costs, in both time and money, of continued litigation.'" *Cendant*, 264 F.3d at 233.[4] It weighs in favor of approval where "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial." *Warfarin*, 391 F.3d at 536.

As an initial matter, "antitrust class action[s] are perhaps the most complex cases to litigate." *Bradburn Parent Teacher Store, Inc. v. 3M (Minn. Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007); *accord In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003). This case was no different. It involved highly complex legal issues concerning antitrust law, pharmaceutical product regulation, and class action procedure, as well as complex scientific and medical issues relating to pharmaceutical manufacturing and composition, dermatology, and gastroenterology, that were investigated and intensively litigated for more than two years. Moreover, because the case law with respect to "product hopping" is not yet well-developed and dependent upon a fact intensive inquiry, this factor added to the complexity of this case. *See Abbott Labs v. Teva Pharm. USA, Inc.*, 432 F. Supp. 2d 408, 422 (D. Del. 2006).

Absent settlement, this case was far from finished. Significant, complex, expensive, and lengthy litigation remained ahead, including adjudication of Plaintiffs' pending class certification motions, summary judgment, pre-trial motions, and trial. Settlement saves the substantial additional expense of a "multi-week trial involving complex scientific and regulatory testimony"

---

[4] Unless otherwise noted, all emphasis is added and citations are omitted.

from expert and fact witnesses as well as hundreds, if not thousands, of trial exhibits. *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013); *see also Warfarin*, 391 F.3d 536 (approving settlement because, in part, "the time and expense leading up to trial would have been significant"); *Meijer, Inc. v. 3M*, 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 continued litigation of this case."). Additionally, even if Plaintiffs were to succeed at trial, "necessary delay through a trial, post-trial motions, and the appellate process would likely deny the Class any recovery for years, an unfavorable result for all parties . . . ." *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 642 (D.N.J. 2004).

Given the procedural and substantive complexities inherent in antitrust class actions, and the time and expense necessarily involved in fully adjudicating this matter, this factor plainly weighs in favor of approving the Settlement.

2. The Reaction of the Settlement Class to the Settlement

It is well-settled that the complete absence, or a small number, of objections to a proposed class settlement is strong evidence that the settlement is fair and reasonable. *See Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993) (silence is "tacit consent" to settlement); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (concluding that, when "only" 29 members of a class of 281 objected, the response of the class as a whole "strongly favors settlement"); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 530 (E.D. Pa. 1990).

The deadline for filing any objections to the settlement was November 5, 2014. As of the date of the present filing, Class Counsel is not aware of any objections with respect to the settlement. *See* Noss Decl., ¶36; Declaration of Jennifer M. Keough Regarding Notice Mailing and Publication ("Keough Decl."), ¶¶20-21. The fact that there have been no objections from

class members, especially from sophisticated, large third-party payor class members, overwhelmingly supports approval.[5]

3. The Stage of the Proceedings and Amount of Discovery Completed

This factor requires the Court "to consider the degree to which the litigation has developed prior to settlement." *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 496, 502 (W.D. Pa. 2003). "The goal here is to determine 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Id.* (quoting *Cendant*, 264 F.3d at 235). Settlements reached after discovery "are more likely to reflect the true value of the claim . . . ."; *see also Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 144-45 (E.D. Pa. 2000); *see also in re Linerboard Antitrust Litig.,* 321 F. Supp. 2d 619, 630 (E.D. Pa. 2004).

As set forth in the Noss Declaration, the Settlement was reached weeks before trial, which was to commence on June 24, 2014. By the time the parties completed settlement negotiations, fact discovery had concluded, over 100 depositions had been taken, and millions of pages of documents had been produced and subject to targeted review. There had also been extensive briefing on multiple motions to dismiss which this Court adjudicated, and the completion of briefing on class certification and summary judgment. The parties had exchanged opening, responsive, and rebuttal expert reports. Moreover, the parties began pretrial preparation, which included, among other things, the exchange of witness lists, trial exhibits, and motions *in limine*. *See* Noss Decl., ¶¶4, 31. Class Counsel was, therefore, fully informed of the merits of the case during settlement negotiations. Consequently, this factor too overwhelmingly supports final approval of the Settlement.

4. The Risks of Establishing Liability

This factor considers "'what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them.'" *Cendant*, 264 F.3d at 237. In considering this factor, courts "attempt to balance the likelihood of success at trial

---

[5] If any objections are received after the date of this submission, Class counsel will address them in the reply brief, which will be filed with the Court by November 21, 2014.

against the benefits of immediate settlement." *Rent-Way*, 305 F. Supp. 2d at 504. The existence of obstacles to a plaintiff's success at trial weighs in favor of settlement. *Warfarin*, 391 F.3d at 537; *Prudential*, 148 F.3d at 319.

Plaintiffs faced formidable obstacles to proving their case and it was never certain that they would ultimately prevail. 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 asserted substantial factual and legal defenses which in its ruling on the motions to dismiss, this Court characterized as "compelling," expressed skepticism that the '"product hopping' alleged here constitutes anticompetitive conduct," and invited Defendants to renew their arguments at summary judgment.[6] Order, June 12, 2013, ECF No. 280, at 3-4.

Given the lack of clear precedent in pharmaceutical product hopping cases and anticipated disagreement on the interpretation of the evidence, there was a very real risk that the Court or a jury would disagree with Plaintiffs on one or more of the issues raised by Defendants. Additionally, even if Plaintiffs prevailed at trial, they would have faced the challenge of sustaining a favorable outcome on appeal. Thus, while Plaintiffs were confident in their factual and legal position with respect to the defenses asserted by Defendants, establishing antitrust liability was far from certain and involved significant risks at summary judgment, trial, and on appeal. *See Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942, 960 (E.D. Tex. 2000) ("[a]lthough Plaintiffs maintain they would likely be successful on the merits at trial," the complicated nature of the case and uncertainty of prevailing supports approval of the settlement.).

---

[6] Defendants' factual and legal defenses included: (1) that the Doryx reformulations did not cause any anticompetitive harm, and, even if they did, the harm was outweighed by procompetitive benefits; and (2) that Mylan and other generic manufacturers' conduct, not Defendants' conduct, impaired generic competition for Doryx.

5. The Risks of Establishing Damages

Like the fourth factor, the fifth factor set forth in *Girsh*, "'attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *Cendant*, 264 F.3d at 238. The Court must compare a "potential damage award if the case were taken to trial against the benefits of an immediate settlement". *Prudential*, 148 F.3d at 319. "Normally, proving damages involves many of the same risks as proving liability 'because the former is contingent upon the latter.'" *Rent-Way*, 305 F. Supp. 2d at 505.

In complex antitrust cases such this, it is axiomatic that both Plaintiffs and Defendants would rely on expert testimony to assist the jury in determining damages at trial. Courts have repeatedly recognized that competing expert testimony presents significant risks to plaintiffs' success in establishing damages. *See Cendant*, 264 F.3d at 239 ("[E]stablishing damages at trial would lead to a 'battle of experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe."); *Rent-Way*, 305 F. Supp. 2d at 506 ("A jury would therefore be faced with competing expert opinions representing very different damage estimates, thus adding further uncertainty as to how much money – if any – the Class might recover at trial.").

Given the differing conclusions that would no doubt be reached by the parties' respective damage experts, "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable . . . ." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). Consequently, this factor weighs in favor of approving the Settlement.

6. The Risks of Maintaining the Class Action Through Trial

At the time the Settlement was reached, Plaintiffs' motions for class certification were fully briefed, but not yet decided. Although Plaintiffs believe their motions were meritorious, there is no guarantee that the Court would have certified the case had it not settled. Indeed, Plaintiff IBEW 38 had already lost class certification once on numerosity grounds. *See* ECF No. 659. Even if the Court had certified the Class, F.R.C.P. 23 provides that a class certification

order may be altered or amended any time before a decision on the merits. Additionally, Defendants would have had the opportunity to try to appeal class certification under F.R.C.P. 23(f). Thus, in any class action suit, there is always a risk that a class will be modified or decertified prior to a decision on the merits. "While this may not be a particularly weighty factor, on balance it somewhat favors approval of the proposed Settlement." *Rent-Way*, 305 F. Supp. 2d at 506-07.

7. The Ability of Defendants to Withstand a Greater Judgment

This factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. Notably, even a finding that this factor cuts against Settlement approval may not materially alter the Court's fairness analysis. *See, e.g.*, *Bradburn Parent Teacher Store,* 513 F. Supp. 2d at 333 (finding that even when defendant "likely can withstand a judgment significantly greater than the Settlement . . . this determination in itself does not carry much weight in evaluating the fairness of the Settlement."); *Warfarin*, 391 F.3d at 538 (concluding that defendant's "ability to pay a higher amount was irrelevant [in] determin[ing] the fairness of the settlement").

Although Defendants in this case could withstand a greater judgment, this does not prevent the Court from approving the Settlement. The amount Plaintiffs obtained in the Settlement is a positive benefit to the class and an even better result considering the novel theories and highly complex legal issues in this case. The theoretical ability of Defendants to pay more in this case is a neutral factor.

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and Risks of Litigation

The final two factors are typically considered in tandem, and "ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Prudential*, 148 F.3d at 322. In other words, the Court must "'measure[] the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case.'" *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 344 (E.D. Pa. 2007). Courts find this factor has been

met when both parties have demonstrated a willingness to litigate the action and engaged in mediation. *See Fleisher v. Fiber Composites, LLC*, No. 12-1326, 2014 WL 866441, at *13 (E.D. Pa. Mar. 5, 2104).

Here, the proposed Settlement of $8 million cash falls well within the range of reasonableness. As set forth above, Plaintiffs faced substantial risks in proving liability and damages in this highly complex, expensive, and time-consuming case. Nor would the risks end there. Even if Plaintiffs were to prevail at trial, the verdict might not survive post-trial motions or appeal.[7] The $8 million settlement that is the result of genuine, arm's-length negotiations conducted in good faith between the parties with the assistance of an experienced mediator avoids these significant risks. Moreover, since the $8 million recovery 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," this factor supports final approval of the Settlement. *Wellbutrin*, No. 2:08-cv-02433, slip op. at 7 (E.D. Pa. July 22, 2013).

B. Evaluation of the Settlement Pursuant to the Relevant *Prudential* Factors

1. Factors that Bear on the Maturity of the Underlying Substantive Issues

As has been explained *supra*, and in the accompanying Noss Decl., the case was settled only after extensive discovery and trial preparation. "The underlying substantive issues were therefore well-developed, supporting approval of the settlement." *In re Flonase Antitrust*

---

[7] *See In re Apple Computer Sec. Litig.*, No. C-84-20148, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) (court entered judgment notwithstanding the verdict for the individual defendants and ordered a new trial); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-Civ., 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (after plaintiffs' jury verdict, court granted defendants' motion for judgment as a matter of law and entered judgment for defendants); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing on appeal an $81 million jury verdict and dismissing securities action with prejudice); *AUSA Life Ins. Co. v. Ernst & Young*, 39 Fed. Appx. 667 (2d Cir. 2002) (affirming district court's dismissal after a full bench trial and earlier appeal and remand); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y. 2000) (granting defendants' motion for judgment as a matter of law after jury verdict for plaintiffs), *aff'd sub nom., Winkler v. Wigley*, 242 F.3d 369 (2d Cir. 2000); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (on rehearing *en banc*, reversing the lower court's denial of defendant's motion for judgment notwithstanding the verdict and entering judgment for the defendant).

Litigation, 291 F.R.D. 93, 102 (E.D. Pa. 2013); *Chakejian v. Equifax Info. Services, LLC*, 275 F.R.D. 201, 215 (E.D. Pa. 2011) (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).

2. 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. No Class member has filed a separate lawsuit against Defendants. The Settlement, therefore, obtains the best and only result for the Class. *See Flonase*, 291 F.R.D. at 102 ("the settlement creates the only award for class members, and is thus beneficial to all indirect purchasers").

3. Whether Class or Subclass Members Are Accorded the Right to Opt-Out of the Settlement

In the Preliminary Approval Order, the Court set forth the procedure and date by which Class members could opt-out of the Settlement. ECF No. 663 at 12-13. This information was provided to Class members via the Notice,[8] and is posted on the website dedicated to this case (www.doryxindirectsettlement.com). The opt-out date and an explanation of how to get additional information on requesting exclusion is also contained in the Summary Notice and press releases that were disseminated in accordance with the Court-approved Notice Plan. *See* Keough Decl., ¶¶3-15; ECF No. 663 at 9. As of the date of this filing, no Class member has requested exclusion from the Class. Accordingly, this factor also supports final approval.

4. Whether Any Provision for Attorneys' Fees Are Reasonable

The Settlement Agreement provides that Class Counsel can seek "attorneys' fees up to 33.33% of the total Settlement Fund (including any interest accrued thereon), the reimbursement of reasonable costs and expenses incurred in the prosecution of the Action, and service awards to the Named Plaintiffs." ECF No. 657-3, ¶10(a). Such a request would be "'consistent with awards in other complex antitrust actions involving the pharmaceutical industry'" (*Flonase*, 291 F.R.D. at 104 (collecting cases)), including the 33.33% awarded to Counsel for the direct

---

[8] *See* Keough Decl., Ex. A, at 2.

purchasers in this case. *See* ECF No. 665 at 14. Nevertheless, Class Counsel are ***not*** seeking "33.33% of the total Settlement Fund," but 33.33% of the Settlement Fund after deduction of Plaintiffs' service awards, notice and administration costs, and litigation costs. This is a reasonable request and is fully supported by application of the *Gunter/Prudential* factors. *See* Memorandum of Law in Support of Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Incentive Awards to Named Plaintiffs, concurrently filed herewith. Consequently, this factor supports final approval of the Settlement.

5. Whether the Procedure for Processing Individual Claims Under the Settlement Is Fair and Reasonable

The procedures for processing Class member claims are fair and reasonable. The Garden City Group ("GCG") is the firm retained by Class Counsel and, after a review of its qualifications, approved by the Court to serve as Claims Administrator. Preliminary Approval Order at 9. GCG will evaluate all claims received to determine whether they are valid and payable from the Settlement Fund. Keough Decl., ¶18. It will also contact claimants, as necessary, to confirm information provided in the claim forms and/or to seek additional information with the goal of disseminating all of the Settlement Fund to Authorized Claimants. *Id*. In short, GCG has administered thousands of settlements and the procedures it utilizes to do so are fair and reasonable for all Class members. Thus, this factor supports approval of the Settlement.

Based on the forgoing reasons, Plaintiffs respectfully submit that the Settlement is fair reasonable and adequate and should be approved.

V. THE PLAN OF ALLOCATION AND PROPOSED CLAIM FORM SHOULD BE APPROVED

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

based on the type and extent of their injuries." *Id*. The proposed plan of allocation meets this standard.

The proposed Plan of Allocation, which was developed by Class counsel in conjunction with their economics expert, was previously submitted to the Court as Exhibit 3 to the Declaration of Walter W. Noss in Support of Preliminary Approval of Class Action Settlement. ECF No. 657-2, Ex. 3. Under the proposed Plan of Allocation, the proceeds of the Settlement, net of Court-approved attorneys' fees, Plaintiffs' service awards, notice and administration costs, and litigation costs, will be distributed to members of the Class who submit claims pro rata based on each Class member's aggregate share of the total Class' indirect purchases of Doryx during the Class Period. The Plan also sets a minimum threshold of $100 of unreimbursed expenditures to be allowed as a claim.

This Plan of Allocation is similar to plans that have previously been approved by courts in analogous cases and implemented with a high degree of success and efficiency.[9] Since the Plan reimburses Class members based on the type and extent of their injuries and does not favor some Class members over others, Class Counsel believe that it is fair, reasonable, and adequate and merits final approval. To date, there have been no objections to the Plan of Allocation. *See* Noss Decl., ¶35.

---

[9] *See Meijer, Inc. v. Biovail Corp.*, No. 2:08-cv-02431, slip op. (E.D. Pa. Nov. 7, 2012) (granting final approval to plan of distribution); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. 2013) (same).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order certifying the Class for settlement purposes, and approving the Settlement and Plan of Allocation as fair, reasonable, and adequate.

DATED: November 7, 2014

Respectfully submitted,
SCOTT+SCOTT, ATTORNEYS AT LAW, LLP

/s/ Walter W. Noss

WALTER W. NOSS (*pro hac vice*)
ANNE L. BOX (*pro hac vice*)
STEPHANIE HACKETT
JENNIFER SCOTT (*pro hac vice*)
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: (619) 233-4565
Facsimile: (619) 233-0508
wnoss@scott-scott.com
abox@scott-scott.com
shackett@scott-scott.com
jscott@scott-scott.com

SCOTT+SCOTT, ATTORNEYS AT LAW, LLP
JOSEPH P. GUGLIELMO
DONALD A. BROGGI
The Chrysler Building
405 Lexington Avenue, 40th Floor
New York, NY 10174
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com
dbroggi@scott-scott.com

SCHNADER HARRISON SEGAL & LEWIS LLP
Ira Neil Richards
1600 Market Street, Suite 3600
Philadelphia, PA 19103
Telephone: (215) 751-2000
Facsimile: (215) 751-2205
irichards@schnader.com

MORGAN & MORGAN, P.C.
PETER SAFIRSTEIN
DOMENICO MINERVA
28 West 44th Street, Suite 2001
New York, NY 10036
Telephone: (646) 564-1637
Facsimile: (212) 273-1128
psaferstein@MorganSecuritiesLaw.com
dminerva@MorganSecuritiesLaw.com

BRANSTETTER, STRANCH & JENNINGS, PLLC
J. GERARD STRANCH IV
227 Second Avenue, North – 4th Floor
Nashville, TN 37201-1631
Telephone: (615) 254-8801
Facsimile: (615) 250-3937

Attorneys for International Brotherhood of Electrical Workers Local 38, Health and Welfare Fund and the Proposed Indirect Purchaser Classes, International Union of Operating Engineers Local 132 Health and Welfare Fund, and Laborers Health and Welfare Trust Fund for Northern California

CERTIFICATE OF SERVICE

The undersigned certifies that on November 7, 2014, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the Eastern District of Pennsylvania using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Walter W. Noss
WALTER W. NOSS
SCOTT+SCOTT, ATTORNEYS AT LAW, LLP
707 Broadway, Suite 1000
San Diego, CA 92101
Telephone: (619) 233-4565