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**

ORDER

In this putative class action, indirect purchasers of Doryx, the branded version of doxycycline hyclate, bring claims against Defendant brand name pharmaceutical companies for allegedly thwarting generic competition in violation of antitrust laws. The Parties now ask me to certify conditionally a Rule 23(b)(3) settlement class and approve preliminarily their proposed Settlement and Plan of Allocation. I conclude preliminarily that the proposed settlement class meets the requirements of Rule 23, the proposed settlement and allocation are within the range of reasonableness, and the notice provisions are consistent with the requirements of due process and Rule 23. Accordingly, I will grant their Motion.

BACKGROUND

Plaintiffs, indirect purchasers, bring claims against Defendant brand name pharmaceutical companies for allegedly thwarting generic competition. Defendants 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.

Plaintiff International Brotherhood of Electrical Workers 38, Health and Welfare Fund filed their complaint on September 21, 2012. (Case No. 12-CV-5410.) The case was consolidated with other antitrust claims brought against Defendants. (Case No. 12-CV-3824.) Defendants moved to dismiss the complaint. (Doc. Nos. 101, 102.) In denying Defendants' Motion, I deferred until summary judgment ruling on the dispositive question of whether "product hopping" is anticompetitive. (Doc. No. 280.) Plaintiff International Union of Operating Engineers Local 132, Health and Welfare Fund filed a complaint on December 5, 2013, which was consolidated with this action. (Case No. 13-CV-7096.) Defendants moved to dismiss or, in the alternative, for summary judgment. (Doc. No. 447, 448.) I granted in part and denied in part Defendants' motion, dismissing certain claims under West Virginia state law. (Doc. No. 541.) Plaintiff Laborers Health and Welfare Trust Fund for Northern California filed a complaint on April 8, 2014, which was consolidated with this action. (Case No. 14-CV-2061.) Defendants moved to dismiss or, in the alternative, for summary judgment. (Doc. No. 593, 597.) Defendants' motion to dismiss is pending.

On April 1, 2013, IBEW 38 filed a Motion for Class Certification. (Doc. No. 155.) Defendants opposed Certification. (Docs. No. 229, 248.) I denied the Motion without prejudice because IBEW 38 failed to demonstrate that it had met the numerosity requirement of Rule 23. (Doc. No. 434.) IBEW 38 and Local 132 filed an Amended Motion for Class Certification on January 7, 2014. (Doc. No. 449.) Laborers Trust filed a Motion for Class Certification on May 16, 2014. (Doc. No. 609.) While the certification motions were pending, the Parties began

settlement discussions and, after lengthy negotiations, reached a proposed settlement on May 30, 2014. (Doc. No. 657.)

Plaintiffs filed the instant Unopposed Motion on July 11, 2014, asking me to: (1) certify conditionally a Rule 23(b)(3) class for settlement purposes; (2) approve preliminarily the Settlement and Plan of Allocation; (3) direct notice of the Settlement to the Class; and (4) schedule a Final Approval Hearing. (Doc. No. 657.) I held a hearing on the Parties' Motion on September 3, 2014. Doc. No. 659; 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

Federal Rule of Civil Procedure 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). At the preliminary approval stage, I must determine whether there are any obvious deficiencies and the "settlement falls within the range of reason." Gates, 248 F.R.D. at 438 (quotations omitted).

Where, as here, a class has not already been 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. Co. of Amer. Sales Practices Litig., 148 F.3d 283, 308 (3d Cir. 1998) ("[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."); Manual for Complex Litigation, § 21.632 (4th ed. 2009) (same).

Preliminary approval is not binding and it is granted unless a proposed settlement is obviously deficient. Gates, 248 F.R.D. at 438. I must consider whether (1) the negotiations occurred at arm's length, (2) there was sufficient discovery, (3) the proponents of the litigation

are experienced in similar litigation, and (4) only a small fraction of the class objected. In re General Motors Corp. Pick-Up Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785-86 (3d Cir. 1995).

DISCUSSION

I. Rule 23

Here, the Parties ask me to certify the settlement class under Rule 23(e) to be defined as:

> 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 insurance from another third party payor covering 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.

(Doc. No. 657.) I preliminarily find that the proposed Class meets all the requirements of Rule 23.

First, under Rule 23(a), the class must be so numerous that the joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). I find that the Class is so numerous and geographically dispersed that joinder of all members is impracticable. According to data produced by Defendants, the Class consists of thousands of members geographically dispersed throughout the United States, which is sufficient to satisfy the impracticality of joinder requirement of Rule 23(a)(l). "[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 fourteen 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 fifteen states rendered joinder impracticable).

Second, Rule 23(a) requires that there be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). To satisfy the commonality requirement, the purported class's claims must depend upon a common contention that must be capable of class-wide resolution. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550-51 (2011). I find the following issues relating to claims and/or defenses (expressed in summary fashion) present common, class-wide questions:

a. Whether the conduct challenged by the Class as anticompetitive constituted a restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, or constituted 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.

Third, Rule 23(a) requires me to evaluate whether Named Plaintiffs' claims are typical of the Class. Fed. R. Civ. P. 23(a)(3); Beck v. Maximus, Inc., 457 F.3d 291, 295-96 (3d Cir. 2006) (citations omitted). Plaintiffs allege on behalf of the Class the same manner of injury from the same course of conduct that they complain of themselves, and assert on their own behalf the same legal theory that they assert for the Class. Any probable factual differences are relevant to damages, not to liability. Gates, 248 F.R.D. at 441. Accordingly, I find that the Named Plaintiffs' claims are typical of the claims of the proposed Class and I appoint IBEW 38, Local 132, and Laborers Trust as Class Representatives.

Fourth, Rule 23(a) requires that Named Plaintiffs must fairly and adequately protect the interests of the Class. Fed. R. Civ. P. 23(a)(4). I find that the Named Plaintiffs' interests do not conflict with the interests of absent members of the Class. All Class Members share a common interest in proving Defendants' alleged anticompetitive conduct, and all Members share a common interest in recovering the overcharge damages sought in the Complaint. Moreover, any Class Member that wishes to opt out will be given an opportunity to do so. Furthermore, the Named Plaintiffs are well-qualified to represent the Class in this case, given their experience in prior cases, and the vigor with which they have prosecuted this action thus far. (Doc. No. 657.)

Turning to the requirements of Rule 23(b)(3), common questions of law and fact must 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, 310-312 (3d Cir. 2008). I find that common questions predominate. Here, the three 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 are applicable to the Class and predominate over those issues that are subject only to 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 balance, in terms of fairness and efficiency, the merits of a class action against those of alternative methods of adjudication. In re Prudential Ins., 148 F.3d at 316. I believe it is desirable, for purposes of judicial and litigation efficiency, to collect the claims of the Class in a single action. I further conclude that there are few manageability problems presented by a case such as this, particularly in light of the Settlement approved in this Order.

II. Class Counsel

Pursuant to Fed. R. Civ. P. 23(c)(l)(B) and 23(g), having considered the factors provided in Rule 23(g)(1)(A), I hereby appoint the following counsel as Class Counsel, and direct them to ensure that any remaining work in this litigation that is performed by any counsel listed on the Complaint is performed efficiently and without duplication of effort: Walter W. Woss, Scott+Scott, Attorneys at Law, LLP, 707 Broadway, Suite 1000, San Diego, CA 92101, Tel: (619) 233-4565.

III. Reasonableness of the Proposed Settlement

The ultimate approval of a class action settlement requires a finding that the settlement is fair, adequate, and reasonable. Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 965 (3d Cir. 1983). In evaluating a proposed settlement for preliminary approval, however, I am required to determine only whether "the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range

of possible approval." Mehling v. New York Life Ins. Co., 246 F.R.D. 467, 472 (E.D. Pa. 2007) (internal quotation marks omitted). "Approval of a plan of allocation for a class action settlement fund is 'governed by the same standard 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) (quoting In re Computron Software, Inc., 6 F. Supp. 2d 313, 321 (D.N.J. 1998)). The proposed Settlement Agreement and Plan of Allocation satisfy these standards.

Upon review of the record and the Settlement Documents, I find that the Proposed Settlement falls within the range of possibly approvable settlements. The Settlement includes a cash payment of $8 million by Defendants into an escrow account for the benefit of the Class in exchange for, *inter alia*, dismissal of the litigation with prejudice and certain releases of claims by Plaintiffs and the Class as set forth in the Settlement Agreement. I find that the Settlement was arrived at by arm's-length negotiations by highly experienced counsel after years of litigation. Accordingly, the Settlement is hereby preliminarily approved, subject to further consideration at the Fairness Hearing provided for below.

I also find that the Plan of Allocation, attached as Exhibit "3" to the Settlement Documents, falls within the range of possibly approvable allocations. Under the Plan, the proceeds of the Settlement, net of Court-approved attorneys' fees, Plaintiffs' service awards ($10,000 for each named Plaintiff), and costs of litigation, will be distributed to Class Members who submit claims *pro rata* based on each Class Member's aggregate share of the total class's indirect purchases of Doryx during the Class Period. The Plan also sets a minimum threshold of $100 for an unreimbursed expenditure to be allowed as a claim. The Plan of Allocation is hereby

preliminarily approved, subject to further consideration at the Fairness Hearing provided for below.

IV. Approval of the Plan of Notice to the Class

The proposed Notice to Class Members of the pendency of this Class Action and the proposed Settlement (attached as Exhibits "A-1" and "A-2" to the Settlement Documents) and the proposed method of notice (attached as Exhibit "4" to the Settlement Documents) satisfy the requirements of Rule 23(e), the requirements due process, and is otherwise fair and reasonable. Accordingly, I will approve the proposed form and method of Notice.

I hereby appoint The Garden City Group, Inc. to serve as claims administrator and to assist Class Counsel in disseminating the Notice. Lael Down of GCG has submitted a declaration setting forth GCG's qualifications, attached as Exhibit "4" to the Settlement Documents. All expenses incurred by the Claims Administrator must be reasonable, are subject to my approval, and shall be payable solely from the Settlement Fund.

Not later than 31 calendar days after entry of this Order, the Claims Administrator shall mail a copy of the Notice and the Third-Party Payor Proof of Claim and Release by first-class mail, postage prepaid, to all TPP Class Members who can be identified with reasonable effort and shall post the Settlement Agreement, Notice, and Consumer and TPP Proof of Claim Form on its website at ww.doryxindirectsettlement.com. The Claims Administrator shall mail the Notice and Consumer or TPP Proof of Claim and Release, as applicable, to any other potential Class Member who requests one. Not later than 90 calendar days after entry of this Order, the Claims Administrator shall publish the Summary Notice. Lead Counsel shall serve on Defendants' Counsel and file with my chambers proof, by affidavit or declaration, of such mailing and publishing not later than 90 calendar days after entry of this Order.

Class Members who wish to participate in the Settlement shall complete and submit the Proof of Claim and Release, attached as Exhibit "A" to Plaintiffs supplemental filing, Doc. No. 661, in accordance with the instructions included there. All Proof of Claim and Release forms must be postmarked 60 calendar days from an order finally approving the Settlement. Any Class Member who does not timely submit a Proof of Claim and Release shall be barred from sharing in the distribution of the proceeds of the Net Settlement Fund, unless otherwise ordered by me, but shall nevertheless be bound by any judgment I enter. Lead Counsel shall have the discretion to accept late-submitted claims for processing by the Claims Administrator so long as distribution of the Net Settlement Fund is not materially delayed.

Pursuant to the Class Action Fairness Act of 2005 Defendants shall serve notices as required under CAFA within ten days from the date Plaintiffs filed the Settlement Documents and file proof of such notice with my chambers.

I hereby appoint The Huntington National Bank to serve as Escrow Agent for the purpose of administering the escrow account holding the Settlement Proceeds. Plaintiffs have submitted the Bank's resume, setting forth their qualifications, attached as Exhibit "6" to the Settlement Documents. All expenses incurred by the Escrow Agent must be reasonable, are subject to my approval, and shall be payable from the Settlement Fund. All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* and shall remain subject to my jurisdiction until such time as funds shall be distributed pursuant to the Settlement Agreement and/or further Court Order(s).

V. Final Fairness Hearing

A hearing on final approval shall be held before me on January 7, 2015, at 10:00 a.m. in Courtroom 6B at the United States District Court for the Eastern District of Pennsylvania, James

A. Byrne United States Courthouse, 601 Market Street, Philadelphia PA 19106. At the Fairness Hearing, I will consider, *inter alia:* (a) the fairness, reasonableness and adequacy of the Settlement and whether the Settlement should be finally approved; (b) whether I should finally approve the Plan of Allocation; (c) whether I should approve awards of attorneys' fees and reimbursement of expenses to Class Counsel; (d) whether incentive awards should be awarded to the named Plaintiffs, and in what amount; and (e) whether entry of a final judgment terminating this litigation should be entered. The Fairness Hearing may be rescheduled or continued; in this event, I will furnish all Counsel with appropriate notice. Class Counsel shall be responsible for communicating any such notice promptly to the Class by posting conspicuous notice on the following website of Class Counsel: www.doryxindirectsettlement.com.

Any Member of the Class may enter an appearance in the Litigation, at his, her, or its own expense, individually or through counsel of their own choice. If they do not enter an appearance, they will be represented by Class Counsel.

All papers in support of the Settlement, Plan of Allocation, any application by counsel for Class Counsel for attorneys' fees and expenses, and any application by the Class Representatives for service awards shall be filed and served no later than November 7, 2014. Reply briefs to Class Counsel's papers in Support of Final Approval and Fee and Expense Applications shall be filed and served no later than November 21, 2014.

Class Members who wish to (a) object with respect to the proposed Settlement and Plan of Allocation and/or (b) wish to appear in person at the Fairness Hearing must first send an Objection and, if intending to appear, a Notice of Intention to Appear, along with a Summary Statement outlining the position(s) to be asserted and the grounds therefore together with copies of any supporting papers or briefs, via first class mail, postage prepaid, to the Clerk of the United

States District Court for the Eastern District of Pennsylvania, James A. Byrne United States Courthouse, 601 Market Street, Philadelphia PA 19106, with copies to the following counsel:

Walter W. Noss, Esq.,
Scott+Scott, Attorneys at Law, LLP
707 Broadway, Suite 1000
San Diego, CA 92101;

J. Mark Gidley, Esq.,
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807

Jonathan Short, Esq.
McCarter & English LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102

Objections must contain a Notice of Intention to Appear saying that the Person objects to the proposed Settlement in the Indirect Purchaser Class Action in *Mylan Pharmaceuticals, Inc., et al. v. Warner·Chilcott Public Limited Company, et al.*, No. 12-3824 (E.D. Pa.), along with a summary statement outlining the position(s) to be asserted and the supporting grounds for the objection, together with copies of any papers or briefs intended to be relied upon. Objectors must include their name, address, telephone number, and signature, documents evidencing their relevant Doryx purchases by year, pill volume, dollar volume, seller, and location of purchase/seller, and the reasons for the objection. To be valid, any such Objection and/or Notice of Intention to Appear and Summary statement must be postmarked no later than thirty calendar days from the date of the Notice. Except as provided by this Order, no person or entity shall be entitled to contest the terms of the proposed Settlement. All persons and entities who fail to file an Objection and/or Notice of Intention to Appear as well as a Summary Statement as provided above shall be deemed to have waived any such objections by appeal, collateral attack or otherwise and will not be heard at the Fairness Hearing.

Any person or entity falling within the defined Class may, upon request, be excluded or opt out from the Class. Any such Person must submit to the Settlement Administrator a Request

for Exclusion, postmarked no later than thirty calendar days before the Final Approval Hearing. A Request for Exclusion must: (a) include the name, address, telephone number, and signature of the Person requesting exclusion; (b) evidence of the Person's relevant Class Period Doryx purchases by year, pill volume, dollar volume, seller, and location of purchase/seller; and (c) state that the Person wishes to be excluded from the Class. All Persons who submit valid and timely Requests for Exclusion in the manner set forth in this paragraph shall have no rights under the Settlement Agreement, shall not share in the distribution of the Net Settlement Fund, and shall not be bound by the Settlement Agreement or the Judgment. Requests for Exclusion must be mailed to: Doryx Indirect Purchaser Antitrust Litigation Exclusions, c/o GCG P.O. Box 10097, Dublin, OH, 43017-6697.

Class Counsel shall provide copies of all Requests for Exclusion, and any written revocation of Requests for Exclusion, to Defendants' counsel as expeditiously as possible and in any event within fourteen calendar days prior to the Final Approval Hearing.

All proceedings in this action are hereby stayed until such time as I render a final decision regarding the approval of the Settlement and, if it approves the Settlement, enters final judgment and dismisses these actions with prejudice.

In the event that the Settlement does not become final, litigation of this Action will resume in a reasonable matter that I will approve.

In the event the Settlement Agreement and the Settlement are terminated or rescinded in accordance with the applicable provisions of the Settlement Agreement, the Settlement Agreement, the Settlement, and all related proceedings shall, except as expressly provided to the contrary in the Settlement Agreement, become null and void, shall have no further force and effect, and Plaintiffs shall retain full rights to assert any and all causes of action against

Defendant(s) and any other released party, and Defendant(s) and any other released parties shall retain any and all defenses and counterclaims. These actions shall revert to their procedural and substantive status before the date of execution of the Settlement Agreement and shall proceed as if the Settlement Agreement and all other related Orders and papers had not been executed by Plaintiffs and Defendant(s).

Neither this Order nor the Settlement Agreement nor any other Settlement-related document, nor any proceedings undertaken in accordance with the terms set forth in the Settlement Agreement or in any other Settlement-related document, shall constitute, be construed as, or be deemed to be evidence of or an admission or concession by Defendants as to the validity of any claim that has been or could have been asserted against Defendants or as to any liability by Defendants as to any matter set forth in this Order, or to whether any Class may be certified for purposes of litigation and trial.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

September 4, 2014